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July 21, 2011

VIA OVERNIGHT DELIVERY

The Honorable Chief Justice Tani Gorre Cantil-Sakauye
The Honorable Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102-4783

Re: *Luther, et al. v. Countrywide Financial Corp., et al.*, Supreme Court Case No. S194319, Second Appellate District Case No. B222889 (Petition for Review filed June 27, 2011)

Dear Chief Justice Cantil-Sakauye and Associate Justices:

Amici curiae the Chamber of Commerce of the Unites States of America (the "Chamber") and the Securities Industry and Financial Markets Association ("SIFMA") respectfully submit this letter pursuant to Rule 8.500(g) in support of Countrywide's Petition for Review. The Court of Appeal, reversing the Superior Court, held that the Securities Litigation Uniform Standards Act of 1998 ("SLUSA") did not divest state courts of subject matter jurisdiction over class actions brought under the federal Securities Act of 1933. This decision is fundamentally at odds with SLUSA's plain language and purpose, and contrary to the holding of every federal court that has addressed the issue. If left in place, it will further burden California's courts and taxpayers with the costs of nationwide federal securities litigation. And if this Court or the United States Supreme Court later reverses, all the judicial resources spent on all those cases will have been wasted. This Court therefore should review the Court of Appeal's erroneous construction of SLUSA now. It should reverse so that California does not become the only State in the nation to permit class action plaintiffs to defeat SLUSA and pursue federal securities claims in its courts.

Interests of *Amici Curiae*

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. The Chamber represents three hundred thousand direct members and indirectly represents an underlying membership of more than three million U.S. businesses and professional organizations of every size and in every sector and geographic region of the country. In addition to more than 20,000 Chamber members located in California, countless others do business in the state

and are directly affected by its litigation climate. An important function of the Chamber is to represent its members' interests in matters before Congress, the Executive Branch and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in courts throughout the country, including this Court, on issues of national concern to the business community. For more information, visit http://www.chamberlitigation.com/cases/issue/securities-corporate-governance.

SIFMA brings together the shared interests of hundreds of securities firms, banks and asset managers. SIFMA's mission is to support a strong financial industry, investor opportunity, capital formation, job creation and economic growth, while building trust and confidence in the financial markets. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit www.sifma.org. Many of SIFMA's members serve as underwriters for, or otherwise participate in, securities offerings and, as such, they have a significant interest in the issues raised by this appeal. SIFMA regularly files *amicus* briefs in cases with broad implications for financial markets.[1]

Given the ongoing volatility of the financial markets, the concomitant rise in securities class action filings, and the adverse impact that securities litigation risks have on the competitiveness of the U.S. capital markets, the issue raised by the Petition is of exceptional importance to the entire business community and securities industry.

Reasons Review Should Be Granted

In 1995, Congress enacted the Private Securities Litigation Reform Act of 1995 (the "Reform Act") to curb abusive securities class action litigation that "was being used to 'injure the entire U.S. economy.'" *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 81 (2006) (quoting House Conference Report). The Reform Act implemented a number of substantive and procedural safeguards – including heightened pleading standards – to deter or dispose of "those suits whose nuisance value outweighs their merits." *Id.* at 82.

Following the passage of the Reform Act, however, plaintiffs sought to end-run "the obstacles set in their path" by filing suits in state court. *Id.* SLUSA was Congress's response to this tactic. Under SLUSA, "covered class actions" asserting securities fraud claims may be maintained *only* in the federal courts.

Further to SLUSA's overall objective that all securities "covered class actions" should be litigated exclusively in the federal courts under federal law, Congress decided to amend the jurisdictional provisions of the 1933 Act, which historically had vested both federal and state courts with concurrent jurisdiction. Consequently, the 1933 Act was amended to eliminate state court jurisdiction for "covered class actions" brought under the 1933 Act. *See* 15 U.S.C. § 77v(a).

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[1] Among SIFMA's members are various Underwriter Defendants, for whom SIFMA's counsel for this letter, Willkie Farr & Gallagher LLP, has served as counsel from time to time on various other matters. Willkie Farr represents only SIFMA and the Chamber in this action.

This case is exactly the sort of nationwide securities class action lawsuit for which Congress, through SLUSA, has sought to provide uniform federal substantive and procedural rules. This action arises from $350 billion in public offerings of securities that were registered with the Securities and Exchange Commission ("SEC") and offered and traded nationally. The institutional investors that purchased those securities are located across the country and around the world. Allowing cases like this one to proceed in state court would permit plaintiffs to evade the procedural protections of the Reform Act and frustrate Congress's objectives when it enacted SLUSA.

Nevertheless, the Court of Appeal held that jurisdiction over this action – which asserts federal 1933 Act claims, and satisfies the definition of a "covered class action" under SLUSA – continues to exist in the California courts because SLUSA's preclusion and removal provisions do not apply by their terms. This marks the first time that any appellate court anywhere in the country has construed SLUSA to hold that a state court has jurisdiction over class actions brought under the 1933 Act.

