No. _____

In The
Supreme Court of the United States

CYAN, INC., et al.,

Petitioners,

v.

BEAVER COUNTY EMPLOYEES RETIREMENT FUND, et al.,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeal Of The State Of California, First Appellate District

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

To curb abusive class-action litigation concerning nationally traded securities, the Private Securities Litigation Reform Act of 1995 ("Reform Act") amended federal securities laws to impose new requirements, including fee limitations, selection criteria for lead plaintiffs, and an automatic stay of discovery pending any motion to dismiss. To prevent plaintiffs from filing class actions in state court and thereby sidestepping the Reform Act, the Securities Litigation Uniform Standards Act of 1998 ("SLUSA") *inter alia* amended the Securities Act of 1933 ("'33 Act") to provide that concurrent state-court subject matter jurisdiction over '33 Act claims will continue "except as provided in [Section 16 of the '33 Act] with respect to covered class actions." Section 16, as amended by SLUSA, defines "covered class action" as any damages action on behalf of more than 50 people. This case is undisputedly a "covered class action."

Section 16, as amended by SLUSA, also precludes covered class actions alleging state-law securities claims and permits precluded actions to be removed to and dismissed in federal court. No state-law claims were alleged in this case.

The question presented – which has split federal district courts in removal cases and thus sidelined federal appeals courts – is:

Whether state courts lack subject matter jurisdiction over covered class actions that allege only '33 Act claims.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioners in this Court, who were defendants in the Superior Court of California, County of San Francisco ("Superior Court"), and petitioners in both the Court of Appeal of the State of California, First Appellate District ("Court of Appeal, First District"), and the Supreme Court of California, are Cyan, Inc., Mark A. Floyd, Michael W. Zellner, Michael L. Hatfield, Paul A. Ferris, Promod Haque, M. Niel Ransom, Michael J. Boustridge, and Robert E. Switz ("Petitioners"). Additional defendants in the Superior Court, who are not parties here and who were not parties in either the Court of Appeal, First District, or the Supreme Court of California, were Goldman Sachs & Co., J.P. Morgan Securities LLC, Jefferies LLC, and Pacific Crest Securities LLC. Respondents in this Court, who were plaintiffs in the Superior Court and real parties in interest in both the Court of Appeal, First District, and the Supreme Court of California, are Beaver County Employees Retirement Fund, Retirement Board of Allegheny County, Delaware County Employees Retirement System, and Jennifer Fleischer. The Superior Court, which is not a party here, was Respondent in both the Court of Appeal, First District, and the Supreme Court of California.

Pursuant to Supreme Court Rule 29.6, Petitioners disclose as follows: Cyan, Inc. was a publicly held company when this action was filed. On August 3, 2015,

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT – Continued

Cyan, Inc. was acquired by Ciena Corporation, a publicly held company, and has since ceased to exist as a corporate entity. Other than Ciena Corporation, there is no parent or publicly held company owning 10% or more of Cyan, Inc.'s stock.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the Superior Court's order denying Petitioners' motion for judgment on the pleadings, which motion contended that the Superior Court lacked jurisdiction over the subject matter of the action. Petitioners' petition for writ of mandate and/or prohibition or other relief was denied by the Court of Appeal, First District. Petitioners' petition for review was denied by the Supreme Court of California.

INTRODUCTION

Chaos has resulted from the lower courts' efforts to resolve the jurisdictional question presented. The importance of that question, which concerns the integrity of national securities markets, "cannot be overstated." *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 78 (2006). This Court should accordingly grant certiorari.

The Reform Act implemented reforms to curb abusive securities class actions, which Congress determined to be harming the nation's economy. Unfortunately, many of the reforms are inapplicable in state court. To prevent state-court litigation from circumventing the Reform Act, SLUSA *inter alia* withdrew state courts' concurrent jurisdiction over class actions alleging '33 Act claims. The decision below, however, misreads SLUSA as continuing, rather than withdrawing, such state-court jurisdiction. Thus, that decision

subverts SLUSA's requirement that the reforms have uniform application in all class actions under the '33 Act. Courts have called the result "bizarre," "absurd," and "directly contrary to the stated intent of Congress."

The question presented – which has split lower courts – arises in two contexts. In the first, a plaintiff who brought a state-court class action alleging only '33 Act claims moves a federal court, after removal, to remand the case to state court. Some 55 decisions of federal district courts have arisen in this context, with more decisions expected. Almost all of these holdings address, but are divided over, the issue of whether the state court had subject matter jurisdiction. In the second context, a defendant in a state-court class action alleging only '33 Act claims moves the state court to dismiss for lack of subject matter jurisdiction. In this second category are five decisions, consisting of *Luther v. Countrywide Financial Corp.*, 195 Cal. App. 4th 789 (2011) ("*Countrywide*"), and four decisions of California trial courts, including the decision below. All five decisions held, incorrectly, that SLUSA continued state-court jurisdiction over class actions under the '33 Act. Plaintiffs have taken note of this revived opportunity to circumvent the Reform Act: since *Countrywide*, filings of '33 Act class actions in California state courts have risen 1400 percent.

The nation's appellate courts are unlikely to resolve the conflict and obviate the need for this Court's review. Federal appeals courts are silent because of the procedural roadblocks to review of remand decisions.

State appeals courts have produced only one decision – *Countrywide* – and are unlikely to produce more.

This petition provides a rare opportunity to turn chaos into order and prevent circumvention of the Reform Act. The Court has jurisdiction to grant certiorari here. The question presented was squarely raised below and was decided on purely federal grounds, and reversal by this Court will terminate the case. The absence of appellate guidance has left lower courts in disarray. Postponing review will only add to the lower courts' confusion, without increasing the prospect of a better opportunity for review. Postponing review will also erode the federal policy – clearly set forth in SLUSA – of providing exclusive federal jurisdiction over class actions under the '33 Act. Certiorari should therefore be granted.

OPINIONS BELOW

The order of the Superior Court adopting its tentative ruling and denying Petitioners' motion for judgment on the pleadings is unreported, but is reprinted at 1a-2a. (References to the Appendix to the petition are in the form "__a.") The transcript of the tentative ruling is reprinted at 3a-14a. The order of the Court of Appeal, First District, denying Petitioners' petition for writ of mandate and/or prohibition or other relief is unreported, but is reprinted at 15a. The order of the Supreme Court of California denying Petitioners' petition for review is unreported, but is reprinted at 16a.

JURISDICTION

Petitioners' motion for judgment on the pleadings for lack of subject matter jurisdiction, filed with the Superior Court on August 25, 2015, was denied on October 23, 2015. 1a. A petition for writ of mandate and/or prohibition or other relief, filed with the Court of Appeal, First District, on December 2, 2015, was denied on December 10, 2015. 15a, 32a. A petition for review, filed with the Supreme Court of California on December 18, 2015, was denied on February 24, 2016. 16a, 35a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTES INVOLVED

Relevant provisions of the '33 Act, as amended by SLUSA, are reprinted at 17a-24a.

STATEMENT OF THE CASE

A. Statutory Framework

1. In the '33 Act, Congress created several causes of action for a false statement made in connection with a public offering of securities. Section 11 creates liability for a false registration statement. 15 U.S.C. § 77k. Section 12(a)(2) creates liability for a false prospectus. 15 U.S.C. § 77l(a)(2). Section 15 creates liability for persons who control those liable under Sections 11 or 12. 15 U.S.C. § 77o. Liability under Section 11

is strict; there is no scienter requirement.[1] Until SLUSA's enactment in 1998, Section 22 gave federal and state courts concurrent subject matter jurisdiction over '33 Act claims and barred removal to federal court of '33 Act claims that were filed in a state court of "competent jurisdiction." 15 U.S.C. § 77v(a).[2]

2. In 1995, Congress found that abusive class-action securities litigation was harming "the entire U.S. economy." *Dabit*, 547 U.S. at 81 (quoting H.R. Conf. Rep. No. 104-369, 1st Sess., at 31 (1995)); *Kircher v. Putnam Funds Trust*, 547 U.S. 633, 636 (2006). The abuses included "nuisance filings, targeting of deep-pocket defendants, vexatious discovery requests, and 'manipulation by class action lawyers of the clients whom they purportedly represent.' " *Dabit*, 547 U.S. at 81 (citation omitted). The harms to the national economy included "extortionate settlements" and "deter[rence of] qualified individuals from serving on boards of directors." *Id.* To curb the abuses, Congress passed the Reform Act. As relevant here, the reforms included fee limitations, selection criteria for lead

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[1] *See, e.g.*, *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 135 S. Ct. 1318, 1331 n.11 (2015).

[2] By contrast, the Securities Exchange Act of 1934 (" '34 Act") has been read to create a cause of action for fraud in connection with the purchase or sale of securities. *See* '34 Act § 10(b); SEC Rule 10b-5, 17 C.F.R. § 240.10b-5. Liability under the '34 Act is not limited to public offerings. *Superintendent of Ins. of State of N.Y. v. Bankers Life & Cas. Co.*, 404 U.S. 6, 10 (1971). Liability is not strict; scienter is required. *Merck & Co. v. Reynolds*, 559 U.S. 633, 648-49 (2010). Federal courts have exclusive jurisdiction over '34 Act claims. 15 U.S.C. § 78aa(a).

plaintiffs, and an automatic stay of discovery pending any motion to dismiss. *See* 15 U.S.C. § 77z-1; *Dabit*, 547 U.S. at 81.

An "unintended consequence" of the Reform Act was to prompt plaintiffs to file securities class actions in state court. *Dabit*, 547 U.S. at 82. Many of the reforms do not apply in state court. H.R. Conf. Rep. No. 105-803, 2d Sess. (1998) ("SLUSA Conf. Rep.") at 14-15. As Congress found, class actions alleging state-law securities claims were increasingly filed in state court after the Reform Act. *Dabit*, 547 U.S. at 82. Nationwide, the number of such filings doubled.[3]

As the language and structure of SLUSA would make clear, Congress was also concerned that, because of both concurrent state-court jurisdiction over '33 Act claims and the '33 Act's removal bar, state-court class actions alleging '33 Act claims would become another means of circumventing the Reform Act.

3. SLUSA was enacted in 1998 to prevent circumvention of the Reform Act.

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[3] *See Report to the President and the Congress on the First Year of Practice under the Private Securities Litigation Reform Act of 1995*, Securities & Exchange Commission (Apr. 1, 1997), at 27-28 ("78 cases had been filed in the first ten months of 1996 (for an annualized total of 94), as compared to 48 for the previous year."), *cited in Diamond Multimedia Sys., Inc. v. Superior Court*, 19 Cal. 4th 1036, 1045 n.10 (1999). In the state courts of California – whose Silicon Valley spawns many initial public offerings ("IPOs") – filings of securities class actions rose fivefold after the Reform Act. SLUSA Conf. Rep. at 15.

