UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

IN RE COUNTRYWIDE FINANCIAL CORPORATION SECURITIES LITIGATION	**Lead Case No. CV-07-05295-MRP (MANx)** **OMNIBUS ORDER on Motions Related to the Second Amended Complaint and the Unopposed Motion to Correct the Order of December 1, 2008**

This case is one of several related securities actions before this Court involving Countrywide Financial Corporation ("Countrywide")[1] and individuals

[1] On July 1, 2008, Countrywide completed a forward triangular merger into a subsidiary of Bank of America called Red Oak Merger Corporation ("Red Oak"). In the transaction, Countrywide shareholders received shares of BofA in exchange for their Countrywide shares. Red Oak was then renamed Countrywide Financial Corporation. Countrywide Fin. Corp., Form 10-Q (Aug. 11, 2008). The merger postdates the class period and the allegations in the complaint. Unless required by context, "Countrywide," as used in this Order, refers to the entity as constituted before the merger.

associated with Countrywide. Countrywide and the individuals collectively are "Defendants."[2]

On August 14, 2007, George Pappas, on behalf of himself and all others similarly situated, filed suit against some of the present Defendants for alleged securities law violations. On November 28, 2007, this Court consolidated the *Pappas* action with several other cases involving publicly traded Countrywide securities. The Court designated New York Funds[3] as lead plaintiffs. In this Order, "Plaintiffs" refers to all the named plaintiffs in this consolidated case.

Plaintiffs filed a Consolidated Amended Complaint ("CAC") on April 14, 2008. It was dismissed in part, with leave to amend granted in some respects, on December 1, 2008. 588 F. Supp. 2d 1132 ("CAC Order").

Plaintiffs filed a Second Consolidated Amended Complaint ("SAC") on February 6, 2009. The proposed class period runs from March 12, 2004 to March 7, 2008 (inclusive). ¶ 1.[4]

Defendants filed motions to dismiss the SAC and an unopposed motion to correct the CAC Order.

Each motion is listed, and its disposition noted, in the Conclusion section of this Order.

This Order contains two substantive parts. The first part ("Legal Discussion") makes brief statements regarding some significant arguments raised by Defendants. *See* Stat. Conf. Hearing Tr. at 23:11-14 (explaining that future

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[2] Some Defendants have retained individual or group counsel. All Defendant group names are self-descriptive, such as "Underwriter Defendants" or "Outside Directors."

[3] "New York Funds" refers to Thomas P. DiNapoli, Comptroller of the State of New York, as Administrative Head of the New York State and Local Retirement Systems, as Trustee of the New York State Common Retirement Fund, and as Trustee of the New York City Pension Funds.

[4] This and all subsequent paragraph citations refer to the SAC.

Orders will contain brief rulings and references to the CAC Order). The second part ("Case Management") orders the parties to meet and confer.

I.

LEGAL DISCUSSION

A. Incorporation and modification of the CAC Order.

Incorporation by reference. The Court hereby adopts the statements of law made in the CAC Order. 588 F. Supp. 2d 1132. The factual discussion and legal conclusions are also adopted to the extent the same facts are alleged in the SAC.

Recent Ninth Circuit opinions. The Ninth Circuit issued three relevant opinions shortly before or after the prior order. The CAC Order's analysis is consistent with all three.

In *Rubke v. Capitol Bancorp Ltd.*, 551 F.3d 1156 (9th Cir. 2009), the Ninth Circuit reconciled its pre- and post-*Tellabs* cases in a manner that is wholly compatible with the CAC Order's reasoning. *Rubke* held that a post-*Tellabs* motion to dismiss analysis may be done in two steps: (1) apply pre-*Tellabs* case law that may suggest isolating allegations; and (2) if the complaint fails step one, proceed to a *Tellabs* "holistic" analysis. *Rubke*, 551 F.3d at 1165. In the CAC Order, the Court used pre-*Tellabs* case law to help guide, but not to limit, the *Tellabs* holistic analysis rather than performing two discrete steps. 588 F. Supp. 2d at 1185-86. This satisfies *Rubke*; a holistic analysis suffices, even if a complaint fails a pre-*Tellabs* analysis.