As the Petition demonstrates, the Court of Appeal wrongfully conflated SLUSA's preclusion and removal provisions with SLUSA's provision eliminating *state court jurisdiction*. (*See* Petition at 4-6.) SLUSA's preclusion provision identifies which claims brought under state common law are preempted. SLUSA's removal provision says which claims may be removed. Neither provision addresses whether a state court may exercise subject matter jurisdiction over a class action exclusively asserting federal claims under the 1933 Act. Rather, another SLUSA provision amended the prior concurrent jurisdiction provision to divest state courts of jurisdiction over such cases. *See* 15 U.S.C. § 77v(a). Indeed, when plaintiffs have argued that class actions asserting only 1933 Act claims, once removed, must be remanded to state court under the 1933 Act's anti-removal provision, numerous federal courts have held that this anti-removal provision (which is also contained in 15 U.S.C. § 77v(a)) does not apply because state courts lack jurisdiction over such actions. (*See* Petition at 18.) Put differently, because SLUSA divested state courts of jurisdiction over 1933 Act class actions, a state court is not a court of "competent jurisdiction" under the anti-removal provision for any covered class action exclusively asserting 1933 Act claims. (*See id.* at 18-20 (citing cases).)

That the Court of Appeal's decision will make the California courts a magnet for 1933 Act class actions is undeniable. Given the nationwide service of process provisions of the 1933 Act, almost every class action asserting a claim under the 1933 Act could and would be brought in California. Indeed, securities lawyers throughout the country have already taken note of the Court of Appeal's invitation for forum shopping. As one commentator explained, "if you are a plaintiff hoping to pursue a '33 Act claim in state court, your best bet is to file the lawsuit in California stat[e] court."[2] Likewise,

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[2] Kevin M. LaCroix, *So, There's Concurrent State Court Jurisdiction for '33 Act Suits, Right? Well . . .*, The D&O Diary (May 20, 2011), *available at* http://www.dandodiary.com/2011/05/articles/securities-litigation/so-theres-concurrent-state-court-jurisdiction-for-33-act-suits-right-well.

a New York plaintiffs' lawyer recommended: "Place this opinion in your notebook. It is sure to come in handy."[3]

The decision of the Court of Appeal would also foster wasteful, duplicative litigation. It is only in federal court where multiple and overlapping securities actions can be consolidated before a single judge for coordinated handling, thereby preventing duplicative discovery and inconsistent rulings on legal and factual issues. Under the Court of Appeal's decision, however, nothing stops plaintiffs from prosecuting parallel class actions in state and federal court. Indeed, that danger is illustrated here, where several of the same named plaintiffs also filed a virtually identical securities class action lawsuit in federal court asserting the same 1933 Act claims with respect to the same mortgage-backed securities.[4] That case remains pending. Allowing a competing state court action to proceed undermines the strong federal interest, enshrined in SLUSA, in maintaining uniformity and integrity in the interpretation and application of the federal securities laws. As the Supreme Court of the United States recognized, "[t]he 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.

Finally, the Court of Appeal's decision increases the risks and costs associated with underwriting a national securities offering. Companies, their directors, and securities industry participants would be forced to defend sprawling federal securities litigation in both state court – under one set of pleading and discovery rules – and in federal court – under another. Permitting competing state court litigation would thus make access to the U.S. capital markets more expensive as investors bear higher costs to compensate for soaring expenses. Foreign markets, by contrast, limit or prohibit private class actions. The end result, as Congress has recognized, is that proliferating securities class action litigation in state courts would deter issuers from raising capital in U.S. markets, sabotaging the competitive footing of U.S. capital markets and the multitude of businesses that serve them.[5]

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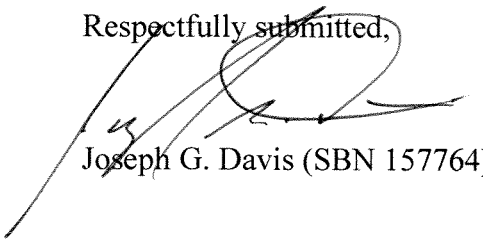
[3] Fred T. Isquith, *SLUSA And State Court Securities Actions*, Law360 (June 24, 2011), *available at* http://www.law360.com/articles/248327.

[4] *See Maine State Retirement Sys. v. Countrywide Fin. Corp.*, No. 2:10-CV-00302-MRP (MANx).

[5] *See* H.R. Rep. No. 104-50, at 20 (1995) ("Fear of [securities] litigation keeps companies out of the capital markets."); *see also* Commission on the Regulation of U.S. Capital Markets in the 21st Century, Report and Recommendations, at 30 (2007), *available at* http://www.uschamber.com/reports/commission-regulation-us-capital-markets-21st-century) (follow "Download Full Report" hyperlink) ("[I]nternational observers increasingly cite the U.S. legal and regulatory environment as a critical factor discouraging companies and other market participants from accessing U.S. markets.").

Accordingly, for the reasons set forth above and in the Petition, the Chamber and SIFMA respectfully submit that this Court should review, and reverse, the Court of Appeal's decision to permit a "covered class action" asserting claims under the 1933 Act to proceed in state court.

Respectfully submitted,



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PROOF OF SERVICE

I, *Joseph G. Davis*, am over the age of eighteen and not a party to the within action. My business address is Willkie Farr & Gallagher LLP, 1875 K Street, NW, Washington, DC 20006.

On **July 21, 2011**, I served the foregoing letter on the following persons by overnight Federal Express, following our ordinary business practices with which I am readily familiar.

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I declare under penalty of perjury under the laws of the ~~State of~~ New York that the foregoing is true and correct. Executed on **July 21, 2011** at New York, New York.

Joseph G. Davis