As argued more fully below, *infra* at 25-36, SLUSA eliminated state-court jurisdiction over class actions alleging '33 Act claims. 15 U.S.C. § 77v. It did so by adding the italicized language to Section 22(a) of the '33 Act: "The district courts of the United States . . . shall have jurisdiction of offenses and violations under this subchapter . . . , and, concurrent with State and Territorial courts, *except as provided in [Section 16] of this title with respect to covered class actions*, of all suits in equity and actions at law brought to enforce any liability or duty created by this subchapter." 15 U.S.C. § 77v(a) (emphasis added). Section 16, as amended by SLUSA, defines "covered class action" as any damages action on behalf of more than 50 people. 15 U.S.C. § 77p(f)(2). By adding new Sections 16(b) and 16(c) to the '33 Act, SLUSA also precluded covered class actions alleging state-law securities claims, *see* 15 U.S.C. § 77p(b), and permitted such precluded actions to be removed to and dismissed in federal court, *see id.* § 77p(c).[4] Finally, SLUSA conformed the '33 Act's removal bar to the new Section 16(c), 15 U.S.C. § 77p(c), by adding the italicized language to Section 22(a) of the '33 Act: "*Except as provided in* [*Section 16(c)*] *of this title*, no case arising under this subchapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States." 15 U.S.C. § 77v(a) (emphasis added). After SLUSA, state

[4] In addition to defining "covered class action" in subsection (f)(2) and setting forth the preclusion and removal provisions in subsections (b) and (c), Section 16 contains a "General Reservation of Rights" (16(a)) and preserves certain state-law claims and state enforcement actions (Sections 16(d)-(e)). 15 U.S.C. § 77p.

courts retain concurrent jurisdiction over '33 Act claims brought in individual actions (*i.e.*, in non-"covered class actions"), which were not found by Congress to be harming the national economy. *See Dabit*, 547 U.S. at 81; *Kircher*, 547 U.S. at 636.

As also argued more fully below, because SLUSA eliminated state-court jurisdiction over covered class actions alleging '33 Act claims, state courts are no longer courts of "competent jurisdiction" for purposes of the '33 Act's removal bar. *See infra* pp. 31-33. Thus, notwithstanding that bar, covered class actions alleging '33 Act claims may be removed to federal court under the federal-question removal provision, 28 U.S.C. § 1441(a). *See id.*

4. Notwithstanding SLUSA's plain command and the holdings of numerous federal district courts, other federal district courts – along with the court below and a California intermediate appellate court in *Countrywide* – have held that state courts retain jurisdiction over covered class actions alleging only '33 Act claims.

Since *Countrywide* was issued, state-court filings of class actions alleging '33 Act claims have significantly increased. In California state courts, such filings have spiked by 1400 percent.[5]

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[5] In the 12 years between SLUSA and *Countrywide*, only 6 class actions alleging Section 11 claims were filed in California state courts – an average of *one case every two years*. In the 5 years after *Countrywide*, at least 38 class actions alleging Section 11 claims were filed in California state courts – an average of *more*

B. Respondents' Class-Action Complaint Under the '33 Act

On May 9, 2013, Cyan filed its IPO. Its stock began to trade on the New York Stock Exchange, a national securities exchange. Following an announcement of weaker-than-expected results, shareholders sued. A Consolidated Complaint (the "Complaint") was filed in the Superior Court on June 13, 2014. Respondents did not dispute below that this case is a "covered class action."[6] Respondents also did not dispute below that the Cyan IPO stock at issue was listed on the New York Stock Exchange; thus, that stock is a "covered security."[7]

The Complaint is brought as a class action on behalf of purchasers of Cyan's IPO stock. Plaintiffs seek to pursue strict liability remedies under the '33 Act. All claims are pursuant to Sections 11, 12(a)(2), and 15 of the '33 Act (15 U.S.C. §§ 77k, 77l(a)(2), and 77o). The Complaint alleges no state-law claims.

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than seven cases every year. Fourteen were filed in 2015 alone. *See* Appendix I.

[6] *See* '33 Act § 16(f)(2) (defining "covered class action" as any damages action on behalf of more than 50 people), 15 U.S.C. § 77p(f)(2).

[7] *See* '33 Act § 16(f)(3) (incorporating Section 18(b)'s definition of "covered security"), § 18(b) (defining "covered security" as any security listed on New York Stock Exchange), 15 U.S.C. §§ 77p(f)(3), 77r(b).

C. Petitioners' Motion for Judgment on the Pleadings, the Superior Court's Denial, and the Orders Denying Review

Because SLUSA eliminated state-court jurisdiction over covered class actions alleging only '33 Act claims, Petitioners moved on August 25, 2015, for judgment on the pleadings for lack of subject matter jurisdiction. On October 23, 2015, the Superior Court denied the Motion, explaining that its "hands are tied by" *Countrywide*. 1a, 5a-6a. The Superior Court added that it had no legal analysis to offer beyond that in *Countrywide*. 5a-6a.

On December 2, 2015, Petitioners challenged the Order in a petition for writ relief filed with the Court of Appeal, First District. 32a. On December 10, 2015, the petition was denied without opinion. 15a. On December 18, 2015, Petitioners filed a petition for review with the Supreme Court of California. 35a. On February 24, 2016, the petition was denied without opinion. 16a. This timely petition followed.

REASONS FOR GRANTING THE PETITION

A petition for a writ of certiorari may be granted where "a state court . . . has decided an important question of federal law that has not been, but should be, settled by this Court." SUP. CT. R. 10(c). This case meets that criterion.

Federal district courts in removal cases have divided bitterly over the question presented. Because of the procedural roadblocks to review of remand orders, federal appeals courts are unlikely to rule on, let alone resolve, the conflict. Absent this Court's guidance, the district courts will remain in disarray with no end in sight.

The question presented is important and was wrongly decided by the Superior Court. SLUSA was designed to prevent state-court class actions from circumventing the Reform Act. Yet, in holding that state courts have concurrent jurisdiction in cases such as this, the Superior Court has endorsed the forum-shopping that SLUSA was intended to stop. The Superior Court's reasoning – which simply adopted that of *Countrywide* – violated basic norms of statutory interpretation: it rendered a key SLUSA provision surplusage, while attributing to Congress the irrational intent to withdraw state-court jurisdiction over state-law, but not federal-law, claims.

The Court now has a rare opportunity to provide urgently needed clarification of SLUSA's jurisdictional provisions.

A. To End the Chaos in the Lower Courts, This Court Should Settle the Question Presented

1. Dozens of federal district court decisions have split on the question presented, with 39 holding that

state courts have subject matter jurisdiction[8] and 10 holding that state courts lack subject matter jurisdiction.[9] The numbers on each side are steadily rising.[10] Conflicts have arisen not only between district courts in the same circuit[11] but also between district judges of the same district[12] and even between decisions of the

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[8] The decisions are listed in Appendix F.

[9] The decisions are listed in Appendix G. In six other cases, the district court denied remand, but the court did not determine whether the state court lacked subject matter jurisdiction. The decisions are listed in Appendix H.

[10] Since January 1, 2015, sixteen federal district courts have issued conflicting decisions on the question presented. *See supra* notes 8 & 9; Appendices F & G.

[11] *Compare, e.g.*, *Wunsch v. Am. Realty Capital Props.*, 2015 U.S. Dist. LEXIS 48759 (D. Md. Apr. 14, 2015), *with Niitsoo v. Alpha Natural Res., Inc.*, 902 F. Supp. 2d 797 (S.D. W. Va. 2012); *compare, e.g.*, *In re King Pharms., Inc*., 230 F.R.D. 503 (E.D. Tenn. 2004), *with Rosenberg v. Cliffs Natural Res., Inc.*, 2015 U.S. Dist. LEXIS 48915 (N.D. Ohio Mar. 25, 2015); *see also infra* note 12.

[12] *Compare Lapin v. Facebook, Inc.*, 2012 U.S. Dist. LEXIS 119924 (N.D. Cal. Aug. 23, 2012), *with Electrical Workers Local #357 Pension and Health & Welfare Trusts v. Clovis Oncology, Inc.*, 2016 WL 2592947 (N.D. Cal. May 5, 2016); *compare Rubin v. Pixelplus Co*., 2007 WL 778485 (E.D.N.Y. Mar. 13, 2007), *with Bernd Bildstein IRRA v. Lazard Ltd*., 2006 WL 2375472 (E.D.N.Y. Aug. 14, 2006).

same district judge.[13] Removal to federal court is blessed here[14] yet sanctioned there.[15]

Federal appeals courts have provided no guidance and are unlikely to do so in the future. Orders granting remand are, with irrelevant exceptions, unreviewable.[16]

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[13] *See W. Va. Laborers Trust Fund v. STEC Inc.*, 2011 U.S. Dist. LEXIS 146846, at *11 n.4 (C.D. Cal. Oct. 7, 2011) (noting that same judge issued contradictory holdings in *Purowitz v. DreamWorks Animation SKG, Inc.*, 2005 U.S. Dist. LEXIS 46911 (C.D. Cal. Nov. 14, 2005), and *Layne v. Countrywide Fin. Corp.*, 2008 U.S. Dist. LEXIS 123896 (C.D. Cal. July 8, 2008)); *see also In re Waste Mgmt. Inc. Sec. Litig.*, 194 F. Supp. 2d 590, 591 (S.D. Tex. 2002) ("In its last order (# 49), this Court denied Plaintiffs' motion to remand under 28 U.S.C. § 1447(c). Since then the Court has continued to mull over what appears to be a case of first impression, has reconsidered its ruling, and has concluded after all that removal under SLUSA was improper and that this case should be remanded.").

[14] *See supra* at 12 & note 9; Appendix G.

[15] *See Iron Workers Mid-South Pension Fund v. Terraform Global, Inc.*, 2016 WL 827374, at *1-6 (N.D. Cal. Mar. 3, 2016) (holding removal improper, granting remand, and awarding plaintiff attorney's fees and expenses).

[16] *See* 28 U.S.C. § 1447(d) ("An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise . . . . "); *Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 234 (2007) (holding appellate review of remand order barred by § 1447(d)); *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 127, 129 (1995) (same); *see also Kircher*, 547 U.S. at 640 (noting irrelevant exceptions to § 1447(d)'s review bar). The class-action exception to § 1447(d)'s review bar, *see* 28 U.S.C. § 1453(c), is inapplicable where, as here, a class action involves only claims concerning a "covered security" as defined in Section 16(f)(3) of the '33 Act. *See* 28 U.S.C. § 1453(d)(1); *supra* at 9 (noting that Cyan stock is "covered security").

Orders denying remand are non-final and thus are appealable only after final judgment.[17] The pool of final judgments that survive to appellate decision is limited, given the high settlement amounts that defendants are willing to pay in even weak securities cases.[18] Discretionary interlocutory review under 28 U.S.C.

[17] *See Chicago, R.I. & P.R. Co. v. Stude*, 346 U.S. 574, 578 (1954); *Estate of Bishop v. Bechtel Power Corp.*, 905 F.2d 1272, 1274-75 (9th Cir. 1990).

[18] *See Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 740 (1975) ("[I]n the field of federal securities laws governing disclosure of information 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 so long as he may prevent the suit from being resolved against him by dismissal or summary judgment.").

§ 1292(b) is unavailable for orders granting remand[19] and is disfavored for orders denying remand.[20]

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[19] *Williams v. AFC Enters., Inc.*, 389 F.3d 1185, 1191 (11th Cir. 2004) (holding that, where district court entered order granting remand of '33 Act class action under SLUSA, § 1447(d) bars review of remand order under 28 U.S.C. § 1292(b)); *see generally In re WTC Disaster Site*, 414 F.3d 352, 371 (2d Cir. 2005) (holding that, where district court entered order granting remand for lack of federal jurisdiction, § 1447(d) bars review of remand order under 28 U.S.C. § 1292(b)); *Feidt v. Owens Corning Fiberglas Corp.*, 153 F.3d 124, 126-27 (3d Cir. 1998) (same); *Krangel v. General Dynamics Corp.*, 968 F.2d 914, 914 (9th Cir. 1992) (same); *Fed. Sav. & Loan Ins. Corp. v. Frumenti Dev. Corp.*, 857 F.2d 665, 671 (9th Cir. 1988). Although in *Luther v. Countrywide Home Loans Servicing LP*, 533 F.3d 1031, 1033 (9th Cir. 2008), the Ninth Circuit held that 28 U.S.C. § 1453(c) authorized appeal of an order granting remand of a class action brought under the '33 Act, the Ninth Circuit's decision does not address § 1453(d)(1). Because the security at issue there was not a "covered security" under Section 16(f)(3) of the '33 Act, *see* 533 F.3d at 1033 n.1, it is clear that § 1453(d)(1) was not applicable and thus did not prevent appeal of the remand order in that case.

