UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PUBLIC EMPLOYEES' RETIREMENT SYSTEM OF MISSISSIPPI, Individually and on Behalf of All Others Similarly Situated,	:	
Plaintiff,	:	No. 09-CV-1110 (HB)
v.	:	
THE GOLDMAN SACHS GROUP, INC. *et al.*,	:	ECF Case
Defendants.	:	

DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO LEAD PLAINTIFF'S MOTION FOR CLASS CERTIFICATION AND APPOINTMENT OF CLASS REPRESENTATIVE AND CLASS COUNSEL

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Action	*Public Employees' Retirement System of Mississippi* v. *The Goldman Sachs Group, Inc. et al.*, No. 09-CV-1110 (HB)
ASF	American Securitization Forum
BLBG	Bernstein Litowitz Berger & Grossman LLP, counsel for Plaintiff MissPERS in the Action
CDO	Collateralized Debt Obligation. Typically, a special-purpose vehicle issues notes to investors and uses the proceeds to acquire and hold a portfolio of interest-bearing securities, such as RMBS or other CDOs. The noteholders of the CDO receive periodic payments from the cash flow of the underlying collateral assets.
Certificates	The 11 different tranches of securities of the GSAMP 2006-S2 trust offered pursuant to the Offering Documents and at issue in the Action
E	Exhibit to the accompanying *Declaration of D. Andrew Pietro*, executed on October 27, 2011
FHFA	Federal Housing Finance Agency
Goldman Sachs	Defendant Goldman, Sachs & Co.
Mason	*Expert Report of Joseph R. Mason*, dated August 16, 2011, appended as Exhibit 45 to the *Declaration of D. Andrew Pietro*
Mississippi AG or AG	Office of the Mississippi Attorney General
MissPERS	Plaintiff Public Employees' Retirement System of Mississippi
MKP	MKP Capital Management
NCUA	National Credit Union Administration
New Century	New Century Financial Corp.
Offering Documents	Registration Statement, filed with the Securities and Exchange Commission on November 5, 2004; Base Prospectus, dated November 17, 2005; Prospectus Supplement, dated March 28, 2006; and Free Writing Prospectus, dated March 28, 2006
PIMCO	Pacific Investment Management Company, LLC
Pl. Br.	*Lead Plaintiff's Memorandum of Law in Support of Motion for Class Certification and Appointment of Class Representative and Class Counsel*, dated September 27, 2011
Pond Gadow	Pond, Gadow & Tyler

RALI	*N.J. Carpenters Health Fund* v. *Residential Capital, LLC*, 272 F.R.D. 160 (S.D.N.Y. 2011), *appeal docketed* No. 11-1683 (2d Cir.)
RMBS	Residential mortgage-backed securities
SAC	*Second Amended Class Action Complaint for Violation of §§ 11, 12(a)(2) and 15 of the Securities Act of 1933*, filed in the Action on September 18, 2009
Section 11	Section 11 of the Securities Act of 1933
T	*Report of Walter N. Torous, Ph.D.*, dated September 9, 2011, appended as Exhibit 1 to the *Declaration of D. Andrew Pietro*
UBS	UBS Global Asset Management
W	Affidavit of Scott Walter, sworn to on October 27, 2011
WAMCO	Western Asset Management Co.

PRELIMINARY STATEMENT

MissPERS seeks to certify a class of highly sophisticated institutional investors in a Goldman Sachs RMBS multi-tranched securitization of risky second-lien mortgages originated solely by New Century. MissPERS claims that the Offering Documents did not disclose departures from New Century's underwriting standards and inflated appraisals in connection with originations of the underlying loans. As this Court previously recognized in denying class certification in *RALI*, the professional investors in RMBS had significant differences in knowledge, investment approaches and analyses, and there were vast changes in information affecting RMBS during the relevant time period. As in *RALI*, these and other factors render this Action unsuitable for any class, much less the single proposed class consisting of all investors in all tranches of the Certificates at any time from the March 2006 offering onwards.

First and foremost, MissPERS' motion should be denied for the same basic reasons as in *RALI*: the claims here present numerous investor-specific issues that cause individual issues to predominate and render individual actions superior. The record of individualized knowledge here is even more extensive than in *RALI*. Defendants present below, and in the Expert Report of Dr. Walter Torous and Affidavit of Scott Walter, substantial evidence of the varying information available to investors or their advisors at the time of purchase. Putative class members—some of the world's most astute investors and asset managers—had access to and considered many information sources regarding the alleged practices, including through direct interactions with New Century and other market participants. Indeed, some investors tailored their securities through *direct negotiation with Goldman Sachs*. Moreover, differences among the Certificates give rise to individualized questions of materiality and loss causation, further compounding the lack of predominance of common questions. In short, investor-by-investor

determinations render this case particularly unsuitable for class treatment, even more so than in *RALI*. *See* Section I.

The predominance of individualized issues is compounded by investor-specific questions of whether claims are time-barred—an issue not raised (and evidence apparently not developed) at *RALI*'s class certification phase. This question applies to MissPERS itself, which has conceded its knowledge of relevant "storm warnings" well over one year before it belatedly filed suit on February 6, 2009. Further, MissPERS' counsel, which agreed beginning in 2004 to monitor MissPERS' portfolio and identify potential claims, publicly asserted *in 2007* the same allegations about New Century on which its claims rest here. *See* Section II.

For reasons similar to those that led this Court to hold that class treatment was not superior in *RALI*, it also is not superior here. MissPERS' proposed class consists of a relatively small number of highly sophisticated investors, the vast majority of which purchased more than $1 million in Certificates. These purchasers are not a cohesive group, as some members are investment funds that profited from RMBS and similar products. Perhaps most importantly—just as in *RALI*—the number and scope of individualized questions will pose significant obstacles to the management of this litigation. *See* Section III.

In addition to these predominance and superiority barriers to class certification, although the Court found in *RALI* that the Rule 23(a) requirements of numerosity, commonality, typicality and adequacy were satisfied, the record here establishes a different result. MissPERS' particular susceptibility to a statute of limitations defense renders it inadequate to serve as a class representative. And differences among the Certificates create conflicting interests among the different holders that likewise make class certification inappropriate. Further, when assessed on a Certificate-by-Certificate basis, numerosity is not satisfied. *See* Section IV.

