No. _____

In The Supreme Court of the United States

FIREEYE, INC., et al.,

Petitioners,

v.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SANTA CLARA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

BORIS FELDMAN
Counsel of Record
IGNACIO E. SALCEDA
GIDEON A. SCHOR
BENJAMIN M. CROSSON
DORU GAVRIL
WILSON SONSINI GOODRICH & ROSATI
PROFESSIONAL CORPORATION
650 Page Mill Road
Palo Alto, CA 94304
(650) 493-9300
boris.feldman@wsgr.com
isalceda@wsgr.com
gschor@wsgr.com
bcrosson@wsgr.com
dgavril@wsgr.com
Attorneys for Petitioners

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

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

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

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

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

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioners in this Court, who were defendants in the Superior Court of California, County of Santa Clara ("Respondent Court"), and petitioners in both the Court of Appeal of the State of California, Sixth Appellate District ("Court of Appeal"), and the Supreme Court of California, are FireEye, Inc., Ashar Aziz, Ronald E.F. Codd, William M. Coughran, Jr., David G. DeWalt, Gaurav Garg, Promod Haque, Robert F. Lentz, Enrique Salem, and Michael J. Sheridan ("Petitioners"). Additional defendants in the Respondent Court, who are not parties here and who were not parties in either the Court of Appeal or the Supreme Court of California, were Morgan Stanley & Co. LLC, Barclays Capital Inc., J.P. Morgan Securities LLC, Goldman, Sachs & Co., UBS Securities LLC, Deutsche Bank Securities Inc., Citigroup Global Markets Inc., Pacific Crest Securities LLC, and Nomura Securities International, Inc. Respondent in this Court, which was Respondent in both the Court of Appeal and the Supreme Court of California, is the Respondent Court. Plaintiffs in the Respondent Court, who are not parties here but who were real parties in interest in both the Court of Appeal and the Supreme Court of California, were IBEW Local Union 363-Money Purchase Plan, IBEW Local Union 363-Pension, IBEW Local Union 363-Welfare Plan, IBEW Local Union 363-Supplement Unemployment Benefit Fund, IBEW Local Union 363-Joint Apprenticeship Training Fund, DeKalb County Employees Retirement Plan, and Steven Platt.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT
– Continued

Pursuant to Supreme Court Rule 29.6, Petitioners disclose as follows: Petitioner FireEye, Inc. has no parent company, and no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

STATUTES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the Court of Appeal's order denying Petitioners' petition for a writ of mandate and/or prohibition or other relief ("Mandate Petition"). The Mandate Petition challenged the Respondent Court's denial of Petitioners' motion for judgment on the pleadings, which motion contended that the Respondent Court lacked jurisdiction over the subject matter of the action. Petitioners' petition for review of the order denying the Mandate Petition was denied by the Supreme Court of California.

This petition presents the same question presented in the pending petition for certiorari in *Cyan, Inc. v. Beaver County Employees Retirement Fund*, No. 15-1439 (filed May 24, 2016). Petitioners respectfully request that this petition be consolidated with the *Cyan* petition for all purposes.

INTRODUCTION

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

The Reform Act implemented reforms to curb abusive securities class actions, which Congress determined to be harming the nation's economy. Unfortunately, many of the reforms are inapplicable in state court. To prevent state-court litigation from circumventing the Reform Act, SLUSA *inter alia* withdrew state courts' concurrent jurisdiction over class actions alleging '33 Act claims. The decision below, however, misreads SLUSA as continuing, rather than withdrawing, such state-court jurisdiction. Thus, that decision subverts SLUSA's requirement that the reforms have uniform application in all class actions under the '33 Act. Courts have called the result "bizarre," "absurd," and "directly contrary to the stated intent of Congress."