[20] *See Carducci v. Aetna U.S. Healthcare*, 2002 WL 31262100, at *3 (D.N.J. July 24, 2002) (denying § 1292(b) certification for order denying remand); *Binkley v. Loughran*, 714 F. Supp. 774, 775-76 (M.D.N.C. 1989) (same), *aff'd mem.*, 940 F.2d 651 (4th Cir. 1991); *see also Ingram v. Union Carbide Corp.*, 34 F. App'x 152 (5th Cir. 2002) (dismissing appeal of order denying remand because of non-compliance with § 1292(b)); *Aucoin v. Matador Servs., Inc.*, 749 F.2d 1180, 1181 (5th Cir. 1985) (same); *see generally Caterpillar Inc. v. Lewis*, 519 U.S. 61, 74 (1996) (Congress intended to reserve § 1292(b) review for "exceptional" cases (citations omitted)); *Couch v. Telescope Inc.*, 611 F.3d 629, 633 (9th Cir. 2010) (§ 1292(b) is a "narrow exception to the final judgment rule"; "the party pursuing the interlocutory appeal bears the burden of" demonstrating that "the certification requirements of the statute have been met"; "[c]ertification under § 1292(b) requires the district court to expressly find in writing that all three § 1292(b) requirements are

State courts have produced only one appellate decision on the issue – *Countrywide* – and are unlikely to produce additional decisions, for several reasons. First, discretionary interlocutory review is as disfavored under state law as it is under 28 U.S.C. § 1292(b). Petitioner's petitions for such review were both denied. *See supra* at 10. Second, the likelihood of settlement, *see supra* at 14, similarly limits the number of state-court judgments that result in appellate decision. Third, *Countrywide* has effectively barred all California state trial courts from entering jurisdictional dismissals and thus has foreclosed consequent non-interlocutory – *i.e.*, procedurally unobstructed – appeals. Under California law, a decision by a California Court of Appeal for one appellate district is binding on *all* California trial courts, even those lying within a *different* appellate district.[21] This case is an example: the Superior Court held that it was bound by *Countrywide*, even though the Superior Court lies within a different appellate district from the *Countrywide* court. 1a. Finally, federal district court decisions denying remand[22] have inherently reduced state-court litigation of the question presented.

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met."; concluding that the statutory requirements were not met (citing cases)). The authorization for interlocutory review of orders denying remand of class actions, *see* 28 U.S.C. § 1453(c), is inapplicable here for the same reasons that § 1453(c)'s exception to § 1447(d)'s review bar is inapplicable here. *See supra* note 16.

[21] *Cuccia v. Superior Court*, 153 Cal. App. 4th 347, 353 (2007) (citing *Auto Equity Sales, Inc. v. Superior Court*, 57 Cal. 2d 450, 455 (1962)).

[22] *See supra* note 9; Appendices G & H.

The disarray in the lower courts and the lack of appellate guidance strongly favor a grant of certiorari.

2. This petition presents a rare opportunity for this Court to resolve the chaos.

a. Although merits litigation is ongoing in the Superior Court, this Court has jurisdiction to grant certiorari under 28 U.S.C. § 1257(a).[23]

The Superior Court's order is a "[f]inal judgment[]" under § 1257. The jurisdictional issue was "a separate and independent matter, anterior to the merits and not enmeshed in the factual and legal issues comprising the plaintiff's cause of action." *Mercantile National Bank v. Langdeau*, 371 U.S. 555, 558 (1963) (state-court decision rejecting claim that federal statute required suit to have been brought in different court was "final" under § 1257 despite ongoing merits litigation in state court). It "serves the policy underlying" the finality requirement for this Court now to resolve the jurisdictional question "rather than to subject [the parties] to long and complex litigation which may all be for naught." *Id.*[24] Moreover, postponing review

[23] Section 1257(a) provides: "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where . . . any title, right, privilege, or immunity is specially set up or claimed under the . . . statutes of . . . the United States."

[24] *See Construction & Gen. Laborers' Union v. Curry* ("*Curry*"), 371 U.S. 542, 549 (1963) (holding that question of state court's jurisdiction to enter temporary injunction against labor picketing was "final and reviewable" under § 1257 because it falls "in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important

here would erode SLUSA's policy of requiring the '33 Act claims in this "covered class action" to be litigated exclusively in federal court and thereby preventing circumvention of the Reform Act. *See Curry*, 371 U.S. at 550.

The Superior Court's order was also rendered by the "highest court of a State in which a decision could be had." 28 U.S.C. § 1257(a). This requirement of § 1257(a) was satisfied because petitions for review of the Superior Court's order were denied by both levels

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to be denied review and *too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated*." (emphasis added; citation omitted)); *id.* at 553 (noting that Court was granting review under § 1257 even though "the [jurisdictional] question now raised would be merged in the final judgment and would be open to review by this Court at that time" (Harlan, J., concurring)); *see also Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985) ("state-court decisions rejecting a party's federal-law claim that he is not subject to suit before a particular tribunal are 'final' for purposes of our certiorari jurisdiction under 28 U.S.C. § 1257").

of California's appellate courts.[25] Thus, the reviewable judgment is that of the Superior Court.[26]

Finally, a title, right, privilege, or immunity is claimed under a federal statute here. Petitioners' motion for judgment on the pleadings claimed that SLUSA gave Petitioners a right to a federal forum and immunized Petitioners from having to litigate this case in state court. Moreover, by adopting *Countrywide*'s interpretation of SLUSA, the Superior Court resolved

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[25] *See, e.g.*, *Virginian Ry. Co. v. Mullens*, 271 U.S. 220, 222 (1926) ("the Supreme Court of Appeals of the State, although petitioned by the defendant to review the [trial court] judgment, declined so to do, thus making the trial court the highest court of the State in which a decision could be had."); Stephen M. Shapiro et al., SUPREME COURT PRACTICE (10th ed. 2013) ("SHAPIRO") at 177 ("If the appellate court declines to review the case, the trial court's judgment becomes that of the highest court in which decision could be had[,] [citations omitted], although the time for filing a petition for certiorari runs from the date of the higher court's refusal to review."); *see also Am. Ry. Express Co. v. Levee*, 263 U.S. 19, 20-21 (1923) (where state's highest court has jurisdiction to grant discretionary review of lower court judgment, "it [i]s necessary for the petitioner to invoke that [discretionary] jurisdiction in order to make it certain that the case could go no farther," but "when the jurisdiction was declined[, the intermediate appellate court] was shown to be the highest Court of the State in which a decision could be had" (citations omitted)); SHAPIRO at 176 n.46 (collecting cases).

[26] *See, e.g.*, *In re Little*, 404 U.S. 553, 553 (1972) (granting petition for certiorari and reversing judgment of Superior Court after both North Carolina Court of Appeals and North Carolina Supreme Court denied review); *see* SHAPIRO at 180 ("An order of a court of last resort declining to review a case is not ordinarily the judgment that is reviewable under § 1257(a); in that event, the reviewable judgment is that of the highest court possessing and exercising jurisdiction.").

this case on a purely federal ground. *See Sears v. Upton*, 561 U.S. 945, 946 n.1 (2010) (state-court decision confers jurisdiction under § 1257 if "it resolved a federal issue on exclusively federal-law grounds").[27]

b. There is no benefit to waiting for federal or state appeals courts to resolve the conflict over the question here presented. Because of the roadblocks to review of remand orders, *see supra* at 13-15, the ordinary process of federal review is exceedingly unlikely to result in any appellate decisions, let alone a uniform line of decisions that will eliminate conflict and obviate the need for review by this Court.[28] State-court litigation is also unlikely to obviate the need for review:

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[27] *See also* SHAPIRO at 153 (requirement is satisfied where case "relat[es] to the construction and application of" federal statutes (citing cases)); *Amalgamated Food Emps. Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 334 (1968) (in determining whether question was "specially set up or claimed" for purposes of § 1257, it is "usually sufficient to ask whether the petitioners satisfied the state rules governing presentation of issues" (Harlan, J., dissenting) (citation omitted)).

[28] Unavailingly, class-action plaintiffs rely on dicta in certain federal appellate decisions. Those decisions are off-point for many reasons, including the fact that they involved only state-law claims and/or analyzed only SLUSA's removal provisions, not SLUSA's amendment to the jurisdictional portion of Section 22(a). *See Proctor v. Vishay Intertechnology, Inc.*, 584 F.3d 1208, 1228 (9th Cir. 2009); *Madden v. Cowen & Co.*, 576 F.3d 957, 976 (9th Cir. 2009); *Luther*, 533 F.3d at 1034; *Herndon v. Equitable Variable Life Ins. Co.*, 325 F.3d 1252, 1253 (11th Cir. 2003); *Riley v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 292 F.3d 1334, 1340-41 (11th Cir. 2002). The Ninth Circuit's decision in *Countrywide* was also off-point because it assumed that SLUSA requires remand and analyzed only whether the Class Action Fairness Act trumps SLUSA.

state cases have resulted in only one appellate decision, for reasons discussed *supra* at 16.

Nor is there any benefit to waiting for this case to proceed through discovery to final judgment. The question presented is purely legal. Only the pleadings are necessary for this Court to resolve it. Discovery and trial will add no clarification to the issues.

While the benefit of waiting for appellate decisions in other cases or for final judgment here is nil, the cost of waiting is high. The number of '33 Act cases brought in state court has spiked since issuance of *Countrywide*[29] – on which the decision below is based, *see* 1a, 5a-6a – and such unabashed forum-shopping shows no sign of abating. The uncertainty and divisions in the federal courts undermine the integrity of the judicial system, as like cases are not being treated alike. In these cases, the deciding factor – as litigants and the public readily perceive – is not a uniform principle of law but rather the particular judge assigned. Moreover, with every passing month absent appellate guidance, SLUSA's intent to give defendants a federal forum will be frustrated. Defendants' corresponding right to a federal forum will similarly be lost.

This case is an ideal vehicle for review. The question presented was squarely raised below. It was decided clearly and exclusively on federal grounds. And a reversal by this Court will terminate the litigation altogether.

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[29] *See supra* at 8.

Petitioners are unaware of any other case on the horizon that will present a better opportunity for resolution of the question presented.

3. In prior cases, a lower-court split prompted a grant of certiorari even absent a Circuit conflict.

Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473 (1981), like this case, presented the question whether state courts have concurrent subject matter jurisdiction over an action arising under a federal statute. In *Gulf Offshore*, petitioner had been sued in Texas state court under the federal Outer Continental Shelf Lands Act, 67 Stat. 462 ("OCSLA"). In the trial court, petitioner argued – on summary judgment and at trial – that state courts lack subject matter jurisdiction over OCSLA claims. The trial court rejected the argument. Texas's intermediate appellate court rejected the argument as well. The Texas Supreme Court denied review. This Court granted certiorari to resolve the "conflict over whether federal courts have exclusive subject-matter jurisdiction over suits arising under OCSLA." 453 U.S. at 477. The conflict in both *Gulf Offshore* and this case involved federal district courts and state intermediate appellate courts. But the conflict in *Gulf Offshore* involved only five decisions, *see* 453 U.S. at 477 & n.3; the conflict here involves dozens of decisions.