BACKGROUND

A. The Securitization Consists of Eleven Different Certificates.

As this Court recognized in *RALI*, RMBS typically are issued by a trust that purchases pools of mortgage loans and sells to investors the rights to benefit from the payments on those loans. As described in the Offering Documents, the "GSAMP Trust 2006-S2" at issue here purchased 12,460 closed-end fixed-rate second-lien mortgage loans from mortgage originator New Century in 2005.[1] (W Ex. A at S-10–11.) New Century, which is not affiliated with Goldman Sachs, was the second-largest subprime mortgage lender in the United States. (E 44 at 1.) The GSAMP 2006-S2 trust issued 11 classes of Certificates under a single prospectus supplement, dated March 28, 2006. (W Ex. A at S-1.)

Each Certificate class is a separate security with different characteristics and CUSIP numbers. (W Ex. A at S-7–10; E 43 at 2.) The trust pays income from the loans to each Certificate based on its seniority in the structure (or "waterfall") reproduced in Appendix A hereto. The most senior is the Class A-1A Certificate. (W Ex. A S-7.) Next are the other senior Certificates (Classes A-1B, A-2 and A-3), the "mezzanine" Certificates (Classes M-1 through M-7), and then non-offered tranches that are not part of the proposed class (including Classes B-1 and B-2). (*Id.*) More junior Certificates pay higher interest rates to compensate investors for their greater risk. (*Id.* at S-60–65.) The initial credit ratings, which ranged from AAA for the Class A-1A to BBB- for the Class M-7, also reflect the Certificates' varying risks. (*Id.* at S-13.)

B. The Mortgages Underlying the Certificates Were High-Risk.

The GSAMP 2006-S2 securitization—as disclosed in the Offering Documents—included high-risk subprime mortgages with an average loan-to-value ratio of 99.84%. (*Id.* at S-14-30.)

[1] This Court previously dismissed claims based on two other offerings in which MissPERS did not invest.

The underlying loans are all second liens, many of which were "piggyback" loans because they were issued along with first liens. (T ¶ 6 n.4; W Ex. A A-22.) Second-lien loans are more likely to default and suffer greater losses when housing prices decline. (T ¶ 66.) Their risk is reflected in their weighted average interest rate of 10.26%. (W Ex. A S-30.) Although the unprecedented implosion of the housing markets and economy ultimately impacted almost all tranches to some degree, the waterfall was designed to shield investors in senior Certificates while allowing investors in subordinate Certificates to take on greater risk. (E 22 201:12-202:1; T ¶ 48; W ¶ 5.)

C. The Alleged Misstatements Relate to New Century's Deviation from Its Underwriting Guidelines and Reliance on Inadequate Property Appraisals.

MissPERS' principal allegations are that the Offering Documents misrepresented New Century's "compliance with underwriting and appraisal standards" (Pl. Br. 3):

- New Century "did not originate loans in accordance with [its] stated underwriting standards"; thus "the [Offering Documents'] representations regarding the underwriting guidelines ... were untrue and omitted material facts." (SAC ¶¶ 52, 54.)
- The appraisals of the underlying New Century loans did not conform to the Uniform Standards of Professional Appraisal Practice as represented in the Prospectus Supplement and, "[d]ue to the inflated appraisals, the LTV ratios listed in the Offering Documents were artificially low." (SAC ¶ 124.)[2]

MissPERS claims that, as a result, "Lead Plaintiff and the Class purchased certificates that were far riskier than represented." (Pl. Br. 2.)

D. The Certificates Were Sold in Individually Negotiated Transactions.

The Affidavit of Scott Walter, head of Goldman Sachs' Syndicate Desk—which coordinated the Certificates' marketing, negotiation and sale—describes the offering process, which closed March 30, 2006. (W ¶¶ 6-12.) Institutional investors purchased amounts varying from $100,000 to more than $172 million, with an average of nearly $5 million. (T Ex. 2D.)

[2] Other alleged misstatements in the Complaint—including that the Offering Documents contained misleading risk factors (SAC ¶ 108) and misrepresented the overcollateralization of the issuing trust (SAC ¶ 125), and that the assigned credit ratings misstated the quality of the Certificates (SAC ¶ 141)—stem from these core allegations.

Critically, this was not a uniform offering of equity securities with pre-established terms and a liquid secondary market. Sales were negotiated individually between Goldman Sachs and the purchaser or its asset manager. [redacted] UBS allocated the Class A-3 Certificates to itself and its clients, including MissPERS. (*See* T Ex. 17C.) Other investors also participated in structuring the Certificates. (W ¶¶ 10-11.) [redacted]

A relatively small number of transactions in the Certificates occurred after the offering. (*See* T Exs. 16A, 17A (135 investors in offering; 52 subsequent investors).) In the absence of any established and liquid public market for trading the Certificates (T ¶ 16; W ¶ 7), each post-offering transaction was individually negotiated between the seller and purchaser. (T ¶ 16 n.18.)

E. The Vast Majority of Transactions in the Certificates Were Made Through or by the Investors' Asset Managers.

At least 81% of all putative class members and 95% of those that purchased in the offering acquired their Certificates through sophisticated asset managers. (T ¶ 80 & n.216.) Asset managers typically purchase a large quantity of RMBS to allocate among their clients. (T ¶ 27.) [redacted] Some investors fully relied on their asset managers' expertise by delegating them authority to purchase securities. (E 20 at 60:4-18.) Asset managers generally monitor investment performance and may also have discretion to sell the investment.

(*See id.* 155:10-156:9.) Indeed, MissPERS testified that it delegated to UBS complete discretion over the purchase, monitoring and sale of the Certificates. (*Id.* 60:4-18; 155:5-156:2.)

F. A Wide Variety of Sophisticated Investors Purchased the Certificates.

Purchasers of the Certificates include CDOs (*e.g.*, [redacted]; banks (*e.g.*, [redacted]); insurance companies (*e.g.*, [redacted].); investment funds (*e.g.*, [redacted]); pension funds (*e.g.*, [redacted]); other large companies (*e.g.*, [redacted].); and major foundations (*e.g.*, [redacted]) and endowments (*e.g.*, [redacted]). (T Ex. 2C; W ¶ 13.) Many entities purchased the Certificates through asset managers that are global leaders in RMBS, such as [redacted] (T ¶ 27; W ¶¶ 13-18.)