The question presented – which has split lower courts – arises in two contexts. In the first, a plaintiff who brought a state-court class action alleging only '33 Act claims moves a federal court, after removal, to remand the case to state court. Some 61 decisions of federal district courts have arisen in this context, with more decisions expected. Almost all of these holdings address, but are divided over, the issue of whether the state court had subject matter jurisdiction. In the second context, a defendant in a state-court class action alleging only '33 Act claims moves the state court to dismiss for lack of subject matter jurisdiction. In this second category are six decisions, consisting of *Luther v. Countrywide Financial Corp.*, 195 Cal. App. 4th 789 (2011) ("*Countrywide*"), and, to our knowledge, five decisions of California trial courts, including the decision

at issue here. All six decisions held, incorrectly, that SLUSA continued state-court jurisdiction over class actions under the '33 Act. Plaintiffs have taken note of this revived opportunity to circumvent the Reform Act: since *Countrywide*, filings of '33 Act class actions in California state courts have risen by more than 1600 percent.

The nation's appellate courts are unlikely to resolve the conflict and obviate the need for this Court's review. Federal appeals courts are silent because of the procedural roadblocks to review of remand decisions. State appeals courts have produced only one decision – *Countrywide* – and are unlikely to produce more. State courts are also incapable of resolving the intra-federal split, as federal courts are not bound by state-court decisions. Any remaining chance of appellate decision is foreclosed by the high likelihood of settlement in securities class actions, as acknowledged by Congress and this Court.

This petition provides a rare opportunity to turn chaos into order and prevent circumvention of the Reform Act. This Court has jurisdiction to grant certiorari. The question presented was squarely raised below and was decided by the Respondent Court on purely federal grounds, and reversal by this Court will terminate the case. The absence of appellate guidance has left lower courts in disarray. Postponing review will only add to the lower courts' confusion, without increasing the prospect of a better opportunity for review. Postponing review will also erode the federal

policy – clearly set forth in SLUSA – of providing exclusive federal jurisdiction over class actions under the '33 Act. Certiorari should therefore be granted.

OPINIONS BELOW

The order of the Court of Appeal denying the Mandate Petition is unreported, but is reprinted at 1a. (References to the Appendix to the petition are in the form "__a.") The Respondent Court's order denying Petitioners' motion for judgment on the pleadings is unreported, but is reprinted at 4a-20a. The order of the Supreme Court of California denying Petitioners' petition for review is unreported, but is reprinted at 21a.

JURISDICTION

The motion for judgment on the pleadings for lack of subject matter jurisdiction, filed with the Respondent Court on January 6, 2016, was denied on April 1, 2016. 4a-5a. The Mandate Petition, filed with the Court of Appeal on May 19, 2016, was denied on September 8, 2016. 1a, 38a. The petition for review, filed with the Supreme Court of California on September 16, 2016, was denied on November 9, 2016. 21a, 41a-43a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTES INVOLVED

Relevant provisions of the '33 Act, as amended by SLUSA, are reprinted at 22a-29a.

STATEMENT OF THE CASE

A. Statutory Framework

1. In the '33 Act, Congress created several causes of action for a false statement made in connection with a public offering of securities. Section 11 creates liability for a false registration statement. 15 U.S.C. § 77k. Section 12(a)(2) creates liability for a false prospectus. 15 U.S.C. § 77l(a)(2). Section 15 creates liability for persons who control those liable under Sections 11 or 12. 15 U.S.C. § 77o. Liability under Section 11 is strict; there is no scienter requirement.[1] Until SLUSA's enactment in 1998, Section 22 gave federal and state courts concurrent subject matter jurisdiction over '33 Act claims and barred removal to federal court of '33 Act claims that were filed in a state court of "competent jurisdiction." 15 U.S.C. § 77v(a).[2]

---

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

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

2. In 1995, Congress found that abusive class-action securities litigation was harming "the entire U.S. economy." *Dabit*, 547 U.S. at 81 (quoting H.R. Conf. Rep. No. 104-369, 1st Sess., at 31 (1995)); *Kircher v. Putnam Funds Trust*, 547 U.S. 633, 636 (2006). The abuses included "nuisance filings, targeting of deep-pocket defendants, vexatious discovery requests, and 'manipulation by class action lawyers of the clients whom they purportedly represent.'" *Dabit*, 547 U.S. at 81 (citation omitted). The harms to the national economy included "extortionate settlements" and "de-ter[rence of] qualified individuals from serving on boards of directors." *Id.* To curb the abuses, Congress passed the Reform Act. As relevant here, the reforms included fee limitations, selection criteria for lead plaintiffs, and an automatic stay of discovery pending any motion to dismiss. *See* 15 U.S.C. § 77z-1; *Dabit*, 547 U.S. at 81.