In *Mistretta v. United States*, 488 U.S. 361 (1989), certiorari was granted in part because of the "disarray among the Federal District Courts." *Id.* at 371 & n.6. There, as here, dozens of district court decisions fell on

either side of the issue, which was the constitutionality of the federal sentencing guidelines.[30] Moreover, certiorari was granted even though federal appellate review was available. If disarray among district courts favored a grant of certiorari there, where federal appellate review was available, then such disarray here – where federal appellate review is largely unavailable – *a fortiori* favors a grant of certiorari.[31]

B. The Jurisdictional Question Is Important and Was Wrongly Decided Below

The holding below – like the holding in *Countrywide* and numerous federal cases – subverts both the Reform Act and SLUSA, to the detriment of national securities markets. Certiorari should be granted to correct those erroneous holdings. This Court's guidance

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[30] *See Mistretta*, 488 U.S. at 371 n.6 (referencing decisions cited by petition for certiorari).

[31] *See also Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 349 & n.2 (1999) (conflict involved three federal appeals courts opposing two federal district courts); *Heffron v. Int'l Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 646 & n.9 (1981) (conflict involved two federal district courts opposing two state supreme courts and three federal appeals courts); *Curtis v. Loether*, 415 U.S. 189, 191 & n.2 (1974) (conflict involved federal district court decision opposing two federal district court decisions and one federal appeals court decision); *cf. Dawson Chemical Co. v. Rohm & Haas Co.*, 448 U.S. 176, 179, 185 & n.4 (1980) (noting "no direct conflict" on patent-law issue, but granting certiorari to "forestall a possible conflict in the lower courts").

will vindicate congressional intent to curb abusive securities class actions, to enact uniform rules effectuating those curbs, and to stop forum-shopping.[32]

1. For two reasons, the significant federal interest in curbing abusive securities class actions has been undercut by *Countrywide* and similar federal decisions. First, the national economy is once more subject to the harmful abuses that the Reform Act and SLUSA sought to eradicate. Second, despite SLUSA's intent to create *uniform* standards, there are now disuniform standards, with abuse-curbing rules applying in federal court and abuse-permitting rules applying in state court. The difference incentivizes the forum-shopping that SLUSA sought to eliminate.

"The magnitude of the federal interest in protecting the integrity and efficient operation of the market for nationally traded securities cannot be overstated." *Dabit*, 547 U.S. at 78. That significant federal interest prompted Congress in 1995 to find that abusive class-action securities litigation was harming "the entire U.S. economy" and to curb the abuse by passing the Reform Act. *Dabit*, 547 U.S. at 81 (quoting H.R. Conf. Rep. No. 104-369, 1st Sess., at 31 (1995)); *Kircher*, 547 U.S. at 636; *see supra* at 5-6.

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[32] In both jurisdictional and non-jurisdictional cases, this Court has repeatedly granted certiorari in cases concerning construction of the federal securities laws. *See* SHAPIRO at 271 (citing cases).

But the Reform Act inadvertently prompted plaintiffs to "bring[] class actions under state law, often in state court." *Dabit*, 547 U.S. at 82. The migration to state court was marked: the number of state-court class actions alleging securities claims doubled nationally and quintupled in California. *See supra* at 6 & note 3. It was also novel: "state-court litigation of class actions involving nationally traded securities had previously been rare." *Dabit*, 547 U.S. at 82. And it was no coincidence: "[S]ince passage of the Reform Act, plaintiffs' lawyers have *sought to circumvent* the Act's provisions by exploiting differences between Federal and State laws by filing frivolous and speculative lawsuits in State court, *where essentially none of the Reform Act's procedural or substantive protections against abusive suits are available.*" SLUSA Conf. Rep. at 14-15 (emphasis added).[33] "To stem this shift from Federal to State courts" and thus "[t]o block this bypass of the Reform Act," Congress enacted SLUSA. *Dabit*, 547 U.S. at 82 (brackets and internal quotation marks omitted); *Kircher*, 547 U.S. at 636.

SLUSA closed the state-court loophole. Targeting state-court securities class actions regardless of whether they allege federal- or state-law claims, SLUSA (1) eliminated state-court jurisdiction over class actions alleging '33 Act claims and (2) precluded most class actions alleging state-law securities claims.

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[33] The *Diamond* Court recognized that, absent SLUSA, California would provide "a more attractive forum and afford more expansive remedies for market manipulation than does federal securities law." 19 Cal. 4th at 1045.

15 U.S.C. §§ 77v, 77p. SLUSA thereby made federal court the "exclusive venue for most securities class action lawsuits." SLUSA Conf. Rep. at 13.

Thirteen years after SLUSA closed the state-court loophole, *Countrywide* unequivocally reopened it. In *Countrywide*, plaintiff investors filed a state-court class action asserting '33 Act claims against the issuers of mortgage-backed securities not traded on a national exchange. 195 Cal. App. 4th at 793. Reversing the Superior Court's dismissal for lack of subject matter jurisdiction, the California Court of Appeal, Second Appellate District, held that, contrary to statutory language, legislative intent, and federal authority, state courts after SLUSA retain concurrent jurisdiction over class actions alleging only '33 Act claims.[34] Commentators predicted that *Countrywide* would transform the California state court system into a haven for class-action plaintiffs alleging '33 Act claims.[35] The predictions

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[34] The court analyzed Section 16 and held that, because Sections 16(b), 16(c), and 16(d) dealt with state-law claims and not federal-law claims, "nothing, then, in [Section 16] describes this case[, which involved '33 Act claims], and thus, nothing in [Section 16] puts this case into the exception to the rule of concurrent jurisdiction." *Id*. at 797. The court concluded: "the fact that the case is not precluded and can be maintained, but cannot be removed to federal court if it is filed in state court, tells us that the state court has jurisdiction to hear the action." *Id.*

[35] "[I]f you are a plaintiff hoping to pursue a '33 Act claim in state court, your best bet [now] is to file the lawsuit in California stat[e] court." Kevin M. LaCroix, *So, There's Concurrent State Court Jurisdiction for '33 Act Suits, Right? Well . . .* , The D&O Diary (May 20, 2011).

came true: in California state courts after *Countrywide*, the number of class actions alleging '33 Act claims has increased by a factor of fourteen. *See supra* at 8 & note 5. The decision below, which relied on *Countrywide*, confirms the trend. 1a, 5a-6a.[36]

As a result, a key SLUSA provision has been largely nullified. Congress enacted SLUSA – the *Uniform* Standards Act – with the goal of providing uniform standards for securities class actions. The *elimination* of state-court jurisdiction over '33 Act class actions was meant to further that goal by having all such cases heard in federal court subject to federal standards. That makes sense: as Congress found abusive securities class actions to be harming the *national* economy, *Dabit*, 547 U.S. at 81, so SLUSA, by directing such litigation into federal court, ensured that securities class actions would be reformed *nationally*. But under *Countrywide* and similar cases, state courts – even as they are stripped of jurisdiction over state-law claims – still retain jurisdiction over federal-law claims. Class-action plaintiffs and lawyers are taking full advantage.

Allowing class actions alleging '33 Act claims to continue in state court splinters, rather than makes uniform, the application of national standards in class

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[36] *See* Douglas H. Flaum et al., *Why Section 11 Class Actions Are Proliferating In Calif.*, Law360 (Apr. 27, 2015) (noting that in choosing California state court, Section 11 plaintiffs "appear to be aware of and specifically taking advantage of the [*Countrywide*] decision[]").

actions. Many of the Reform Act's provisions are undisputedly inapplicable in state court. *See, e.g.*, 15 U.S.C. § 77z-1(a)(2), (a)(3)(A) (notice and certification requirements); *id*. § 77z-1(a)(3)(B)(iii) (lead plaintiff appointment process). Federal pleading standards also might not apply, and federal appellate review of trial court decisions would be unavailable. As a result, the outcome of class actions under the '33 Act "will frequently and predictably depend on whether it is brought in state or federal court," further destroying uniformity. *Felder v. Casey*, 487 U.S. 131, 151 (1988).

The practical consequences for litigants are even stranger. Under *Countrywide* and similar holdings, an issuer defendant can now face two securities class actions challenging the same IPO, one filed in federal court and the other filed in state court. That defendant can be forced to litigate simultaneously in different forums with separate procedural regimes – the antithesis of uniform national standards. Nor is this a mere hypothetical. Plaintiffs in federal-court class actions challenging IPOs have actually brought parallel state-court class actions under the '33 Act. In those state-court actions, plaintiffs have sought discovery despite the Reform Act's automatic discovery stay, which bars discovery pending a motion to dismiss. Compounding the confusion, state courts disagree on whether to stay the state case in deference to the federal case.[37]

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[37] *Compare Buelow v. Alibaba Group Holding Ltd.*, No. CIV535692, slip op. (Cal. Super. Ct. San Mateo Cty. Apr. 1, 2016) (refusing to stay state-court class action – which alleged '33 Act claims – in deference to federal-court class action alleging '34 Act

The consequent patchwork of legal regimes "undermine[s] the principal purpose of SLUSA," "makes no sense," and is "absurd," "bizarre," "inconceivable," "anomalous," "counter-intuitive," and "directly contrary to the stated intent of Congress."[38] As one court explained, "Congress's desire to create a unified national standard for securities class actions cannot be met if fifty different state jurisdictions now become the . . . interpreters of a federal statute. . . . Instead of a national standard, there will be fifty different standards." *Unschuld v. Tri-S Sec. Corp.*, 2007 U.S. Dist. LEXIS 68513, at *29-30 (N.D. Ga. Sept. 14, 2007) (footnote omitted) (remanding '33 Act class action while noting result at odds with congressional intent).[39] Courts "cannot interpret federal statutes to negate their own stated purposes." *King v. Burwell*, 135 S. Ct. 2480, 2493 (2015) (citation omitted).

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claims, where both actions arise out of IPO), *with In re Etsy, Inc. S'holder Litig.*, No. CIV 534768, slip op. (Cal. Super. Ct. San Mateo Cty. Feb. 29, 2016) (staying state-court action – which alleged '33 Act claims – in deference to federal-court action alleging '33 Act and '34 Act claims, where both actions arise out of IPO).

[38] *Rubin*, 2007 WL 778485, at *5; *Williams v. AFC Enters., Inc.*, 2003 U.S. Dist. LEXIS 28623, at *9-10 (N.D. Ga. Nov. 20, 2003); *Knox v. Agria Corp.*, 613 F. Supp. 2d 419, 423 (S.D.N.Y. 2009); *Northumberland Cty. Ret. Sys. v. GMX Res., Inc.*, 810 F. Supp. 2d 1282, 1287 (W.D. Okla. 2011); *Niitsoo*, 902 F. Supp. 2d at 798.

[39] The SLUSA Senate Report, which states that SLUSA was enacted to combat the "noticeable shift in class action litigation from federal to state courts," cites "[d]isparate, and shifting, state litigation procedures" and the concern with "fragmentation of our national system of securities litigation[.]" S. Rep. No. 105-182, 2d Sess., at 3 (1998).

2. The holding below was incorrect.

a. Respondents allege only '33 Act claims. Respondents also concede that this is a "covered class action." *Supra* at 9. SLUSA amended the '33 Act's jurisdictional provision, Section 22, by eliminating concurrent state jurisdiction over "covered class actions" that allege "offenses and violations under [the '33 Act]." 15 U.S.C. § 77v(a). Thus, the Superior Court should have held that it lacked subject matter jurisdiction.

SLUSA's amendment to Section 22 of the '33 Act provides that concurrent state-court jurisdiction over '33 Act claims will continue "except as provided in [Section 16] of this title with respect to covered class actions." *Id.* We refer to this amendment as the "Jurisdictional Amendment." Courts disagree as to whether the Jurisdictional Amendment should be read broadly as *except for covered class actions as defined in Section 16(f)* as opposed to restrictively as *except for the certain types of covered class actions precluded by Section 16(b) and removable by Section 16(c)*.[40] In Petitioners' view, the broad approach is correct, as exemplified by the decisions in *Knox v. Agria Corp.*, 613 F. Supp. 2d 419 (S.D.N.Y. 2009), and *Hung v. iDreamSky Tech. Ltd.*, 2016 U.S. Dist. LEXIS 8389 (S.D.N.Y. Jan. 25, 2016).