G. Each Investor Had Access to Varying Information Regarding New Century's Underwriting and Appraisal Practices.

Mr. Walter explained how investors "performed their own independent research and analysis of the investment," including "direct interactions" with originators. (W ¶¶ 14, 27.) Dr. Torous catalogued various investors' access to information relevant to the alleged misstatements. (T ¶¶ 33-45.) He concluded that putative class members "each conducted their own form of due diligence, analyses and research .... Further individualized inquiry would be needed to ascertain precisely what each investor knew and considered at the time of its purchases." (*Id.* ¶ 45.) Based on their knowledge, some potential investors declined to purchase the Certificates because they were backed by New Century loans. (*See, e.g.*, W Ex. G; E 19.) The varying nature and extent of investors' knowledge are illustrated by "Case Studies" in Dr. Torous' report and the information in the record on which those studies are based, as well as Mr. Walter's summary of interactions with those investors:

[redacted]

[redacted]

H. Available Information Developed Further Following the Offering.

The putative class encompasses investors that bought Certificates not only in the March 2006 offering, but at any time at least up to the filing of this case. (Pl. Br. 1.) That period encompasses virtually the entire housing market decline and torrent of attention to the financial crisis. (T ¶ 67.) Available information regarding the collapsing RMBS market, second-lien

mortgages, and underwriting, appraisal and credit rating practices "was dynamic and likely varied from investor to investor and over time." (*Id.* ¶¶ 53, 69-76.) Even MissPERS' expert, Dr. Mason, contributed to the mix of information, publishing on "massive deteriorations in subprime mortgage performance, especially in" 2006 loans (E 37 at 15) and opining publicly in 2007 that "borrowers inflated their stated income" in most stated income loans (E 38 at 3). Dr. Mason also admitted to hearing "chatter" about inflated appraisals in 2007. (E 46 at 223:24-224:3.) On April 2, 2007, New Century filed for bankruptcy, and New Century and the GSAMP Trust 2006-S2 advised investors of ensuing risks. (E 36; E 39; E 41.) The Bankruptcy Court Examiner's February 28, 2008 report asserted that New Century had degraded its "underwriting policies and procedures" and extensively departed from its guidelines. (E 44 at 111.)

Later purchasers also had access to monthly trustee reports, which provide detailed loan performance information, such as prepayments, late payments, foreclosures, distributions and losses. (T ¶ 58; E 43.) In addition, Goldman Sachs' "Collateral Analyzer" provided electronic tools to monitor and analyze loan performance. (W ¶ 26.) This information contradicts MissPERS' core claim that all Certificates would have been affected the same by the alleged misrepresentations. (Pl. Br. 6.) In fact, the Class A-1A Certificates never missed a principal or interest payment and were paid in full in February 2009. (T ¶ 17.) In contrast, the Classes M-1 through M-7 and Class A-1B experienced (at different times) write-downs and were completely written off beginning in November 2007. (*Id.* ¶ 59.) Other senior Certificates (including MissPERS' Class A-3) continued to receive timely principal and interest payments.

Some investors, including MissPERS, also had access to estimated valuations or "marks" for their Certificates. (*See* T ¶ 61.) MissPERS received a monthly account statement from UBS, which provided MissPERS with estimated valuations of its Class A-3 Certificates. (*E.g.*, E 42;

see also T ¶ 61.) Those valuations identified an 85% decline in the value of the Certificates from their March 2006 purchase to December 31, 2007. (E 42.) Other data services, including IDC, also provided marks for the Certificates. (T ¶ 61.)

Individual investors continued to learn about the matters allegedly misrepresented by performing their own research, attending industry conferences, meeting with originators and dispersing information widely as their employees changed jobs. (T ¶¶ 53-57.) [redacted]

I. MissPERS Received "Storm Warnings" in 2007 About the Allegations.

In a 2004 agreement, the Mississippi AG—which handles all litigation for MissPERS (E 7 7:16-8:13)—retained BLBG to "monitor" MissPERS' "investment portfolio and investigate potential cases involving [its] investment holdings." (E 2 at 1.) The agreement provides BLBG with "on-line access" to and "additional information" regarding MissPERS' investments. (*Id.* at 2.) BLBG committed to "monitor and investigate market news and other information which causes a significant loss in the value of securities" and to notify the AG of "available legal options." (*Id.* at 1.) The information MissPERS provided to BLBG is purportedly "protected by the attorney-client privilege," evincing the agency relationship between the parties. (*Id.* at 2.)

On February 8, 2007, BLBG filed a securities class action against New Century, the originator of all mortgages in the securitization at issue here. The complaint in that 2007 lawsuit substantially alleged all the themes echoed in this Action, including that New Century:

- "kept pushing ever-increasing sub-prime loan volume through its system by loosening the Company's underwriting standards and introducing a growing percentage of high risk mortgage products" (E 4 ¶ 3);

- "made repeated exceptions to and reduced its underwriting guidelines and offered higher risk products to continue to reach record mortgage volume" (*id.* ¶ 111);
- "began originating loans with 'risky increased LTVs [loan to value ratios]' and began to lower credit standards starting in 2003" (*id.* ¶ 112); and
- abandoned underwriting guidelines because "nearly every loan had an exception such as debt ratio exceptions or loan-to-value exceptions ... [and] 'the guidelines were thrown against a wall' and underwriters were instructed to 'dig deep' in order to make loans work and all decisions were volume driven" (*id.* ¶ 130).

On March 19, 2007, BLBG announced its "extensive investigation into the conduct" of New Century and other subprime lenders, including "interviews with over 100 witnesses." (E 3 (BLBG press release).) The firm claimed to have "developed evidence of serious misconduct" such as lenders "abandoning their underwriting standards," and stated it was "advising institutional investor clients … on their legal rights." (*Id.*)

Another law firm, Pond Gadow, approached the Mississippi AG in 2007 with "concerns about holdings that [MissPERS] had in securities that were backed by mortgages." (E 7 at 26:23-27:23.) Pond Gadow reported that "appraisals weren't really accurate or done well" and borrowers "were put into loans they would not normally have qualified for." (*Id.* at 155:7-24.) MissPERS' Rule 30(b)(6) witness himself described this advice as "storm warnings" of the allegations here. (*Id.* at 217:2-4.) By this time, December 2007, the Certificates were already marked at only 15% of their original value. (E 42.) Bernstein Litowitz and Pond Gadow jointly filed this lawsuit on behalf of MissPERS on February 6, 2009, more than a year later.