In *Zucco Partners, LLC v. Digimarc Corp.*, 552 F.3d 981 (9th Cir. 2009), *as superseded and amended by* 2009 WL 311070 (9th Cir. Feb. 10, 2009), the Ninth Circuit reiterated that *Tellabs* requires a "holistic" analysis before dismissal and confirmed that the two-step inquiry described above may be used. 2009 WL 311070, at *1, *5-6. The CAC Order's methodology accords with *Zucco*'s discussion of how various allegations may be construed for purposes of giving rise to a strong inference of scienter—including former employee allegations,

accounting allegations, certifications in SEC filings, and insider sales. *Cf. Zucco* at 2009 WL 311070, at *9-22.

And in *Glazer Capital Mgmt., LP v. Magistri*, 549 F.3d 736 (9th Cir. 2008), released shortly before the CAC Order, the Ninth Circuit discussed the doctrines of "collective scienter" and "group pleading." *Glazer* discussed two collective scienter cases—one from the Second and one from the Seventh Circuit. *Id.* at 743. Collective scienter refers to a doctrine that allows a strong inference of scienter as to a corporation, even though the allegations fail to raise a strong inference as to any individual acting on the corporation's behalf. *Id.* The *Glazer* panel went on to consider two other cases—from the Fifth and Eleventh Circuits—that rejected the related, but distinct, doctrine of "group pleading." *Id.* at 743-44. Group pleading allows a strong inference of scienter as to individuals on the basis of allegations that corporate statements may be imputed to "individuals with direct involvement in the everyday business of the company." *Id.* The *Glazer* panel left open the possibility of "collective scienter," though *Glazer* evaluated a case where "group pleading" was more likely in issue and *Glazer* seemed to approve "group pleading" dicta from the Seventh Circuit. *See id.* at 744.

This Court does not express any opinion on either collective scienter or group pleading; neither doctrine is necessary to resolve the present motions and the SAC does not require such a theory. *But see* ¶ 30 (stating that "it is appropriate to treat the Officer Defendants as a group for pleading purposes"—which the Court interprets as a convenient shorthand for legal allegations because the rest of the SAC clearly distinguishes alleged actions and statements by each of the Officer Defendants).

This Court follows the *Glazer* panel in holding that a complaint must "plead . . . facts that constitute strong circumstantial evidence of" scienter. *Id.* (internal citation and quotation omitted). *See Glazer*, 549 F.3d at 746-47 (reconciling this standard with the position-based inferences made in *Berson v. Applied Signal*

Tech., Inc., 527 F.3d 982 (9th Cir. 2008)). The relevant circumstances are those the complaint properly alleges, supplemented by facts appropriate for judicial notice. This is the same standard applied in the CAC Order. 588 F. Supp. 2d at 1186, 1189-91 (following *Berson* and allowing position-based inferences in a manner fully compatible with *Glazer*). Similarly, signing a document filed with the SEC is a relevant circumstance, but should almost never be sufficient to raise a strong inference. *Glazer*, 549 F.3d at 747-48.

Corrections to CAC Order. Outside Directors move to correct three errors regarding Plaintiffs' fact allegations in the CAC Order. The CAC Order is CORRECTED as follows:

- both instances of "board" at slip op. 13:14 are replaced with "executives";
- "directors and officers" at slip. op. 84:23 is replaced with "executives and managers"; and
- "on the board" at slip op. 95:20 is stricken.

These corrections do not alter the legal reasoning or result of the CAC Order.[5]

B. Brief statements regarding some of the present motions' arguments.

1. Evidentiary matters.

Requests for judicial notice. The Court need not address the substance of the arguments requesting and opposing judicial notice. The SAC and documents filed with the SEC, which are indisputably subject to notice, resolve the present motions.