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[40] *See generally* Mitchell A. Lowenthal & Shiwon Choe, *State Courts Lack Jurisdiction to Hear Securities Act Class Actions, But The Frequent Failure To Ask The Right Question Too Often Produces The Wrong Answer*, 17 U. PENN. J. BUS. L. 739, 754, 759-78 (2015) (collecting cases).

In *Knox*, the court explained that SLUSA eliminated state-court jurisdiction over covered class actions alleging '33 Act claims. 613 F. Supp. 2d at 425 ("The exception in the jurisdictional provision of Section 22(a) exempts covered class actions raising ['33] Act claims from concurrent jurisdiction."). *Knox* involved a putative class action initially filed in state court solely under the '33 Act. Defendants removed that case to federal court pursuant to 28 U.S.C. § 1441(a) (federal question removal) rather than 15 U.S.C. § 77p(c) (SLUSA removal under Section 16(c) of the '33 Act). Plaintiffs moved to remand, citing the removal bar in the '33 Act: "Except as provided in [Section 16(c)], no case arising under [the '33 Act] and brought in any State court of *competent jurisdiction* shall be removed to any court of the United States." 613 F. Supp. 2d at 422 (quoting 15 U.S.C. § 77v(a) (emphasis added)). Because defendants did not remove under Section 16(c), the question in *Knox* was whether the state court was a court of "competent jurisdiction" and the case might have to be remanded,[41] or whether the state court lacked jurisdiction and federal question removal was proper.

To answer this question, the *Knox* court examined the meaning of the Jurisdictional Amendment by looking to Section 16 and each of its subsections. 613 F. Supp. 2d at 423-24. The court found that "[t]he

[41] *Knox* expressly declined to address the scope of the exception to the removal bar as not necessary for its decision. 613 F. Supp. 2d at 423.

reference to Section 16 does not add a substantive limitation to the exception to concurrent jurisdiction in Section 22(a); rather it simply points the reader to the definition of a 'covered class action.'" *Id.* at 424. This interpretation "also harmonizes with the rest of SLUSA." *Id.* at 425. It is "consistent with SLUSA's addition to the anti-removal provision," which addition "prevents plaintiffs from frustrating removal of state-law based covered class actions by adding a non-removable individual ['33] Act claim to an otherwise removable state-law based covered class action." *Id.* It also "is consistent with Congress's general remedial intent in passing SLUSA: 'to prevent certain State private securities class action lawsuits alleging securities fraud from being used to frustrate the objectives of the [Reform Act].'" *Id.* (citation omitted). Finding that the state court lacked jurisdiction, the *Knox* court accordingly denied the motion to remand.

Hung addressed the same question as *Knox* and adopted *Knox*'s reasoning and holding. *See* 2016 U.S. Dist. LEXIS 8389, at *5-14. *Hung* included two other relevant holdings. First, it held that SLUSA's addition to the '33 Act's removal bar of the phrase "Except as provided in [Section 16(c)]" is "not relevant" where only federal-law securities claims are alleged. *Id.* at *6. Second, it rejected the plaintiff's reading of the Jurisdictional Amendment. According to the plaintiff's reading, the Amendment means "except with respect to those state-law class actions removable under [Section 16](c) and precluded by [Section 16](b)"; that is, the plaintiff argued, the Amendment stripped state

courts of jurisdiction over cases removable under Section 16(c). *Id.* at *8. But, as the court explained, the plaintiff's reading is precluded by *Kircher*, which held that a defendant can elect to leave a removable case in state court. *Id.* at *9. The plaintiff's reading also makes Section 22(a) internally inconsistent, by giving "state courts jurisdiction over *federal* claims 'except' for certain *state* claims" when "state claims, of course, are not a subset of federal claims, excisable through an exception." *Id.* at *9-10 (emphasis added). Finally, the plaintiff's reading produces the "odd result" of having state-law claims removed and dismissed but having federal-law claims stay in state court and proceed without application of the Reform Act's reforms. *Id.* at *12. According to the plaintiff's reading, "the [Reform Act] and SLUSA would encourage plaintiffs to litigate federal securities class actions in state court, with lessened procedural protections, and they would prohibit defendants from removing such cases to federal court." *Id.* at *12-13. "This outcome is implausible given the purpose of the Acts in question." *Id.* at *13.

The correct reasoning is that of *Knox*, *Hung*, and similar decisions, not that of the decision below.

b. *Countrywide* and similar federal decisions rest on two fatal errors.

First, such decisions violate principles of statutory interpretation. By holding that *no* covered class actions under the '33 Act are excluded from concurrent jurisdiction, those decisions render the Jurisdictional Amendment a nullity.

According to a favorite argument of class-action plaintiffs, those decisions hold that the Jurisdictional Amendment excluded only those state-law claims precluded by Section 16(b) and removable by Section 16(c). Under this reading, Section 22's Jurisdictional Amendment merely reiterates or "acknowledges" what is already stated in Section 16. That is far from the "real and substantial effect" Congress intends when it "acts to amend a statute." *Stone v. INS*, 514 U.S. 386, 397 (1995). Further, to acknowledge Section 16, the amendment need only have stated "except as provided in Section 16." The reference to "covered class action" under this reading is surplusage. As this Court has explained, however, "legislative enactments should not be construed to render their provisions mere surplusage." *Dunn v. CFTC*, 519 U.S. 465, 472 (1997).

Moreover, Section 22 grants concurrent jurisdiction for '33 Act claims, *not* state-law claims. *See Knox*, 613 F. Supp. 2d at 424; *Hung*, 2016 U.S. Dist. LEXIS 8389, at *9-10; 15 U.S.C. § 77v(a) ("jurisdiction of offenses and violations *under this subchapter*"; "suits in equity and actions at law brought to enforce any liability or duty *created by this subchapter*" (emphasis added)). It makes no sense that an amendment limiting the grant of such jurisdiction should refer to state-law claims.

Any purported reading of the Jurisdictional Amendment's reference to "covered class action" as being limited to cases with state-law claims violates the interpretive principle that "'when the legislature uses

certain language in one part of the statute and different language in another, . . . different meanings were intended.'" *Sosa v. Alvarez-Machain*, 542 U.S. 692, 711 n.9 (2004) (citation omitted). Where Congress intended "covered class action" to refer to state-law claims, the statute adds modifying language: in Section 16(b) with "covered class action[s] *based upon* [*State law*]"; in Section 16(c) with "covered class action[s] . . . , *as set forth in subsection (b)*"; and in Section 16(d) with the preservation of certain "covered class action[s] . . . *based upon* [*State law*]." 15 U.S.C. § 77p (emphasis added). By contrast, the statute does *not* modify the references to "covered class action" in Sections 16(f) and 22(a).

Second, *Countrywide* and similar federal holdings urge a bizarre result that contradicts congressional intent: state courts lack jurisdiction to hear state-law securities class actions but retain jurisdiction over '33 Act class actions. Under principles of federalism, Congress generally tries not to "unduly interfere with the legitimate activities of the States." *Levin v. Commerce Energy, Inc.*, 560 U.S. 413, 431 (2010) (citation omitted). But where an action "arises under a law of the United States, Congress may, if it see[s] fit, give to the Federal courts exclusive jurisdiction." *Haywood v. Drown*, 556 U.S. 729, 756 (2009) (citation omitted). According to *Countrywide* and similar federal cases, Congress did just the opposite: it interfered with states' adjudication of their own laws, but chose not to act within its power to give federal courts exclusive jurisdiction over federal claims.

That courts have split on the import of the Jurisdictional Amendment may call into question what the

statutory language really means. But SLUSA's structure, as described in *Knox* and *Hung*, *see supra* at 31-33, reveals Congress's intent and makes clear the proper reading: that state courts no longer have jurisdiction over class actions under the '33 Act such as this one. *See King*, 135 S. Ct. at 2492 ("Given that the text is ambiguous, we must turn to the broader structure of the Act to determine the meaning of [the provision].").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

BEAVER COUNTY EMPLOYEES RETIREMENT FUND, ET AL. Plaintiffs, vs. CYAN, INC., et al. Defendants.	Case No. CGC-14-538355 [Consolidated with 14-539008] ORDER DENYING DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS (Filed Oct. 23, 2015)

I heard argument today on the captioned motion. I provided an oral tentative in open court, with a court reporter attending. For the reasons stated on the record I adopt the tentative and deny the motion.

Dated: October 23, 2015 /s/ *Curtis E.A. Karnow*
Curtis E.A. Karnow
Judge Of The
Superior Court

CERTIFICATE OF ELECTRONIC SERVICE
(CCP 1010.6(6) & CRC 2.260(g))

I, DANIAL LEMIRE, a Deputy Clerk of the Superior Court of the County of San Francisco, certify that I am not a party to the within action.

On OCT 23 2015, I electronically served THE ATTACHED DOCUMENT via File & ServeXpress on the recipients designated on the Transaction Receipt located on the File & ServeXpress website.

Dated: **OCT 23 2015**

T. Michael Yuen, Clerk

By: /s/ *Danial Lemire*
DANIAL LEMIRE, Deputy Clerk

APPENDIX B

SUPERIOR COURT OF THE
STATE OF CALIFORNIA
COUNTY OF SAN FRANCISCO

BEAVER COUNTY EMPLOYEES RETIREMENT FUND, et al., Individually and on Behalf of All Others Similarly Situated,

Plaintiffs,

vs.

CYAN, INC., et al.,

Defendants. /

Case No. CGC-14-538355 (Consolidated with No. CGC-14-539008)

TRANSCRIPT OF PROCEEDINGS
San Francisco, California
Friday, October 23, 2015

REPORTED BY:
SHEILA PHAM, RPR
CSR No. 13293
Pages 1-14

Transcript of Proceedings, taken at SAN FRANCISCO SUPERIOR COURT, 400 McAllister Street, Department 304, San Francisco, CA 94102, beginning at 2:06 p.m. and ending at 2:18 p.m., on Friday, October 23, 2015, before Sheila Pham, RPR, Certified Shorthand Reporter No. 13293.

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Also Present:

Robin Wechkin

[4] San Francisco, California,
Friday, October 23, 2015 2:06 p.m. -- 2:18 p.m.

THE COURT: With respect to the motion, I think my hands are tied by Luther versus Countrywide, and so just have to deny the motion.

You're welcome to argue.

MR. FELDMAN: Thank you, Your Honor. I'd like to suggest a few reasons why your hands are not tied by that decision. Number 1, it is distinguishable. Countrywide is not traded on the national market.

THE COURT: I know, but there's nothing in the opinion that suggests that that matters.

MR. FELDMAN: It was not a basis for the Court's decision, and I think it's a basis for distinguishing it.

And second, the decision is a nullity because the Court lacks jurisdiction to decide it.

THE COURT: Which Court did?

MR. FELDMAN: Either the Superior Court or the Court of Appeals, they lack jurisdiction because Luther removed jurisdiction over those cases for state court.

THE COURT: I can ignore Luther because I think Luther -- because I don't think the Court of Appeal has the jurisdiction that it decided.

[5] MR. FELDMAN: Yes.

THE COURT: That's pretty tough. Okay.

MR. FELDMAN: If you decide you're going to follow Luther and if you think Luther was wrongly decided, I hope the Court will consider writing on the subject because we're going to take a writ and that way the Court of Appeals here will have an informed opinion as to why Luther may have got it wrong.