STANDARD FOR CERTIFICATION

MissPERS faces "a significant burden to show that class certification is appropriate." *Spagnola* v. *Chubb Corp.*, 264 F.R.D. 76, 92 (S.D.N.Y. 2010). It must provide "enough evidence, by affidavits, documents, or testimony, to [satisfy the Court] that each Rule 23 requirement has been met." *In re IPO Sec. Litig.*, 471 F.3d 24, 41 (2d Cir. 2006). "[A] district

court must first ascertain whether the claims meet the preconditions of Rule 23(a) of numerosity, commonality, typicality, and adequacy. It may then consider granting class certification where it "'finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.'" *Teamsters Local 445* v. *Bombardier Inc.*, 546 F.3d 196, 201-02 (2d Cir. 2008).

MissPERS bears the burden of proving predominance by a preponderance of the evidence. *Id.* at 202; *RALI*, 272 F.R.D. at 171. Because it is "critical" "to determine how the case will be tried" and to "test[]" whether "the issues likely to be presented at trial ... are susceptible of class-wide proof," Fed. R. Civ. P. 23(c)(1) Adv. Comm. Note to 2003 Amends., the predominance criterion is "far more demanding" than the commonality inquiry under Rule 23(a). *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 623 (1997). "'[A] court must deny certification where individual issues of fact abound.'" *Blessing* v. *Sirius XM Radio Inc.*, No. 09 Civ. 10035 (HB), 2011 WL 1194707, at *6 (S.D.N.Y. Mar. 29, 2011).[3]

ARGUMENT

I. AS IN *RALI*, INVESTORS' VARYING KNOWLEDGE MEANS INDIVIDUAL ISSUES PREDOMINATE.

A. The Record of Investor Knowledge Is Even More Extensive Than in *RALI*.

"[B]road knowledge of the alleged wrongful conduct" here, "defeat[s] the predominance of common issues under Rule 23(b)(3)," just as it did in *RALI*. 272 F.R.D. at 168. A Section 11 claim is barred when "'the purchaser knew about the false statement at the time of acquisition.'" *Id.* (quoting *DeMaria* v. *Andersen*, 318 F.3d 170, 175 (2d Cir. 2003)); *see also* 15 U.S.C.

[3] "[C]ourts must consider potential defenses in assessing the predominance requirement," *Myers* v. *Hertz Corp.*, 624 F.3d 537, 551 (2d Cir. 2010), including, as MissPERS agrees (Pl. Br. 11), affirmative defenses. *See Waste Mgmt. Holdings, Inc.* v. *Mowbray*, 208 F.3d 288, 295 (1st Cir. 2000) ("law [is] settled that affirmative defenses should be considered in making class certification decisions").

§ 77k(a); *In re IPO*, 471 F.3d at 44 ("Obviously, ascertaining each purchaser's intent would require an individualized determination."); *In re Superior Offshore Int'l, Inc. Sec. Litig.*, No. H-08-0687, 2010 WL 2305742, at *5 (S.D. Tex. June 8, 2010). In *RALI*, this Court held that predominance was not satisfied because "different putative class members have different levels of knowledge regarding the underwriting guidelines and practices based on their respective levels of sophistication and time of purchase." 272 F.R.D. at 168. The record here establishes even more so that sophisticated investors had access to varying information at different times relevant to MissPERS' allegations, thus demonstrating that individualized inquiries predominate.

Individually Negotiated Transactions. Although MissPERS attempts to cast this Action as a typical Section 11 case warranting purported "routine[]" presumptions (Pl. Br. 16), the reality is much different. The illiquid securities here are nothing like common stock offered at pre-established terms and traded on a liquid exchange, but rather were tailored and sold to highly sophisticated investors in individually negotiated transactions. (*See* E 20 56:11-57:10; T ¶ 16.) The terms resulting from these negotiations are *sui generis* and vary based on each investor's individualized information, appetite and assessments. (*See* W ¶¶ 5-7; T ¶ 16.) Such investor- and transaction-specific determinations are not suitable for class treatment. *See IPO*, 471 F.3d at 44; *Newton* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 187 (3d Cir. 2001) (need for trade-by-trade inquiries meant "individual issues overwhelmed common questions").

Individualized Knowledge of New Century's Practices. Institutional investors had access to in-depth information about New Century's appraisal and underwriting practices. In *RALI*, this Court discussed WAMCO—also a putative class member here—as an example of individualized knowledge because WAMCO had a "regular practice" of "meet[ing] with mortgage originators" to learn about "procedures" and "exceptions to underwriting guidelines."

272 F.R.D. at 169. [redacted] For some investors, these meetings were part of their in-depth pre-investment research into the originators. (E 21 at 109:13-22.) Several investors, in fact, declined to purchase the Certificates specifically because of the negative conclusions they drew about New Century. [redacted]

Investors analyzed loan-level data that informed them about the loan pool and New Century's practices. [redacted] Investors could also combine or compare these data with data from other offerings to gain even more insight into valuations, appraisals, and borrower characteristics. (E 6 at 103:12-24.)

Knowledge of Asset Managers. The putative class members' reliance on asset managers compounds the predominance of individualized questions. *RALI* recognized that an asset manager's knowledge should be imputed to the investor when it had "complete discretion over

its investments." 272 F.R.D. at 169. The record here shows that at least 81% of putative class members (and 95% of investors in the offering) used an asset manager. (T ¶ 80 & n.216.) But not every investor and asset manager had the same relationship. Sometimes—as with MissPERS and UBS—the asset manager had very broad investment discretion and the investor had little or no role in investment decisions. (E 20 at 132:5-14.) By contrast, other investors may have maintained some or all control over their investment decisions. Thus, questions regarding each asset manager's degree of discretion as well as its knowledge add yet additional layers of individualized inquiry.