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

633, 648-49 (2010). Federal courts have exclusive jurisdiction over '34 Act claims. 15 U.S.C. § 78aa(a).

[3] *See Report to the President and the Congress on the First Year of Practice under the Private Securities Litigation Reform Act*

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

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

As argued more fully *infra* at 24-34, SLUSA eliminated state-court jurisdiction over class actions alleging '33 Act claims. 15 U.S.C. § 77v. It did so by adding the italicized language to Section 22(a) of the '33 Act: "The district courts of the United States . . . shall have jurisdiction of offenses and violations under this subchapter . . . , and, concurrent with State and Territorial courts, *except as provided in* [*Section 16*] *of this title with respect to covered class actions*, of all suits in equity and actions at law brought to enforce any liability or duty created by this subchapter." 15 U.S.C. § 77v(a) (emphasis added). Section 16, as amended by SLUSA, defines "covered class action" as any damages action on behalf of more than 50 people. 15 U.S.C. § 77p(f)(2). By adding new Sections 16(b) and 16(c) to the '33 Act,

---

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

SLUSA also precluded covered class actions alleging state-law securities claims, *see* 15 U.S.C. § 77p(b), and permitted such precluded actions to be removed to and dismissed in federal court, *see id.* § 77p(c). Finally, SLUSA conformed the '33 Act's removal bar to the new Section 16(c), 15 U.S.C. § 77p(c), by adding the italicized language to Section 22(a) of the '33 Act: "*Except as provided in* [*Section 16(c)*] *of this title*, no case arising under this subchapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States." 15 U.S.C. § 77v(a) (emphasis added). After SLUSA, state courts retain concurrent jurisdiction over '33 Act claims brought in individual actions (*i.e.*, in non-"covered class actions"), which were not found by Congress to be harming the national economy. *See Dabit*, 547 U.S. at 81; *Kircher*, 547 U.S. at 636.

As also argued more fully below, because SLUSA eliminated state-court jurisdiction over covered class actions alleging '33 Act claims, state courts are no longer courts of "competent jurisdiction" for purposes of the '33 Act's removal bar. *See infra* at 28-32. Thus, notwithstanding that bar, covered class actions alleging '33 Act claims may be removed to federal court under the federal-question removal provision, 28 U.S.C. § 1441(a). *See id.*

4. Notwithstanding SLUSA's plain command and the holdings of numerous federal district courts, other federal district courts – along with the Respondent Court and a California intermediate appellate court in *Countrywide* – have held that state courts

retain jurisdiction over covered class actions alleging only '33 Act claims.

Since *Countrywide* was issued, state-court filings of class actions alleging '33 Act claims have significantly increased. In California state courts, such filings have spiked by more than 1600 percent.[4]

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

FireEye conducted its IPO on September 20, 2013, and its secondary public offering on March 6, 2014. FireEye's stock trades on the Nasdaq, a national securities exchange. Following FireEye's announcement on May 6, 2014, of its Q1'14 financial results, shareholders sued. A Consolidated Amended Complaint (the "Complaint") was filed in the Respondent Court on March 4, 2015. Plaintiffs did not dispute below that this case is a "covered class action."[5] Plaintiffs also did not dispute below that the FireEye stock at issue was

---

[4] In the 12.5 years between SLUSA and *Countrywide*, only 6 class actions alleging Section 11 claims were filed in California state courts – an average of *.48 cases a year*. In the 5.5 years after *Countrywide*, at least 46 class actions alleging Section 11 claims were filed in California state courts – an average of *8.36 cases a year*. The pace is accelerating: fourteen such class actions were filed in 2015, and eighteen have already been filed in 2016. *See* Appendix H.