Sieracki. Sieracki requests judicial notice of a conference call transcript that contradicts SAC allegations. The Court cannot take notice of the transcript and

[5] The Court on its own motion corrects the date of the BofA Form 8-K identified in the SAC as filed "Nov. 7, 2009." That filing relates to events of November 7, but was filed on November 10.

accept its identification of the speaker over the SAC's identification without converting Sieracki's motion into one for summary judgment. Fed. R. Civ. Proc. 12(d). But even if the SAC quotes to which Sieracki objects were disregarded, the conclusion would remain the same: the SAC would still plead a strong inference of scienter as to Sieracki, as held in the CAC Order. *See* 588 F. Supp. 2d at 1196.

2. Accounting-related allegations.

Countrywide, KPMG, and Individual Defendants. The SAC pleads more sophisticated accounting-related theories than the CAC. The fact allegations for the SAC's accounting theories are also satisfactory. Scienter allegations against accountant KPMG now suffice under the Public Securities Litigation Reform Act standard. The SAC also passes the applicable pleading standards for loss causation, even relatively early in the class period, and therefore the Court will not entertain arguments to further slice the timeline at the pleading stage. The accounting-related allegations and claims may therefore proceed against the relevant Defendants.

Underwriters. The Underwriter Defendants' due diligence defense for accounting-related statements for fiscal years 2005 and earlier is apparent from the face of the SAC, just as was the case with the CAC. 588 F. Supp. 2d 1174.

Underwriter Defendants make not-unreasonable arguments regarding their possible due diligence defense for accounting-related statements related to fiscal year 2006. The SAC, unlike the CAC, sufficiently articulates why the due diligence defense is not apparent on the SAC's face. Claims against Underwriter Defendants for accounting-related statements for fiscal years 2006 and later may proceed.

3. Insider trading-related allegations.

Scienter from insider trading. Sambol and Sieracki note that the CAC Order held that the insider trading allegations gave only "weak support" to Plaintiffs' scienter allegations as to Sambol and Sieracki. *Id.* at 1189. The CAC raised no

scienter inference as to Kurland based on insider trading allegations. *Id.* The CAC alleged a strong inference of scienter as to Mozilo based on Mozilo's alleged trading. *Id.* at 1188.

The SAC does nothing to alter the insider trading-based scienter analysis in the CAC Order. In fact, Sambol, Sieracki, and Kurland now confirm the logic of the "weak support" by raising sound arguments based on documents filed with the SEC. These judicially noticeable documents show that Sambol, Sieracki, and Kurland sold pursuant to plans that were not unusually modified; and, in Kurland's case, because some sales were made due to an employment agreement. Kurland Mot. Exs. A-C (employment agreement-related documents filed with SEC).

The CAC Order's holding remains as to the SAC's insider trading-based scienter inferences with respect to all relevant Defendants.

Section 20A substantive insider trading claims. Kurland, Sambol, and Sieracki correctly point out that their 10b5-1 plans negate an inference that they made sales based on actual insider knowledge. Therefore, the § 20A claim against all three in Count 13 are DISMISSED WITH PREJUDICE.

The SAC adequately pleads a Section 20A claim in Count 13 against Mozilo due to his unusual 10b5-1 plan modifications beginning October 26, 2006. CAC Order, 588 F. Supp. 2d at 1188. No claim is stated for Mozilo's sales that were made under 10b5-1 plans adopted prior to that date. Therefore, the § 20A claim in Count 13 against Mozilo is DISMISSED WITH PREJUDICE only as to sales pursuant to 10b5-1 plans adopted prior to October 26, 2006.

3. Individual Defendants.

Kurland. The SAC fails to cure the CAC's shortcomings on scienter and loss causation as to Kurland. Counts 10 and 11 against Kurland are therefore DISMISSED WITH PREJUDICE.