Different Knowledge at Different Purchase Times. This Court held in *RALI* that "different levels of knowledge can be imputed to investors who purchased at different times because throughout the relevant period more and more information became publicly available, including reports of government actions or investigations, analysts reports, news items and raw data. This information cast increasing levels of doubt on whether the loans comprising mortgage backed securities were originated in conformity with appropriate guidelines and risk analyses." 272 F.R.D. at 169-70. MissPERS' proposed class period runs at least until this Action's filing, making issues of changing knowledge even more prominent here than in *RALI*.[4] (Pl. Br. 1.)

Information available to investors relevant to MissPERS' allegations increased over time. For example, BLBG claimed in March 2007 to have "developed evidence of serious misconduct" at New Century (E 3), New Century filed for bankruptcy the next month (E 39), and the Bankruptcy Examiner's February 2008 report alleged New Century made "frequent exceptions to its underwriting guidelines" (E 44 at 3). (*See also* T ¶¶ 63-65.) Other relevant information

[4] MissPERS' expert report defined the class period as encompassing purchasers "prior to February 6, 2009," when the Action was filed. (Mason ¶ 2.) After their expert was unable to proffer any rationale for this end (*see* E 46 at 91:13-93:18), MissPERS' motion excised any mention of the cut-off date. (*See* Pl. Br. 1.)

that became available over time included ratings downgrades (T Ex. 5), unprecedented difficulties at subprime originators (T Ex. 6), plummeting home prices and housing starts (T Exs. 7, 8), soaring loan delinquencies (T Exs. 9, 10), and deficiencies in underwriting standards and appraisals (T Exs. 13, 14). Investors after the offering also had access to performance data for the Certificates via monthly trustee reports and the "Collateral Analyzer" tool. (E 43; T ¶ 58; W ¶ 26.) These reports provided detailed loan performance information, including on prepayments, late payments, foreclosures, distributions, and losses. Some investors, including MissPERS, also had access to estimated valuations for the Certificates. (E 42; T ¶ 61.)

Issues of what information was known by which investors and when become particularly critical because of the proposed multi-year class period. MissPERS asks the Court to certify a multi-year class period that would impermissibly sweep in many investors that purchased their Certificates after the information recited in the complaint's allegations was prominently within the public domain. Such an overly broad class cannot be certified, nor can it be tentatively certified with hope that the deficiency can be fixed later. *See* Rep. of the Jud. Conf. Comm. on R. of Prac. and Proc. (Sept. 2002) (Rule 23 amendment deleted "provision for conditional class certification ... to avoid the unintended suggestion, which some courts have adopted, that class certification may be granted on a tentative basis"). As in *RALI*, questions about the differing, growing knowledge of the subsequent investors are not susceptible to collective determination.

B. MissPERS Cannot Escape *RALI*'s Predominance Conclusion.

MissPERS and its expert attempt to minimize the core issue in *RALI* and this motion of *investor* knowledge by focusing on *Defendants'* knowledge allegedly acquired through due diligence.[5] (*See, e.g.*, Pl. Br. 2-4.) Defendants, however, have never disputed that their own

[5] Defendants will not engage at this time on MissPERS' many irrelevant and incorrect merits arguments regarding Defendants' due diligence practices. In short, MissPERS' entire theory rests on the supposed "statistical inference"

knowledge, to the extent relevant, does not require investor-specific inquiry. Given the overriding significance to this motion of the question of investor knowledge, *see IPO*, 471 F.3d at 43-45; *RALI*, 272 F.R.D. 168-70, it is more telling that MissPERS' expert conceded he had not "undertaken" any "review" of investor knowledge. (E 46 at 126:24-127:4.)

MissPERS' attempt to concoct a list of "[q]uestions of law and fact common to the class" also does not negate the individualized issues dominating this case or distinguish it from *RALI*. (Pl. Br. 11.) The Supreme Court in *Wal-Mart Stores, Inc.* v. *Dukes* reiterated that a plaintiff cannot satisfy the predominance and superiority requirements by providing a laundry list of common questions—many of which can be hypothesized in any putative class action—because "[w]hat matters to class certification ... is not the raising of common 'questions'—even in droves—but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation." 131 S. Ct. 2541, 2551 (2011) (citation omitted).

MissPERS contends that a class should be certified unless Defendants "demonstrate under § 11(a) that Class members had actual knowledge of the misrepresentations and omissions in the Offering Documents." (Pl. Br. 22.) This argument not only attempts improperly to shift MissPERS' burden on class certification to Defendants, but also conflates class certification with a merits determination. As the Second Circuit held, courts should "assure that a class certification motion does not become a pretext for a partial trial of the merits." *IPO*, 471 F.3d at 41. Given the ample record summarized above, MissPERS' criticisms that Defendants should have obtained even more "documents and testimony" miss the mark.[6] (Pl. Br. 21.) Defendants

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of assuming the due diligence results for the sampled loan pool could be applied equally to the non-sampled loans. (Pl. Br. 3.) MissPERS' expert erroneously assumed a random loan sample, when in fact the sample was selected "adversely" to identify potentially problematic loans. (E 46 at 277:12-278:20.) MissPERS' expert conceded that, if the loan pool had been adversely selected—as was the case—his extrapolation is incorrect. (*Id.* 278:2-11.)

[6] Plaintiff's assertions that Defendants "abandoned" their non-party subpoenas (Pl. Br. 21) and have less evidence of investor knowledge than in *RALI* are incorrect. As Goldman Sachs was a party to the individualized negotiations

are not obliged to prove their merits case now—the Court's bifurcation of class and merits stages (*see* Orders dated March 18 and June 13, 2011) would otherwise have been pointless—but rather to show "how the case will be tried" and whether it is "susceptible of class-wide proof." Fed. R. Civ. P. 23(c)(1), Adv. Comm. Note to 2003 Amend. Defendants have done just that and provided ample evidence as to the individualized dealings with different investors and that, at different times, different investors had access to different information bearing directly on the alleged misrepresentations.[7] In *RALI*, this Court made no findings as to which investors' claims failed on the merits and instead concluded that the "facts illustrate sufficient differences in the knowledge of putative class members," such that "individual issues predominate." 272 F.R.D. at 170. The same conclusion is warranted here.