THE COURT: I appreciate that. I do that sometimes very, very rarely. Maybe once every few years. I feel quite strongly that my hands are tied in a way that they're not to be tied, and I hope and pray that the Court of Appeal across the street refers to me and they've been good enough to do that on the reversing, that is.

But I don't think that's this case. Luther doesn't seem to be inappropriate. Its reading of the statute is plausible. My guess is it's probably -- anybody cared, it's probably the right reading of the statute, but I don't think I really have anything to contribute as the trial judge on the issue.

MR. FELDMAN: Okay. Thank you.

THE COURT: But you've done what you need to do, and I appreciate what you're doing. And good luck.

MR. FELDMAN: Thank you.

[6] THE COURT: The attentive will be adopted and the motion will be denied.

Let's turn to case management. One thing I want to just talk about briefly, I have a proposed order regarding the pro hac vice application of Robin Wechkin, W-E-C-H-K-I-N. I don't know if that person is here.

MR. DOLAN: She is, Your Honor.

ROBIN WECHKIN: That's me.

THE COURT: Hi, how are you? I'm glad you're here.

I just want to briefly ask you something. You've sort of gone over my trip wire in terms of the amount of work that you're doing in California for the last two years. It doesn't mean there's anything wrong in the end with your application, but you've got cases in California for the last couple of years in Santa Clara and San Mateo. And I guess this would be your fourth California case, I think, in the last two years.

So my question is, as I try to determine a very ambiguous standard, which is whether or not you're sort of doing business here in California sufficiently that you should join the bar. Can you estimate for me about how much of your time, say, in the last two years has been spent on California cases? Rough percentage, and I'll accept whatever percentage you suggest.

[7] ROBIN WECHKIN: 20 percent.

THE COURT: About what?

ROBIN WECHKIN: I'd say about 20 percent.

THE COURT: About 20 percent. I'll sign the order.

ROBIN WECHKIN: Thank you, Your Honor.

THE COURT: Let's call the case management. There isn't much in the statement. I think it's -- we're getting to the time we need to talk about trial dates, looked at the other trial date and I think we need one. It's going to be a great focusing device for all of us.

And I don't know if people are in a position now to estimate it for me or I need to sit down another case management conference for this purpose. I want to know, first of all, is this a jury trial?

MR. GRANT: Yes, Your Honor.

THE COURT: Do people have estimates now of roughly how much time you think the trial will be?

MR. GRANT: The length of trial or to get to trial?

THE COURT: Both, both facts.

MR. GRANT: I don't know that we really talked about it.

THE COURT: Yeah. You need to talk about it [8] first, don't you? I think you do.

MR. SALCEDA: We believe that discovery in this case should be very narrow. In fact, there is a single issue. In fact, Mr. Grant and I and Mr. Dolan had

the pressure of being in Little Rock, Arkansas, yesterday for --

THE COURT: You were in Arkansas?

MR. SALCEDA: Yes, we were. We had a deposition in this matter yesterday.

We think that the case should be pretty quick to get through discovery, and what we urge is the Court consider -- and I don't know if the Court wants to do it now -- is to set a discovery cutoff but then a time for dispositive motions because I think we will have a very strong dispositive motion. We wouldn't want to have a situation where the Court doesn't have very much time to deal with it, and now we're doing all sorts of pretrial submissions.

THE COURT: Right.

MR. GRANT: Your Honor, one comment I do have is that the case involves a customer of defendants who is located in Arkansas, which requires us to go through out-of-state discovery processes.

THE COURT: Sure.

MR. GRANT: So if it was a customer down in Los [9] Angeles, it would be much, much easier to get that discovery taken care of.

THE COURT: You need out-of-state commissions or something?

MR. GRANT: Well, we've already issued one.

THE COURT: Okay.

MR. GRANT: But we were waiting to push them for production until we got the protective order signed. We started our meet and confer, but it's hard to tell -- at this point, I'm not sure if we need any motion to compel in Arkansas, which I do not have a lot of experience in Arkansas, Your Honor.

THE COURT: Well, I think the best way to do this is to have you meet and confer on this and the related subjects and I'll mention what the related subjects are, and for you to send me a proposal for us to get together again in a couple of weeks or month or so, not much work in that really, so we can set all these dates.

I think you should do the following: Propose a schedule for trial, what the dates would be. Estimate 4.2 hours per day for in-court time because I hear motions in other cases at 9:00 and at 4:00 every day. If there's going to be a jury, you want to add approximately three to four days to your trial estimate [10] for selection of jury and for jury deliberations because you should assume that another case will be finishing just as you come in, and then as soon as you're done, I have another case ready to go. I just swap the trials in like that. So although the number of days I allocate to this case might shrink, they will not grow. You will not get more days after we decide among ourselves about how many days it will be.

You should prepare a schedule that allows for dispositive motions, like summary judgment or summary

adjudication motions. And you will recall that these kinds of motions aren't just brought by defendants, they're brought by plaintiffs. When the summary judgment was first introduced to the United States, it was a device for plaintiffs to get rid of affirmative defenses a long time ago.

I want to set a schedule for motions in limine, including, specifically, important motions of motion in limine that might be questions for hearing like witnesses, for example, expert issues. So we want to get that teed up in advance. And we probably want to make sure we talk about your instructions before we pick the jury.

My hope is to settle the jury instructions substantially before we pick a jury. In part, because [11] if we wait until trial, we'll make ourselves nervous and also because it is often wise to give some of the substantive instructions to the jury before they hear the evidence so they have a good grip as to what sorts of things they should be looking for and not wait until the very end to tell them what the topic of the case is.

So with those constraints, I think you should meet and confer, come up with a schedule that you like. If you have disputes, obviously just put down your respective positions and what you think we should be doing, and then suggest when you're going to be ready to go and when because I need to reserve time on the Court's schedule.

When do you think you may be ready to come back and talk about this issue?

MR. GRANT: A couple of weeks.

THE COURT: Let's go off the record.

(Off the record.)

THE COURT: The next CMC is at 2:00 p.m. on the 10th of November and the parties' joint case management conference statement that will have the proposals with respect to trial dates and associated dates. And when you come in on the 10th, bring your own personal trial schedules because if I can't accommodate what you've picked out, I will be running over some other options at [12] the time. I really would like to set the trial date when we get together next time.

MR. GRANT: Your Honor, do you have a date when you want the CMC statement?

THE COURT: Well, the user's guide for the department suggests three days. Would that work for you?

MR. GRANT: Yes, Your Honor.

THE COURT: Is there anything else I can do for you today?

MR. GRANT: Your Honor, we have one question in connection with the class certification. We noticed that in the notice, there was a reference to filing the opt-outs, but there was no reference in that in any order that you issued. I was a little concerned that I may have just slipped up without even seeing it.

THE COURT: Probably did. What would you like me to do? You obviously need to file them. Do you need something from me?

MR. GRANT: I just want to be clear with Your Honor that it's okay to file that and that's what the Court expects.

THE COURT: Yes. I need to know about it.

MR. GRANT: Sure. And we'll redact personal --

THE COURT: Right. Absolutely. If there are [13] objections and people want to respond to them, I'll certainly see those responses as well. That's fine. Anything else I can do?

MR. GRANT: No, Your Honor.

THE COURT: I'll see you in November.

MR. GRANT: Thank you, Your Honor.

MR. FELDMAN: Thank you, Your Honor.

MR. SALCEDA: Thank you, Your Honor. (Transcript of Proceedings was concluded at 2:18 p.m.)

I, the undersigned, a Certified Shorthand Reporter of the State of California, do hereby certify:

That the foregoing proceedings were taken before me at the time and place herein set forth; that any witnesses in the foregoing proceedings, prior to testifying, were duly sworn; that a record of the proceedings was made by me using machine shorthand which was thereafter transcribed under my direction; that the

foregoing transcript is a true record of the testimony given.

Further, that if the foregoing pertains to the original transcript of a deposition in a Federal Case, before completion of the proceedings, review of the transcript [ ] was [ ] was not requested.

I further certify that I am neither financially interested in the action nor a relative or employee of any attorney or party to this action.

IN WITNESS WHEREOF, I have this date subscribed my name.

Dated November 4, 2015

/s/ *Sheila Pham*
Sheila Pham, RPR
CSR No. 13293

APPENDIX C

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

CYAN, INC. et al., Petitioner, v. THE SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO, Respondent; BEAVER COUNTY EMPLOYEES RETIREMENT FUND, et al., Real Parties in Interest.	A146891 (City and County of San Francisco Super. Ct. Nos. CGC-14-538355 and CGC-14-539008) (Filed Dec. 10, 2015)

THE COURT:

The petition for writ of mandate, prohibition or other relief is denied.

(Ruvolo, P.J., Rivera, J. and Streeter, J. participated in the decision.)

DEC 10 2015

Ruvolo, P.J.
Presiding Justice

APPENDIX D

Court of Appeal, First Appellate District,
Division Four – No. A146891

S231299

IN THE SUPREME COURT OF CALIFORNIA

En Banc

CYAN, INC. et al., Petitioners,

v.

SUPERIOR COURT OF SAN FRANCISCO COUNTY,
Respondent;

BEAVER COUNTY EMPLOYEES RETIREMENT
FUND, et al., Real Parties in Interest.

(Filed Feb. 24, 2016)

The petition for review is denied.

CANTIL-SAKAUYE
Chief Justice

APPENDIX E

Section 22(a) of the '33 Act – with language added by SLUSA in bold italics – provides:

> The district courts of the United States . . . shall have jurisdiction of offenses and violations under this subchapter [15 U.S.C. §§ 77a *et seq.*] . . . , and, concurrent with State and Territorial courts, ***except as provided in [Section 16] of this title with respect to covered class actions,*** of all suits in equity and actions at law brought to enforce any liability or duty created by this subchapter. . . . ***Except as provided in [Section 16(c)] of this title,*** no case arising under this subchapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States.

15 U.S.C. § 77v(a).

Section 16 of the '33 Act – with language added by SLUSA in bold italics – provides:

> Additional Remedies***; Limitation on Remedies***
>
> ***(a) Remedies additional***
>
> ***Except as provided in subsection (b),*** the rights and remedies provided by this subchapter [15 U.S.C. §§ 77a *et seq.*] shall be in addition to any and all other rights and remedies that may exist at law or in equity.

(b) Class action limitations

No covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging –

> ***(1) an untrue statement or omission of a material fact in connection with the purchase or sale of a covered security; or***
>
> ***(2) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security.***

(c) Removal of covered class actions

Any covered class action brought in any State court involving a covered security, as set forth in subsection (b) of this section, shall be removable to the Federal district court for the district in which the action is pending, and shall be subject to subsection (b) of this section.

(d) Preservation of certain actions

> ***(1) Actions under State law of State of incorporation***
>
> > ***(A) Actions preserved***
> >
> > ***Notwithstanding subsection (b) or (c) of this section, a covered class action described in subparagraph (B) of this paragraph that is based upon the statutory or common law of the State***

in which the issuer is incorporated (in the case of a corporation) or organized (in the case of any other entity) may be maintained in a State or Federal court by a private party.

(B) Permissible actions

A covered class action is described in this subparagraph if it involves –

> ***(i) the purchase or sale of securities by the issuer or an affiliate of the issuer exclusively from or to holders of equity securities of the issuer; or***
>
> ***(ii) any recommendation, position, or other communication with respect to the sale of securities of the issuer that –***
>
> > ***(I) is made by or on behalf of the issuer or an affiliate of the issuer to holders of equity securities of the issuer; and***
> >
> > ***(II) concerns decisions of those equity holders with respect to voting their securities, acting in response to a tender or exchange offer, or exercising dissenters' or appraisal rights.***

(2) State actions

(A) In general

Notwithstanding any other provision of this section, nothing in this section may be construed to preclude a State or political subdivision thereof or a State pension plan from bringing an action involving a covered security on its own behalf, or as a member of a class comprised solely of other States, political subdivisions, or State pension plans that are named plaintiffs, and that have authorized participation, in such action.