Outside Directors. Outside Directors reiterate the CAC Order's doubts about falsity in Countrywide's 2003 SEC filings, arguing that those doubts are a reason

to dismiss claims based on alleged misstatements in those filings. *See* CAC Order, 588 F. Supp. 2d at 1161 n.33. However, those doubts were only strong enough to dismiss with prejudice accounting-related allegations based on those filings—and only because the relevant changes at Countrywide allegedly occurred late enough in 2003 that they could not have manifested themselves until accounting-related statements based on periods after 2003. *Id.* at 1161-62. The CAC Order's holding that falsity is adequately pled as to non-accounting-related statements for fiscal year 2003 also applies to the SAC. *See id.* at 1178.

McLaughlin's statute of repose argument. New counsel for McLaughlin argues that the statute of repose bars the § 11 claim against him. The Court concludes that this result is correct.[6]

Section 13 of the '33 Act establishes a statute of repose for § 11 claims. 15

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[6] The following analysis is not undertaken without some doubt. In the most significant recent case involving the statute of repose, a panel of the Second Circuit invited the Securities and Exchange Commission ("SEC") to brief its position on repose timing due to statutory and regulatory ambiguities. *P. Stolz Family P'ship L.P. v. Daum*, 355 F.3d 92 (2d Cir. 2004). Since that case, the SEC adopted the Securities Offering Reform ("SOR"), which modified the statute of repose's timing (though not, of course, the statutory rule addressed in *P. Stolz*) for some actors, as discussed below.

This Court appears to be the first to consider the SOR's effect on repose timing. *See, e.g., In re Metropolitan Sec. Litig.*, 532 F. Supp. 2d 1260 (2007) (discussing repose period for shelf offerings made before the SOR's effective date). This is not surprising, since the repose period is three years and the SOR did not become effective until December 15, 2005.

The Court located only one significant practice guide or treatise that has commented in depth on the matter. That publication calls some of the relevant regulations "incomplete and otherwise not decipherable." 1 SECURITIES LAW HANDBOOK § 6:45. The Court does not necessarily agree with this conclusion, but it does note that statutes of repose aim to create certainty. *See P. Stolz*, 355 F.3d at 103. Rules—whether statutory, judicial, or administrative—governing a statute of repose should therefore be clear, concise, easy to locate, and should not include ambiguous exceptions.

U.S.C. § 77m. The repose clock begins running when "the security [is] bona fide offered to the public." 15 U.S.C. § 77m. After three years from the bona fide offering, no claim is viable. *Id.* The statute does not admit of equitable tolling. *P. Stolz Family P'ship L.P. v. Daum*, 355 F.3d 92, 104 (2d Cir. 2004).

McLaughlin, a former Countrywide officer, is a Defendant on the Series A Medium-Term Notes ("the Notes"), originally registered in a shelf registration[7] dated April 7, 2004 (Form S-3) and supplemented by a filing dated April 21, 2004 (filed under Rule 424(b)(5), 17 C.F.R. § 230.424(b)(5)). McLaughlin signed the Form S-3 registration.

The Notes allegedly were first offered under a registration statement effective February 7, 2005. ¶ 929. Subsequent offerings (under the shelf registration, together with numerous Rule 424(b)(2), 17 C.F.R. § 230.424(b)(2), supplements and a December 15, 2005 free-writing prospectus under Rule 433, 17 C.F.R. § 230.433) continued into 2006. ¶ 930.

McLaughlin was not named as a Defendant until the CAC was filed on April 11, 2008.[8]

Therefore, if the repose clock on all Notes began prior to April 11, 2005, McLaughlin cannot be liable at all. However, if subsequent events reset the repose clock, McLaughlin is potentially liable on some or all offerings.