C. Differences Among the Certificates Compound the Lack of Predominance.

Under Section 11, each plaintiff must prove a *material* misrepresentation, in other words "'a statement or omission that a reasonable investor would have considered significant in making investment decisions.'" *Litwin* v. *Blackstone Group, L.P.*, 634 F.3d 706, 717 (2d Cir. 2011). Because "information already known" is immaterial, *In re Moody's Corp. Sec. Litig.*, 274 F.R.D.

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with putative class members and otherwise had firsthand knowledge of their sophistication and some of their interactions with originators, it was able to present evidence of investor knowledge based on its own interactions with investors (as described in the Walter Affidavit). In addition, through non-party discovery, Defendants obtained substantial evidence of investor knowledge from UBS (the asset manager to MissPERS and other putative class members) and other sources. When certain other non-parties adamantly resisted Defendants' discovery efforts, Defendants determined that they already had more than sufficient information to show the existence of individualized investor knowledge issues without burdening this and other courts with additional motion practice at this stage that might have embellished an already abundant record.

[7] This broad record of investor knowledge distinguishes this case from those cited by MissPERS. In *Merrill*, the court held that, unlike *RALI*, "the evidence in the record that any class member knew of false statements in the Offering [Documents] before purchase is weak at best." *Pub. Emps.' Ret. Sys. of Miss.* v. *Merrill Lynch & Co.*, No. 08 Civ. 10841 (JSR), 2011 WL 3652477, at *19 (S.D.N.Y. Aug. 22, 2011). In *DLJ*, the court observed that "Defendant has not shown sufficient evidence that class members could have acquired the requisite knowledge regarding the alleged misstatements and omissions." *N.J. Carpenters Health Fund* v. *DLJ Mortg. Capital, Inc.*, No. 08 Civ. 5653 (PAC), 2011 WL 3874821, at *6 (S.D.N.Y. Aug. 16, 2011). The court also noted that defendants did not raise their argument related to individualized knowledge until "Lead Plaintiff [had] limited ability to respond" and presented "no testimonial or documentary evidence." *Id.* at *7 n.1.

480, 489 (S.D.N.Y. 2011), materiality requires an investor-specific determination. Further, because of the differences in risk in the various Certificates (T ¶ 7 n.11), the materiality of any alleged misstatement cannot be common across all Certificates. Some Certificates bear the risk of early loss and might be affected by relatively low default levels. Others are shielded from initial losses by subordinate tranches, so that the effect of the same defaults might thus be trivial or non-existent. (*Id.*) Because each Certificate is affected differently, materiality must be assessed for each Certificate individually.

Individualized questions concerning loss causation also preclude class certification. Only losses attributable to a misrepresentation are recoverable. *See* 15 U.S.C. §§ 77k(e), 77*l*(b). Because of the Certificates' subordinated structure, misrepresentations that purportedly might cause a loss for some Certificates might not cause a loss for more senior Certificates. MissPERS does not attempt to show that loss causation is subject to common proof, but instead confuses the issue with the distinct question of "damages" calculation. (Pl. Br. 19-20.) *See McMahan & Co.* v. *Wherehouse Entm't, Inc.*, 65 F.3d 1044, 1047-48 (2d Cir. 1995) (distinguishing "negative causation" and "damages").

MissPERS glosses over the differences among the 11 Certificates by erroneously arguing that the Certificates were "uniformly affected" by the alleged misrepresentations. (Pl. Br. 6.) The differing attributes and performance of the Certificates, however, flatly contradict MissPERS' assertion. For example, the Class A-1A Certificate received all principal and interest and is now fully paid off, while the Class M-7 Certificate suffered early losses and was completely written off in November 2007.[8] (T ¶¶ 39, 59.)

[8] Confronted with these differences during his deposition, MissPERS' expert argued that all Certificates "move directionally the same" in response to information even though the "magnitude" likely differs. (E 46 at 161:11, 162:4.) Prof. Mason, however, had not examined any data to verify his theory. (*Id.* 162:23-163:12.) The very data that he suggested would be most "reliable" (*id.* 163:13-20) shows Certificates moving in divergent directions. (E 5.)

II. STATUTE OF LIMITATIONS ISSUES, AS SHOWN BY MISSPERS, RENDER INDIVIDUALIZED ISSUES EVEN MORE PREDOMINANT THAN IN *RALI*.

Individualized issues predominate as to whether at least some putative class members' claims are time-barred. Compelling record evidence—which Defendants did not have the opportunity to develop until after this Court's ruling on Defendants' motion to dismiss—shows that MissPERS in particular had full notice of its allegations long before the applicable limitations period and renders MissPERS' failure to meet the predominance standard even more pronounced than in *RALI*, where this issue was not raised and this record was not present.

Section 11 claims are barred if made more than a year after the "discovery of the untrue statement" or "after such discovery should have been made by the exercise of reasonable diligence." 15 U.S.C. § 77m. "An investor does not have to have notice of the entire [alleged] fraud being perpetrated to be on inquiry notice." *Dodds* v. *Cigna Sec., Inc.*, 12 F.3d 346, 352 (2d Cir. 1993); *see also In re Alstom SA Sec. Litig.*, 406 F. Supp. 2d 402, 421 (S.D.N.Y. 2005). Instead, inquiry notice arises from "'notice of ... facts, which in the exercise of reasonable diligence, would have led to actual knowledge.'" *LC Capital Partners, LP* v. *Frontier Ins. Grp., Inc.*, 318 F.3d 148, 154 (2d Cir. 2003). Such notice is "[o]ften referred to as 'storm warnings.'" *Freidus* v. *ING Groep N.V.*, 736 F. Supp. 2d 816, 827 (S.D.N.Y. 2010).