(B) "State pension" plan defined

For purposes of this paragraph, the term "State pension plan" means a pension plan established and maintained for its employees by the government of the State or political subdivision thereof, or by any agency or instrumentality thereof.

(3) Actions under contractual agreements between issuers and indenture trustees

Notwithstanding subsection (b) or (c) of this section, a covered class action that seeks to enforce a contractual agreement between an issuer and an indenture trustee may be maintained in a State or Federal court by a party to the agreement or a successor to such party.

(4) Remand of removed actions

In an action that has been removed from a State court pursuant to subsection (c) of this section, if the Federal court determines that the action may be maintained in State court pursuant to this subsection, the Federal court shall remand such action to such State court.

(e) Preservation of State jurisdiction

The securities commission (or any agency or office performing like functions) of any State shall retain jurisdiction under the laws of such State to investigate and bring enforcement actions.

(f) Definitions

For purposes of this section, the following definitions shall apply:

(1) Affiliate of the issuer

The term "affiliate of the issuer" means a person that directly or indirectly, through one or more intermediaries, controls or is controlled by or is under common control with, the issuer.

(2) Covered class action

(A) In general

The term "covered class action" means –

(i) any single lawsuit in which –

(I) damages are sought on behalf of more than 50 persons or prospective class members, and questions of law or fact common to those persons or members of the prospective class, without reference to issues of individualized reliance on an alleged misstatement or omission, predominate over any questions affecting only individual persons or members; or

(II) one or more named parties seek to recover damages on a representative basis on behalf of themselves and other unnamed parties similarly situated, and questions of law or fact common to those persons or members of the prospective class predominate over any questions affecting only individual persons or members; or

(ii) any group of lawsuits filed in or pending in the same court and involving common questions of law or fact, in which –

(I) damages are sought on behalf of more than 50 persons; and

(II) the lawsuits are joined, consolidated, or otherwise proceed as a single action for any purpose.

(B) Exception for derivative actions

Notwithstanding subparagraph (A), the term "covered class action" does not include an exclusively derivative action brought by one or more shareholders on behalf of a corporation.

(C) Counting of certain class members

For purposes of this paragraph, a corporation, investment company, pension plan, partnership, or other entity, shall be treated as one person or prospective class member, but only if the entity is not established for the purpose of participating in the action.

(D) Rule of construction

Nothing in this paragraph shall be construed to affect the discretion of a State court in determining whether actions filed in such court should be joined, consolidated, or otherwise allowed to proceed as a single action.

(3) Covered security

The term "covered security" means a security that satisfies the standards for a covered security specified in paragraph (1)

or (2) of section 77r(b) of this title at the time during which it is alleged that the misrepresentation, omission, or manipulative or deceptive conduct occurred, except that such term shall not include any debt security that is exempt from registration under this subchapter pursuant to rules issued by the Commission under section 77d(2) of this title.

15 U.S.C. § 77p.

APPENDIX F

Electrical Workers Local #357 Pension and Health & Welfare Trusts v. Clovis Oncology, Inc., No. 16-cv-00933-EMC, 2016 WL 2592947 (N.D. Cal. May 5, 2016); *Fortunato v. Akebia Therapeutics, Inc.*, No. 15-13501-PBS, 2016 WL 1734073 (D. Mass. Apr. 29, 2016); *Badri v. TerraForm Global, Inc.*, No. 15-cv-06323-BLF, 2016 U.S. Dist. LEXIS 28127 (N.D. Cal. Mar. 3, 2016); *Iron Workers Mid-South Pension Fund v. TerraForm Global, Inc.*, No. 15-cv-6328-BLF, 2016 WL 827374 (N.D. Cal. Mar. 3, 2016); *Patel v. TerraForm Global, Inc.*, No. 16-cv-00073-BLF, 2016 WL 827375 (N.D. Cal. Mar. 3, 2016); *Carlson v. Ovascience, Inc.*, No. 15-14032-WGY, 2016 WL 2650707 (D. Mass. Feb. 23, 2016); *Buelow v. Alibaba Grp. Holding Ltd.*, No. 15-cv-05179-BLF, 2016 U.S. Dist. LEXIS 7444 (N.D. Cal. Jan. 20, 2016); *Kerley v. MobileIron Inc.*, No. 15-cv-04416-VC, slip op. (N.D. Cal. Nov. 30, 2015); *Cervantes v. Dickerson*, No. 15-cv-3825-PJH, 2015 U.S. Dist. LEXIS 143390 (N.D. Cal. Oct. 21, 2015); *City of Warren Police & Fire Ret. Sys. v. Revance Therapeutics, Inc.*, 125 F. Supp. 3d 917 (N.D. Cal. 2015); *Liu v. Xoom Corp.*, No. 15-CV-00602-LHK, 2015 U.S. Dist. LEXIS 82830 (N.D. Cal. June 25, 2015); *Pac. Inv. Mgmt. Co. LLC v. Am. Int'l Grp., Inc.*, No. SA CV 15-0687-DOC (DFMx), 2015 U.S. Dist. LEXIS 75355 (C.D. Cal. June 10, 2015); *Rosenberg v. Cliffs Natural Res., Inc.*, No. 1:14CV1531, 2015 U.S. Dist. LEXIS 48915 (N.D. Ohio Mar. 25, 2015); *Plymouth County Ret. Sys. v. Model N, Inc.*, No. 14-cv-04516-WHO, 2015 U.S. Dist. LEXIS 1104 (N.D. Cal. Jan. 5, 2015); *Rajasekaran v. CytRx Corp.*, No. CV 14-3406-GHK

(PJWx), 2014 U.S. Dist. LEXIS 124550 (C.D. Cal. Aug. 21, 2014); *Desmarais v. Johnson*, No. C 13-03666 WHA, 2013 U.S. Dist. LEXIS 153165 (N.D. Cal. Oct. 22, 2013); *Toth v. Envivo, Inc.*, No. C 12-5636 CW, 2013 U.S. Dist. LEXIS 147569 (N.D. Cal. Oct. 11, 2013); *City of Birmingham Ret. & Relief Sys. v. MetLife, Inc.*, No. 2:12-cv-02626-HGD, 2013 U.S. Dist. LEXIS 147675 (N.D. Ala. Aug. 23, 2013); *Reyes v. Zynga, Inc.*, No. C 12-05065 JSW, 2013 WL 5529754 (N.D. Cal. Jan. 23, 2013); *Niitsoo v. Alpha Natural Res., Inc.*, 902 F. Supp. 2d 797 (S.D. W. Va. 2012); *Harper v. Smart Techs., Inc.*, No. C 11-5232 SBA, 2012 WL 12505217 (N.D. Cal. Sept. 28, 2012); *Young v. Pac. Biosci. of Cal., Inc.*, No. 5:11-cv-05668 EJD, 2012 U.S. Dist. LEXIS 33695 (N.D. Cal. Mar. 13, 2012); *W. Va. Laborers Trust Fund v. STEC Inc.*, No. SACV 11-01171-JVS (MLGx), 2011 U.S. Dist. LEXIS 146846 (C.D. Cal. Oct. 7, 2011); *W. Palm Beach Police Pension Fund v. Cardionet, Inc.*, No. 10cv711-L(NLS), 2011 U.S. Dist. LEXIS 30607 (S.D. Cal. Mar. 24, 2011); *Parker v. Nat'l City Corp.*, No. 1:08 NC 70012, 2009 U.S. Dist. LEXIS 132947 (N.D. Ohio Feb. 12, 2009); *Hamel v. GT Solar Int'l Inc.*, No. 1:08-cv-00437-PB, slip op. (D.N.H. Feb. 12, 2009); *Layne v. Countrywide Fin. Corp.*, No. CV 08-3262 MRP, 2008 U.S. Dist. LEXIS 123896 (C.D. Cal. July 8, 2008); *Unschuld v. Tri-S Sec. Corp*., No. 1:06-CV-2931-JEC, 2007 WL 2729011 (N.D. Ga. Sept. 14, 2007); *Bernd Bildstein IRRA v. Lazard Ltd*., No. 05 CV 3388 (RJD) (RML), 2006 WL 2375472 (E.D.N.Y. Aug. 14, 2006); *Pipefitters Local 522 & 633 Pension Trust Fund v. Salem Commc'ns Corp*., No. CV 05-2730-RGK (MCx), 2005 U.S. Dist. LEXIS 14202 (C.D. Cal. June 28, 2005);

Higginbotham v. Baxter Int'l, Inc., No. 04 C 4909, 2005 U.S. Dist. LEXIS 12006 (N.D. Ill. May 25, 2005); *Zia v. Medical Staffing Network, Inc.*, 336 F. Supp. 2d 1306 (S.D. Fla. 2004); *Steamfitters Local 449 Pension & Ret. Sec. Funds v. Quality Distrib., Inc.*, No. 8:04-cv-961-T-26MAP, 2004 U.S. Dist. LEXIS 32014 (M.D. Fla. June 25, 2004); *In re Tyco Int'l, Ltd., Multidistrict Litig.*, 322 F. Supp. 2d 116 (D.N.H. 2004); *Williams v. AFC Enters., Inc.*, No. 1:03-CV-2490-TWT, 2003 U.S. Dist. LEXIS 28623 (N.D. Ga. Nov. 20, 2003); *Haw. Structural Ironworkers Pension Trust Fund v. Calpine Corp.*, No. 03-cv-0714-BTM (JFS), 2003 U.S. Dist. LEXIS 15832 (S.D. Cal. Aug. 26, 2003); *Martin v. BellSouth Corp.*, No. 1:03-CV-728-WBH, 2003 U.S. Dist. LEXIS 28605 (N.D. Ga. July 2, 2003); *Nauheim v. Interpublic Group of Cos.*, No. 02-C-9211, 2003 WL 1888843 (N.D. Ill. Apr. 15, 2003); *In re Waste Mgmt. Inc. Sec. Litig.*, 194 F. Supp. 2d 590 (S.D. Tex. 2002).

APPENDIX G

Hung v. iDreamSky Tech. Ltd., Nos. 15-CV-2514 (JPO), 15-CV-2944 (JPO), 15-CV-3484 (JPO), 15-CV-3794 (JPO), 2016 U.S. Dist. LEXIS 8389 (S.D.N.Y. Jan. 25, 2016); *Wunsch v. Am. Realty Capital Props.*, No. JFM-14-4007, 2015 U.S. Dist. LEXIS 48759 (D. Md. Apr. 14, 2015); *Lapin v. Facebook, Inc.*, Nos. C-12-3195 MMC, C-12-3196 MMC, C-12-3199 MMC, C-12-3200 MMC, C-12-3201 MMC, C-12-3202 MMC, C-12-3203 MMC, 2012 U.S. Dist. LEXIS 119924 (N.D. Cal. Aug. 23, 2012); *In re Fannie Mae 2008 Sec. Litig.*, No. 08 Civ. 7831 (PAC), 2009 U.S. Dist. LEXIS 109888 (S.D.N.Y. Nov. 24, 2009); *Knox v. Agria Corp.*, 613 F. Supp. 2d 419 (S.D.N.Y. 2009); *Pinto v. Vonage Holdings Corp*., No. 07-0062 (FLW), 2007 WL 1381746 (D.N.J. May 7, 2007); *Rubin v. Pixelplus Co*., No. 06 Civ. 2964 (ERK), 2007 WL 778485 (E.D.N.Y. Mar. 13, 2007); *Rovner v. Vonage Holdings Corp*., No. 07-178 (FLW), 2007 WL 446658 (D.N.J. Feb. 5, 2007); *In re King Pharms., Inc*., 230 F.R.D. 503 (E.D. Tenn. 2004); *Kulinski v. Am. Elec. Power Co.*, No. 02-03-412, slip op. (S.D. Ohio Jan. 7, 2004) (overruling objection to magistrate judge's report in *Kulinski v. Am. Elec. Power Co*., No. C-2-03-412, 2003 WL 24032299 (S.D. Ohio. Sept. 19, 2003)).