SEC Rule 430B, part of the Securities Offering Reform ("SOR") effective December 1, 2005, now governs Section 11 liability periods under some

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[7] The CAC Order discussed standing in the shelf registration context. *See* CAC Order, 488 F. Supp. 2d at 1164-65 (discussing shelf registration mechanics and standing). In the standing determination, the question is whether parts of shelf-registered securities' registration statement shared misstatements or omissions at the time that "part . . . became effective." *Id.*

[8] Plaintiffs do not, and cannot, argue that the CAC's filing relates back to the first complaint's filing. *Louisiana-Pacific Corp. v. ASARCO, Inc.*, 5 F.3d 431, 434 (9th Cir. 1993).

circumstances. 17 C.F.R. § 230.430B(f)(2), (f)(4). It does so by determining when the registration statement becomes effective, and by deeming that effective date the first bona fide offering—but only as some actors. *Id.*

Rule 430B is not retroactive. "Retroactivity is not favored in the law. Thus . . . administrative rules will not be construed to have retroactive effect unless the language requires this result." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). However, agency action may be retroactive where agencies "clarify"—as opposed to "change"—existing law. *ABKCO Music, Inc. v. LaVere*, 217 F.3d 684, 689 (9th Cir. 2000) (discussing retroactive effect of a statutory amendment), *cert. denied* 531 U.S. 1051 (2000).

Rule 430B changed preexisting law in some potentially relevant ways, as illustrated below in the discussion of pre- and post-Rule 430B law.[9] *See also* 1 SECURITIES LAW HANDBOOK §§ 6:43, 6:45 (discussing some ways that Rule 430B changed preexisting law on § 11 liability timing). The SEC has opined that Rule 430B may be relied on after its effective date. SEC Div. Corp. Fin., SOR Transition Questions and Answers, *available at* http://www.sec.gov/divisions/corpfin/transitionfaq.htm (Sept. 13, 2005). Finally, statements by the SEC in its Releases for new rules have made clear when the SEC intends a clarification. *See, e.g.*, *Levy v. Sterling Holding Co., LLC*, 544 F.3d 493, 500, 506-08 (3d Cir. 2008), *cert. pet. filed* (Mar. 18, 2009 U.S. No. 08-1165). Specifically, the SOR Release notes that several portions of the SOR are merely

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[9] McLaughlin's arguments that the prior version of Rule 158 included the relevant content of Rule 430B are in error. Rule 158 changes the date determination only for the reliance inquiry. 17 C.F.R. § 230.158(c) ("For the purposes of the last paragraph § 11(a) [15 U.S.C. § 77k(a) (governing reliance)] only . . . .) (emphasis added). McLaughlin Reply at 2-3. Further, Rule 158 had to be updated to conform to Rule 430B. SOR Release, 70 Fed. Reg. 44773 n.465. If the regulation were not clear enough, the SEC told the Second Circuit in an amicus brief that Item 512(a) of Regulation S-K, not Rule 158, controls the pre-SOR repose determination. *P. Stolz*, 355 F.3d at 106.

clarifying. *See, e.g.*, 70 Fed. Reg. 44722-01, at 44739 ("We have modified [a safe harbor] Rule to clarify . . . ."). [10] The SOR Release contains no such language for the relevant aspects of Rule 430B.

For Notes traceable to registration statement effective dates before December 1, 2005, the issue is therefore controlled by pre-Rule 430B law. Under

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[10] The Ninth Circuit endorses a five-factor test to guide the inquiry whether administrative rules may be retroactively applied by an agency. *Miguel-Miguel v. Gonzales*, 500 F.3d 941, 951 (9th Cir. 2007). The Ninth Circuit does not appear to use these factors to help determine whether a regulation that is not expressly retrospective should be interpreted as retrospective. *Accord Levy*, 544 F.3d 493, 506-08 (3d Cir. 2008) (using similar factors on an SEC rule that the SEC expressly stated was merely clarifying). Still, because those factors suggest an additional reason why retroactivity is inappropriate, and for the sake of completeness, the Court performs a brief analysis under those factors. The factors are: "(1) whether the particular case is one of first impression, (2) whether the new rule represents an abrupt departure from well established practice or merely attempts to fill a void in an unsettled area of the law, (3) the extent to which the party against whom the new rule is applied relied on the former rule, (4) the degree of the burden which a retroactive order imposes on a party, and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard." *Miguel-Miguel*, 500 F.3d at 951.