The record of MissPERS' knowledge exemplifies that individualized limitations issues predominate here. MissPERS was aware—or at least on inquiry notice—of its claims more than one year before February 6, 2009.[9] MissPERS admitted that it received in 2007 "storm warnings" of its claims (E 7 at 217:2), including Pond Gadow's reports to the AG about how "appraisals weren't really ... done well," borrowers being "put into loans they would not have

[9] This specific, detailed discovery record sharply distinguishes this case from *Merrill*, in which the court focused on "generic news reports" that could apply to all investors and concluded that "[t]he facts" relating to the limitations issue had "not changed" since the court's denial of the motion to dismiss the complaint. 2011 WL 3652477, at *17.

normally qualified for," and how this affected MissPERS' "securities that were backed by mortgages." (*Id.* 27:17-23, 155:8-11, 152:21-22.) Other specific notice stemmed from BLBG's activities under its "monitoring agreement" with MissPERS,[10] such as its February 8, 2007 class action complaint against New Century alleging the same principal theories as here (E 4), and its March 2007 press release announcing that its "investigation" uncovered "serious misconduct" relating to New Century's underwriting practices. (E 3.) *See Dodds*, 12 F.3d at 350 ("'storm warnings'" "suggest to an investor of ordinary intelligence the probability that she has been defrauded"); *Reilly* v. *Natwest Mkts. Grp. Inc.*, 181 F.3d 253, 268 (2d Cir. 1999) (30(b)(6) deponent provides "binding answers"). The import of these "storm warnings" is even more pronounced given the 85% decline in value of MissPERS' Certificates by the end of 2007. (E 42.)

MissPERS' particular susceptibility to this statute of limitations defense demonstrates precisely why investors' actual or inquiry knowledge one year or more before the February 6, 2009 filing of the complaint will be contested, individualized issues in this case. Given the differences concerning the timing, nature and extent of the inquiries conducted by investors, there are substantial questions as to when each such investor was or should have become aware of the allegations on which the claims here are based. Because statute of limitations issues turn on the facts about which each investor was on notice—and those facts vary from investor to investor—this cannot be determined by "generalized proof." (Pl. Br. 19.)

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[10] Monitoring counsel's knowledge is properly imputed to MissPERS. "[W]hen an agent is employed to represent a principal with respect to a given matter and acquires knowledge material to that representation, for purposes of assessing the principal's rights ... vis-à-vis a third person the agent's knowledge is imputed to the principal." *Veal* v. *Geraci*, 23 F.3d 722, 725 (2d Cir. 1994); *see also Weiss* v. *La Suisse, Societe D'Assurances Sur La Vie*, 381 F. Supp. 2d 334, 339 (S.D.N.Y. 2005) ("Knowledge by an agent is sufficient to start the limitations period running on a claim held by the agent's principal.").

III. AS IN *RALI*, CLASS TREATMENT IS NOT SUPERIOR.

As in *RALI*, the record here shows that class treatment would not be superior. *See* 272 F.R.D. at 170-71. This Court explained in *RALI* that "[c]lass treatment is particularly appropriate where it allows large groups of claimants to bundle into a single action common claims that are too small to pursue individually" and held "[t]hat purpose is not served where ... the proposed class consists of large, institutional and sophisticated investors with the financial resources and incentive to pursue their own clams." *Id.* at 170. As explained above, putative class members here have the same or greater sophistication, resources and incentive to pursue their claims as those in *RALI*. The putative class includes foreign and domestic investment funds, banks and other large, sophisticated investors. (T Ex. 2C.) Most investors purchased more than $1 million of Certificates, and many well in excess. (T ¶ 23, Ex. 2D.) Four asset managers each invested $100 million or more. (*Id.*) One example of investors' "financial resources and incentive to pursue their own claims," *RALI*, 272 F.R.D. at 170, is a [redacted] that invested $123 million here and filed at least three lawsuits against other financial institutions regarding its RMBS investments. (T ¶ 23 n.24.) Numerous other individual lawsuits are pending against Defendants and other issuers of RMBS brought by plaintiffs such as the FHFA, NCUA and various Federal Home Loan banks. "When the size of each claim is significant, and each proposed class member therefore possesses the ability to assert an individual claim, the goal of obtaining redress can be accomplished without the use of the class action device." *Primavera Familienstiftung* v. *Askin*, 178 F.R.D. 405, 411 (S.D.N.Y. 1998). Investors here, at least as much as in *RALI*, have the incentive and resources to pursue their claims.[11]

[11] Moreover, as in *RALI*, "the putative class members are not 'sufficiently cohesive to warrant adjudication by representation.'" 272 F.R.D. at 171 (quoting *Amchem*, 521 U.S. at 623). Like in *RALI*, the proposed class would include investment funds, "which were deeply involved in and profited from [RMBS] and other structured-finance products." *Id.* (*See* T ¶ 21.)

Superiority also is absent because "addressing all claims as part of the same class would present obstacles to the management of the litigation." *RALI*, 272 F.R.D. at 170. For the reasons set forth in Sections I and II above, if a class were certified "the Court would have to hear significant individualized evidence on, among other things, each purchaser's knowledge and damages," which "defeats the requisite superiority of class treatment." *Id.*

IV. THE RULE 23(a) REQUIREMENTS ARE NOT MET HERE.

Although this Court found the Rule 23(a) requirements met in *RALI*, the record here establishes a different result. First, the record evidence demonstrating MissPERS' particular susceptibility to a statute of limitations defense (*see* Section II) renders it inadequate to serve as a class representative. *See Gary Plastic Packaging Corp.* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 903 F.2d 176, 179 (2d Cir. 1990) (proposed representative inadequate because it purchased the securities "despite having notice of, and having investigated, the alleged fraud").[12]

Differences among the Certificates also create conflicting interests within the class that render MissPERS an inadequate representative and defeat typicality.[13] MissPERS purchased only the Class A-3 Certificate but seeks to represent purchasers of more senior and more subordinate Certificates. (E 8; Pl. Br. 1.) MissPERS faces a disqualifying conflict of interest in, for instance, negotiating any settlement or asserting theories of harm. *See Wal-Mart*, 131 S. Ct. at 2550 ("'[A] class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members.'"); *In re Literary Works in Elec. Databases Copyright Litig.*, 654 F.3d 242, 254 (2d Cir. 2011) (rejecting representative when "interests diverge as to the distribution of … recovery"). These are not "conjectural" conflicts, as rejected

[12] This distinguishes this case from *RALI*, in which the challenges to adequacy were based only on "lack of knowledge" of the allegations and alleged "conflicts" among class members. 272 F.R.D. at 164-65.