APPENDIX H

Brady v. Kosmos Energy, Ltd., Nos. 3:12-cv-0373-B, 3:12-cv-0781-B, 2012 U.S. Dist. LEXIS 176567 (N.D. Tex. July 10, 2012); *Northumberland County Ret. Sys. v. GMX Res., Inc.*, 810 F. Supp. 2d 1282 (W.D. Okla. 2011); *Purowitz v. DreamWorks Animation SKG, Inc.*, No. CV 05-6090 MRP (VBKx), 2005 U.S. Dist. LEXIS 46911 (C.D. Cal. Nov. 14, 2005); *Lowinger v. Johnston*, No. 3:05CV316-H, 2005 WL 2592229 (W.D.N.C. Oct. 13, 2005); *Alkow v. TXU Corp*., Nos. 3:02-CV-2738-K, 3:02-CV-2739-K, 2003 WL 21056750 (N.D. Tex. May 8, 2003); *Brody v. Homestore, Inc*., 240 F. Supp. 2d 1122 (C.D. Cal. 2003).

APPENDIX I

'33 ACT CLASS ACTIONS FILED IN CALIFORNIA STATE COURTS AFTER SLUSA

AFTER *COUNTRYWIDE*:

	Filing Date	Case Name	Case No.
1.	May 20, 2016	Wagner v. NantKwest, Inc.	Los Angeles County BC621292
2.	Apr. 28, 2016	Rivera v. Fitbit, Inc.	San Mateo County CIV538403
3.	Apr. 19, 2016	Braun v. NRG Yield, Inc.	Kern County BCV-16-100867
4.	Apr. 13, 2016	Pytel v. Sunrun Inc.	San Mateo County CIV538215
5.	Mar. 17, 2016	Beck v. Apigee Corporation	San Mateo County CIV537817
6.	Feb. 26, 2016	Geller v. LendingClub Corporation	San Mateo County CIV537300
7.	Feb. 17, 2016	City of Warren Police and Fire Retirement System v. Natera, Inc.	San Mateo County CIV537409
8.	Jan. 25, 2016	Giavara v. GoPro, Inc.	San Mateo County CIV537077
9.	Jan. 22, 2016	Electrical Workers Local #357 Pension And Health & Welfare Trusts v. Clovis Oncology, Inc.	San Mateo County CIV537068
10.	Jan. 14, 2016	Barnett v. Ooma, Inc.	San Mateo County CIV536959
11.	Dec. 7, 2015	Beaver County Employees Retirement Fund v. Avalanche Biotechnologies, Inc.	San Mateo County CIV536488
12.	Dec. 1, 2015	Rezko v. XBiotech Inc.	Los Angeles County BC602793
13.	Nov. 19, 2015	Kleiman v. Sientra, Inc.	San Mateo County CIV536313
14.	Oct. 23, 2015	Fraser v. Wuebbels (TerraForm Global, Inc.)	San Mateo County CIV535963
15.	Oct. 5, 2015	Buelow v. Alibaba Group Holding Limited	San Mateo County CIV535692
16.	Aug. 24, 2015	Steinberg v. MobileIron, Inc.	Santa Clara County 1-15-CV-284761
17.	Aug. 11, 2015	Shen v. TrueCar, Inc.	Los Angeles County BC590999
18.	July 21, 2015	Cervantes v. Dickerson (Etsy, Inc.)	San Mateo County CIV534768
19.	June 2, 2015	Hunter v. Aerohive Networks, Inc.	San Mateo County CIV534070
20.	May 1, 2015	City of Warren Police and Fire Retirement System v. Revance Therapeutics, Inc.	San Mateo County CIV533635, transferred on Nov. 6, 2015 to Santa Clara County 15-CV-287794

21.	Apr. 2, 2015	Firerock Global Opportunity Fund LP v. Castlight Health, Inc.	San Mateo County CIV533203
22.	Mar. 20, 2015	O'Donnell v. Coupons.com, Inc.	Santa Clara County 1-15-CV-278399
23.	Jan. 29, 2015	City of Warren Police and Fire Retirement System v. A10 Networks, Inc.	Santa Clara County 1-15-CV-276207
24.	Jan. 6, 2015	Liu v. Xoom Corp.	San Francisco County CGC-15-543531
25.	Oct. 16, 2014	Berliner v. Pacific Coast Oil Trust	Los Angeles County BC560944
26.	Sept. 5, 2014	Plymouth County Retirement System v. Model N, Inc.	San Mateo County CIV530291
27.	June 20, 2014	In re FireEye, Inc. Securities Litigation	Santa Clara County 1-14-CV-266866
28.	Apr. 3, 2014	Rajasekaran v. CytRx Corp.	Los Angeles County BC541426
29.	Apr. 1, 2014	Beaver County Employees Retirement Fund v. Cyan, Inc.	San Francisco County CGC-14-538355
30.	July 10, 2013	Desmarais v. Johnson (CafePress Inc.)	San Mateo County CIV522744
31.	Oct. 19, 2012	Toth v. Envivio, Inc.	San Mateo County CIV517481
32.	Sept. 13, 2012	Robinson v. Audience, Inc.	Santa Clara County 1-12-CV-232227
33.	Aug. 1, 2012	Reyes v. Zynga Inc.	San Francisco County CGC-12-522876
34.	May 30, 2012	Lapin v. Facebook, Inc.	San Mateo County CIV514240
35.	Mar. 13, 2012	Marcano v. Nye (Zeltiq Aesthetics, Inc.)	Alameda County RG12621290
36.	Oct. 21, 2011	Young v. Pacific Biosciences of California, Inc.	San Mateo County CIV509210
37.	Sept. 27, 2011	Harper v. Smart Technologies, Inc.	San Francisco County CGC-11-514673
38.	July 1, 2011	West Virginia Laborers' Trust Fund v. STEC, Inc.	Orange County 30-2011-00489022

BEFORE *COUNTRYWIDE*:

	Filing Date	**Case Name**	**Case No.**
1.	Apr. 15, 2008	Layne v. Countrywide Financial Corp.	Los Angeles County BC389208
2.	Nov. 14, 2007	Luther v. Countrywide Home Loans Servicing LP	Los Angeles County BC380698
3.	July 29, 2005	Purowitz v. DreamWorks Animation SKG, Inc.	Los Angeles County BC337475
4.	Mar. 9, 2005	Pipefitters Local 552 and 633 Pension Trust Fund v. Salem Communications Corp.	Ventura County CIV232456
5.	Mar. 11, 2003	Hawaii Structural Ironworkers Pension Trust Fund v. Calpine Corp.	San Diego County GIC806973
6.	Sept. 23, 2002	Brody v. Homestore, Inc.	Los Angeles County BC281956

APPENDIX J

Appellate Courts Case Information

CALIFORNIA COURTS
THE JUDICIAL BRANCH OF CALIFORNIA

1st Appellate District

Court data last updated: 05/22/2016 02:10 PM

Docket (Register of Actions)

Cyan Inc. et al. v. Superior Court of the City and County of San Francisco
Division 4
Case Number A146891

Date	Description	Notes
12/02/2015	Filed petition for writ of:	Mandate and/or Prohibition
12/02/2015	Filing fee.	
12/02/2015	Exhibits lodged.	1 Volume
12/02/2015	Filed proof of service.	
12/10/2015	Order denying petition filed.	The petition for writ of mandate, prohibition or other relief is denied. (Ruvolo, P.J., Rivera, J. and Streeter, J. participated in the decision.)
12/10/2015	Case complete.	

12/21/2015	Service copy of petition for review received.	Filed in California Supreme Court by Wilson Sonsini, attorneys for petitioners Cyan Inc. et al
12/24/2015	Record transmitted to Supreme Court.	
01/11/2016	Received copy of:	Answer to petition for review; filed in California Supreme court by Robbins Geller, attorneys for RPIs Beaver County Retirement Fund et al
01/19/2016	Received:	"reply to answer to petition for review";
01/25/2016	Received copy of:	Letter to California Supreme Court from Robbins Geller, attorneys for RPI Beaver County Employees; dated 1/21/16, re new court decision
01/28/2016	Received copy of:	Letter to California Supreme Court, dated 1/27/16, from Wilson Sonsini, attorneys for petitioner Cyan; re new case authority

02/01/2016	Ext. by Supreme Court re: petition for hearing filed:	The time for granting or denying review in the above-entitled matter is hereby extended to and including March 17, 2016, or the date upon which review is either granted or denied.
02/24/2016	Petition for review denied in Supreme Court.	

APPENDIX K

Appellate Courts Case Information

CALIFORNIA COURTS
THE JUDICIAL BRANCH OF CALIFORNIA

Supreme Court

Court data last updated: 05/22/2016 02:10 PM

Docket (Register of Actions)

CYAN v. S.C. (BEAVER COUNTY EMPLOYEES RETIREMENT FUND)
Case Number S231299

Date	Description	Notes
12/18/2015	Petition for review filed	Petitioner: Cyan, Inc. Attorney: Boris Feldman Petitioner: Mark A. Floyd Attorney: Boris Feldman Petitioner: Michael W. Zellner Attorney: Boris Feldman Petitioner: Michael L. Hatfield Attorney: Boris Feldman Petitioner: Paul A. Ferris Attorney: Boris Feldman Petitioner: Promod Hague Attorney: Boris Feldman Petitioner: M. Niel Ransom Attorney: Boris Feldman

		Petitioner: Michael J. Boustridge Attorney: Boris Feldman
		Petitioner: Robert E. Switz Attorney: Boris Feldman
12/18/2015	Record requested	
12/18/2015	Note:	Court of Appeal record has been imported and is available in electronic format.
01/07/2016	Answer to petition for review filed	Real Party in Interest: Beaver County Employees Retirement Fund
		Real Party in Interest: Retirement Board of Allegheny County
		Real Party in Interest: Delaware County Employees Retirement System
		Real Party in Interest: Jennifer Fleischer Attorney: Andrew S. Love
01/15/2016	Reply to answer to petition filed	Petitioner: Cyan, Inc. Attorney: Boris Feldman
		Petitioner: Mark A. Floyd Attorney: Boris Feldman
		Petitioner: Michael W. Zellner Attorney: Boris Feldman

		Petitioner: Michael L. Hatfield Attorney: Boris Feldman
		Petitioner: Paul A. Ferris Attorney: Boris Feldman
		Petitioner: M. Niel Ransom Attorney: Boris Feldman
		Petitioner: Michael J. Boustridge Attorney: Boris Feldman
		Petitioner: Robert E. Switz Attorney: Boris Feldman
01/21/2016	Filed:	Letter, dated January 21, 2016, from Andrew S. Love, counsel for RPI, regarding a recent decision.
01/27/2016	Filed:	Letter, dated January 27, 2016, from Boris Feldman, counsel for petitioners, regarding new authority.
01/29/2016	Time extended to grant or deny review	The time for granting or denying review in the above-entitled matter is hereby extended to and including March 17, 2016, or the date upon which review is either granted or denied.

02/24/2016	Petition for review denied	
03/07/2016	Returned record	petition for review