These factors were developed to "balance[]" the "equit[ies]" of an individual's case after an administrative body's determination. *See id.* at 951. Here, in a private-party case, the Court will consider reliance by both parties involved. Applying the factors, the Court observes: (1) this is not a case of first impression; (2) the SEC changed well established practice; (3) actors on both sides of the transactions may have relied on the pre-SOR rule and the price of the securities (and offering-related fees and expenses) may have impounded an expected value in reliance on the old rule; (4) the degree of burden for McLaughlin is probably substantial, though the degree of burden for Plaintiffs is unknown because they have not yet alleged a damages amount for their claims against McLaughlin in particular; and (5) the statutory interest may be framed in favor of either party, though the SEC's SOR policy—an administrative policy, not necessarily a statutory policy—favors McLaughlin. The *Miguel-Miguel* factors lead to the same result due to the importance of reliance—factors (2) and (3)—to business transactions. Again, Rule 430B does not overcome the *Bowen* presumption against retroactivity.

that law, the repose clock for registered securities begins on the first true public offering date—usually the effective date. *P. Stolz*, 355 F.3d at 98-99, 104; *Finkel v. Stratton Corp.*, 962 F.2d 169, 174 (2d Cir. 1992).[11]

Pre-Rule 430B timing law did not distinguish among any actors except for underwriters, whose liability at that time was governed solely by § 11(d) (creating a special timing rule for underwriters). Subsequent registration statement effective dates do not reset the repose clock for securities sold under registration statements with earlier effective dates. *Stolz*, 355 F.3d at 104-06 (quoting 17 C.F.R. § 229.512(a)(2) (2004)).

The Notes were offered in a series of shelf registration takedowns. In a shelf registration, each offering under a new registration statement effective date starts the repose clock for securities sold pursuant to that registration statement—but only if a set of conditions are met. *Id.* at 106 (quoting Item 512 of Regulation S-K, 17 C.F.R. § 229.512(a)(2) (2004) [hereinafter "Item 512(a)"]). That new offering date "shall be deemed the initial bona fide offering" of securities sold under that new registration statement.

McLaughlin signed the shelf registration Form S-3. Under the pre-Rule 430B law he is deemed to have signed it again at each effective date, and that new effective date is deemed the initial bona fide offering date for securities offered

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[11] The same statute of repose governs §§ 11(a) and 12(1)-(2) [15 U.S.C. § 77l(a)(1)-(2)] liability determinations. "Section 11 provides for liability on account of false registration statements." *Gustafson v. Alloyd Co, Inc.*, 513 U.S. 561, 571 (1995). Section 12(1), the provision directly at issue in *P. Stolz*, creates liability for improperly selling or offering securities. 355 F.3d at 98-99. And "§ 12(2) [provides] for liability based on misstatements in prospectuses." *Gustafson*, 513 U.S. at 571.

Thus, the statute of repose's "bona fide offering" language may refer to different events in the three provisions' various contexts, but "bona fide offering" captures the same idea in all three contexts: the first true offering date in a particular offer. *See P. Stolz*, 355 F.3d at 99, 104-05; *Finkel*, 962 F.2d at 174.

under that new registration statement effective date—if the Item 512(a)(1)-(2) conditions are met.

Those pre-Rule 430B law conditions for a Form S-3 shelf registration (such as that used for the Notes) occur when: (1) a post-effective amendment was necessary to comply with '33 Act § 10(a)(3), 15 U.S.C. § 77(j)(a)(3) (providing that "when a prospectus is used more than nine months after the effective date of the registration statement, the information contained therein shall be as of a date not more than sixteen months prior to such use, so far as such information is known to the user of such prospectus or can be furnished by such user without unreasonable effort or expense"); (2) a post-effective amendment was filed to reflect a fundamental change—but this exception applies to Form S-3 shelf registrations only if the change is not filed with the SEC in a document automatically incorporated by reference; or (3) a post-effective amendment contained information material to the plan of distribution, or a material change to the plan. Item 512(a)(1)-(2) (2005).