[13] Defendants recognize that *RALI* rejected the arguments that issues of knowledge and differences among tranches defeated typicality. 272 F.R.D. at 165-68. Thus, Defendants raise those issues here for preservation purposes.

in *RALI*. 272 F.R.D. at 164. For example, if a settlement were allocated under the waterfall structure, MissPERS would be fully compensated by a recovery of about 35%, and thus would lack incentive to argue for a larger recovery. Only a 100% recovery would ensure that all putative class members receive compensation. Departing from the waterfall to allocate a recovery among the Certificates under other methodologies would create other conflicts.[14]

MissPERS also has not satisfied numerosity, when assessed on a Certificate-by-Certificate basis. As shown in Appendix B, six of the 11 Certificates were purchased by fewer than five putative class members and a further two Certificates by fewer than 20 putative class members and the average value purchased for each Certificate in the offering is above $2 million, some dramatically so. (T ¶ 80.) Accordingly, on a Certificate-level basis, if not more generally, this case fails to satisfy the numerosity requirement.[15] *See Gen. Tel. Co. of N.W.* v. *EEOC*, 446 U.S. 318, 330 & n.14 (1980) (collecting cases in which "35-45" class members "would be too small to meet the numerosity requirement"); *Abu Dhabi Commercial Bank* v. *Morgan Stanley & Co.*, 269 F.R.D. 252, 255 (S.D.N.Y. 2010) (refusing to certify a class of more than 100 noteholders or subclasses of around 35 noteholders); *Primavera*, 178 F.R.D. at 411 (denying certification where putative class consisted of at least 118 sophisticated investors with adequate financial resources).

CONCLUSION

For the foregoing reasons, MissPERS' Motion for Class Certification and Appointment of Class Representative and Class Counsel should be denied.

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[14] Some courts have limited a plaintiff's standing in RMBS cases to represent only investors in the plaintiff's tranche. *See Me. State Ret. Sys.* v. *Countrywide Fin. Corp.*, 2011 WL 4389689, at *3-8 (C.D. Cal. May 5, 2011); *Stichting Pensioenfonds ABP* v. *Countrywide Fin. Corp.*, 2011 WL 3558173, at *2 (C.D. Cal. Aug. 9, 2011).

[15] Although the Court rejected the numerosity challenge in *RALI*, 272 F.R.D. at 163, Defendants respectfully submit that the nature and number of constituents of each tranche here are insufficient to satisfy Rule 23(a).

Dated: October 28, 2011

Respectfully submitted,

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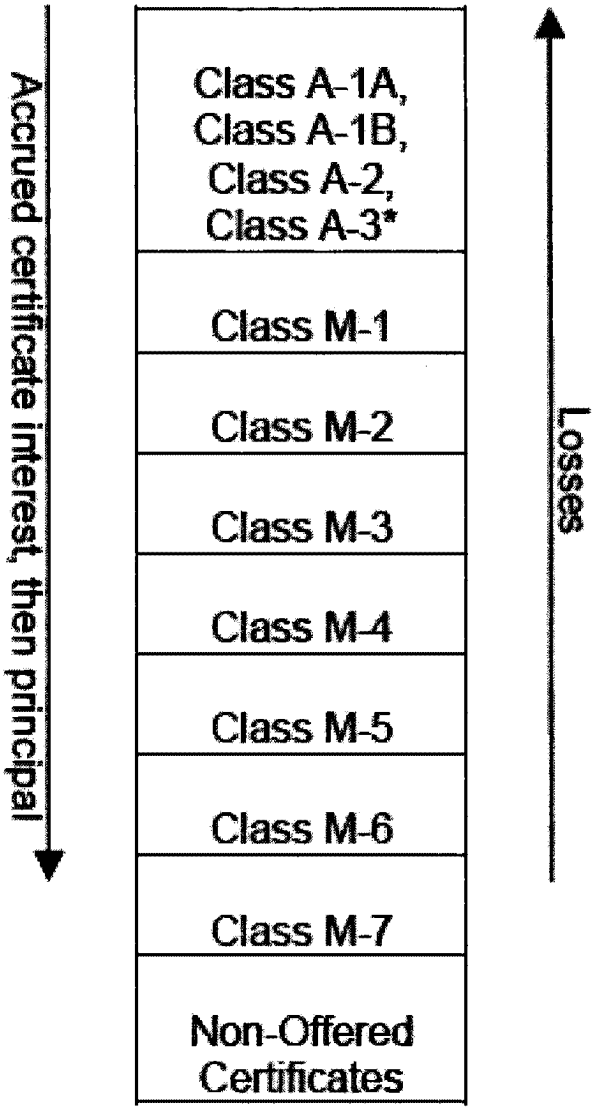
APPENDIX A

GSAMP 2006-S2 Payment and Loss Priority



Source: GSAMP 2006-S2 Prospectus Supplement. (W Ex. A at S-7.)

APPENDIX B

Average Value of Purchase in GSAMP 2006-S2 Offering by Tranche*

Certificate Tranche	Tranche Value at Offering	Number of Purchasers in Offering	Number of Purchasers Post-Offering	Average Value of Purchase in Offering
A-1A	$ 130,000,000	62	9	$ 2,096,774
A-1B	$ 32,500,000	4	2	$ 8,125,000
A-2	$ 243,151,000	18	18	$ 13,508,389
A-3**	**$ 100,000,000**	**38**	**20**	**$ 2,631,579**
M-1	$ 79,333,000	3	2	$ 26,444,333
M-2	$ 16,682,000	1	0	$ 16,682,000
M-3	$ 35,217,000	1	1	$ 35,217,000
M-4	$ 12,975,000	1	0	$ 12,975,000
M-5	$ 15,570,000	3	0	$ 5,190,000
M-6	$ 11,863,000	3	0	$ 3,954,333
M-7	$ 21,131,000	3	0	$ 7,043,667
Total	$ 698,422,000	137	52	$ 5,097,971

* Data consists of transactions prior to February 6, 2009, compiled from Goldman Sachs trade data (GSAMP 46676) and trade data from non-parties Pershing (Pershing 1-11), Mesirow Financial (GS MESFIN 1-9), Raymond James (RJA-PublEmpl-GS 1), Brown Brothers Harriman (GS BBH 1-2), State Street (GS StateStreet 1), Ridgeworth Capital (GS_RCM_1-3), Cantor (GS CANTOR 1), Bank of New York Mellon (GS BNYMellon 1), and Barclays (BARC_1). Additional transactions may have taken place involving entities that have not produced data in this litigation or by entities that are not identifiable from the currently-available data.

** Certificate tranche purchased by MissPERS