The pre-Rule 430B Item 512(a)(1)-(2) conditions are not met here. The Rule 424(b)(2) filings between April 11, 2005 (three years before McLaughlin was first named in this case) and December 1, 2005 (the SOR's effective date), do not meet the exceptions that pre-Rule 430B law made for filings required under '33 Act § 10(a)(3), a fundamental change under Regulation S-K Item 512(a)(1)-(2), or material information about the plan of distribution under the same.

Therefore, the latest date that pre-Rule 430B law deems McLaughlin to have signed the registration statement is February 7, 2005 (the date of the first offering).

Rule 430B controls Notes traceable to registration statements effective on or after December 1, 2005 (the SOR's effective date). 17 C.F.R. § 229.512(a)(5) (2005), 17 C.F.R. § 230.430(B) (2005). The Rule states that some types of post-effective amendments will create a new effective date and initial bona fide offering date "only for the issuer and for a person that is at the time an underwriter"—that

is, not for officers, such as McLaughlin, who signed shelf registration documents. SOR Release, 70 Fed. Reg. at 44773-74; 17 C.F.R. §§ 230.430B(f)(2), 230.430B(f)(4)(ii).

New effective dates on the Notes, as to some actors, were triggered by Rule 424(b)(2) supplements. SEC Regulations expressly state that these effective dates are the first bona fide offer dates for those actors. 17 C.F.R. § 230.430B(f)(2).

The exceptions that do trigger new filing dates for persons in McLaughlin's position are the same as those under prior law except that material information regarding the plan of distribution does not now trigger a new effective date in some circumstances. *Id.* § 230.430B(f)(2) (controlling the effective date for officers in McLaughlin's position); 17 C.F.R. § 229.512(a)(2) (stating that the effective date is the bona fide first offering date for securities offered under a registration statement with the new effective date), *id.* § 512(a)(5)(i)(B) (referring back to Rule 430B); 70 Fed. Reg. at 44774 ("Any person signing any report or document incorporated by reference in the prospectus that is part of the registration statement or the registration statement, other than a document filed for the purposes of updating the prospectus pursuant to Section 10(a)(3) [15 U.S.C. 77j(a)(3)] or reflecting a fundamental change, is deemed not to be a person who signed the registration statement as a result.").

Rule 430B treats McLaughlin as not having re-signed the shelf registration documents on each new registration statement's effective date. This is because the subsequent Rule 424(b)(2) supplements and Rule 433 free-writing prospectus did not meet the exceptions that Rule 430B makes for filings required under '33 Act § 10(a)(3) or a fundamental change under Regulation S-K Item 512(a)(1)(ii).

Thus, the latest date that post-Rule 430B law deems McLaughlin to have signed the registration statement is February 7, 2005 (the date of the first offering). 17 C.F.R. § 229.512(a)(5)(i)(B) (2005).

Accordingly, McLaughlin's motion to dismiss the § 11 claim (Count 1)

against him is GRANTED WITH PREJUDICE.

McLaughlin's control person-liability argument. McLaughlin also now argues that, because he resigned from Countrywide effective April 5, 2005, he cannot, as a matter of law, be liable as a control person under § 15 for Countrywide's potential liability on Notes issued after his resignation. McLaughlin is correct. His motion to dismiss the § 15 claim (Count 3) against him is GRANTED WITH PREJUDICE only for offerings after April 5, 2005.[12]

Other Defendants' statute of repose argument. Outside Directors, Dougherty, Garcia, and Mozilo are also named in Count 1. These Defendants were all named in this case no later than January 25, 2008. The repose cut-off date therefore is January 25, 2005. These Defendants join in McLaughlin's arguments. Even assuming these Defendants signed nothing but the Form S-3, the earliest possible date pre- or post-SOR law would last deem these Defendants to have signed the Notes' registration documents is February 7, 2005.

Therefore, Count 1 against Outside Defendants, Dougherty, Garcia, and Mozilo is not barred by the statute of repose.

II.

CASE MANAGEMENT

Meet and confer. The parties recently met and conferred regarding discovery and scheduling in this case. Notice of Meet and Confer (Jan. 12, 2009). The parties filed their meet and confer status report on March 30, 2009.

Within 12 days of this Order's filing date, the parties shall again meet and confer; and file an updated status report, together with a proposed schedule.[13] The

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[12] One effect of Rule 430B is that §§ 11, 12(2), and 15 liability periods may now differ for some actors. Commentators have observed this effect as well. *See, e.g.*, 1 SECURITIES LAW HANDBOOK § 6:45. The SOR Release expressly notes this as to § 12(2). 70 Fed. Reg. at 44773 n.463.

[13] Due to some recent confusion in this case, the Court clarifies: all dates shall be calculated by the date of an order's filing, not the date it is entered on the docket

proposed schedule shall take into account the Court's prior directions to expedite the case.

During the meet and confer, the parties should bear in mind the following:

Parallel proceedings. The parties should continue to consider (1) the schedule of the parallel *Luther* case in state court; (2) the schedule in the ERISA case pending before Judge Walter of this District—particularly in light of the trial schedule already set in that case, *Alvidres v. Countrywide*, 07-CV-5810-JFW, Sched. Order at 30 (C.D. Cal. Sept. 22, 2008); and (3) harmonizing this case's schedule with any schedule the parties may propose in *Argent Classic Convertible Arbitrage Fund L.P. v. Countrywide*, CV 07-7097-MRP.

Debt-related issues. The parties should discuss Defendants' arguments regarding the issues raised by the debt instruments in this case. The parties should consider this Court's recent comments on debt instruments (including reliance, fraud on the market, and damages) in the *Argent* order of March 19, 2009. Of course, the parties should take into account any distinctions between this case's Plaintiffs and Argent, as well as the distinctions between the public market here in issue and the private market in Argent. The importance of differences between the securities at issue in Argent and the various debt instruments in this case should also be considered.

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system. Weekends count; the electronic docket system enables counsel to file documents at any time, including weekends.

III.

CONCLUSION

Outside Directors' unopposed motion to **correct** the CAC Order is GRANTED and the CAC Order is *nunc pro tunc* CORRECTED as stated *supra* at 5:11-15, 5 n.5.

All requests for **judicial notice** are GRANTED only to the extent that they request notice of documents filed with the SEC. All other requests for judicial notice are DENIED.

Dougherty and Brown's motion to dismiss is DENIED.

Countrywide Defendants' motion to dismiss is DENIED.

Garcia's motion to dismiss is DENIED.

Gissinger's motion to dismiss is DENIED.

KMPG's motion to dismiss is DENIED.

Kurland's motion to dismiss Counts 10, 11, and 13 against him is GRANTED WITH PREJUDICE.

McLaughlin's motion to dismiss Count 1 against him is GRANTED WITH PREJUDICE. McLaughlin's motion to dismiss Count 3 against him is GRANTED WITH PREJUDICE only as to any potential liability on or after April 5, 2005. The remainder of McLaughlin's motion is DENIED.

Mozilo's motion to dismiss against him Count 13 is GRANTED WITH PREJUDICE only as to sales pursuant to 10b5-1 plans adopted prior to October 26, 2006. The remainder of Mozilo's motion is DENIED.

Outside Director's motion to dismiss is DENIED.

Sambol's motion to dismiss is GRANTED WITH PREJUDICE only as to the § 20A claim against him in Count 13. The remainder of Sambol's motion is DENIED.

Sieracki's motion to dismiss is GRANTED WITH PREJUDICE only as to the § 20A claim against him in Count 13. The remainder of Sieracki's motion is

DENIED.

Underwriter Defendants' motion to dismiss is DENIED.

All parties are ORDERED to **meet and confer** regarding the next appropriate steps in this litigation. The parties shall file a joint status report and proposed schedule within 12 days of this Order's filing date.

IT IS SO ORDERED.

DATED:___April 6, 2009_____

Hon. Mariana R. Pfaelzer
United States District Judge