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

listed on the Nasdaq; thus, that stock is a "covered security."[6]

The Complaint is brought as a class action on behalf of purchasers of stock in FireEye's secondary public offering. Plaintiffs seek to pursue strict liability remedies under the '33 Act. All claims are pursuant to Sections 11, 12(a)(2), and 15 of the '33 Act (15 U.S.C. §§ 77k, 77l(a)(2), and 77o). The Complaint alleges no state-law claims.[7]

C. The Respondent Court's Denial of the Motion for Judgment on the Pleadings, the Court of Appeal's Denial of the Mandate Petition, and the California Supreme Court's Denial of the Petition for Review

Because SLUSA eliminated state-court jurisdiction over covered class actions alleging only '33 Act claims, Petitioners moved on January 6, 2016, for judgment on the pleadings for lack of subject matter jurisdiction. On April 1, 2016, the Respondent Court denied the motion, adopting *Countrywide*'s interpretation of SLUSA. 4a-20a.

On May 19, 2016, Petitioners commenced an original proceeding in the Court of Appeal by filing the

---

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

[7] A class action under the '34 Act was separately filed in federal court and dismissed. *Fadia v. FireEye, Inc.*, 2016 WL 6679806 (N.D. Cal. Nov. 14, 2016).

Mandate Petition, which challenged the Respondent Court's order. 38a. On September 8, 2016, the Mandate Petition was denied. 1a. On September 16, 2016, Petitioners petitioned the Supreme Court of California to review the Court of Appeal's order. 41a-42a. On November 9, 2016, the petition for review was denied. 21a. This timely petition followed.

REASONS FOR GRANTING THE PETITION

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

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

The question presented is important and was wrongly decided by the Respondent Court. SLUSA was designed to prevent state-court class actions from circumventing the Reform Act. Yet, in holding that state courts have concurrent jurisdiction in cases such as this, the Respondent Court has endorsed the forum-shopping that SLUSA was intended to stop. The Respondent Court's reasoning – which adopted that of

Countrywide – violated basic norms of statutory interpretation: it rendered a key SLUSA provision surplusage, while attributing to Congress the irrational intent to withdraw state-court jurisdiction over state-law, but not federal-law, claims.

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

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

1. Dozens of federal district court decisions have split on the question presented, with 44 holding that state courts have subject matter jurisdiction[8] and 11 holding that state courts lack subject matter jurisdiction.[9] The numbers on each side are steadily rising.[10] Conflicts have arisen not only between district courts in the same circuit[11] but also between district judges

[8] The decisions are listed in Appendix E.

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

[10] Since January 1, 2015, twenty-two conflicting decisions have been issued by district courts on the question presented, with the most recent issued respectively on September 2 and August 10, 2016. *See* Appendices E, F.

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

of the same district[12] and even between decisions of the same district judge.[13] Removal to federal court is blessed here[14] yet sanctioned there.[15]

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

---

2004), *with Rosenberg v. Cliffs Natural Res., Inc*., 2015 U.S. Dist. LEXIS 48915 (N.D. Ohio Mar. 25, 2015); *see also infra* note 12.

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

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

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

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

[16] *See* 28 U.S.C. § 1447(d) ("An order remanding a case to the State court from which it was removed is not reviewable on appeal

are appealable only after final judgment.[17] The number of cases that survive to final judgment and appellate decision is limited, given the high settlement amounts that defendants are willing to pay in even weak securities cases.[18] Discretionary interlocutory review under 28 U.S.C. § 1292(b) is unavailable for orders granting

---

or otherwise. . . . "); *Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 234 (2007) (holding appellate review of remand order barred by § 1447(d)); *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 127, 129 (1995) (same); *see also Kircher*, 547 U.S. at 640 (noting irrelevant exceptions to § 1447(d)'s review bar). The class-action exception to § 1447(d)'s review bar, *see* 28 U.S.C. § 1453(c), is inapplicable where, as here, a class action involves only claims concerning a "covered security" as defined in Section 16(f)(3) of the '33 Act. *See* 28 U.S.C. § 1453(d)(1); *supra* at 9-10 (noting that Cyan stock is "covered security").

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

[18] *See Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 740 (1975) ("[I]n the field of federal securities laws governing disclosure of information even a complaint which by objective standards may have very little chance of success at trial has a settlement value to the plaintiff out of any proportion to its prospect of success at trial so long as he may prevent the suit from being resolved against him by dismissal or summary judgment.").

remand[19] and is disfavored for orders denying remand.[20]

There is no point in waiting for state courts to rule on the question. Their decisions are not binding on the

---

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

[20] *See In re Fannie Mae 2008 Sec. Litig.*, No. 08 Civ. 7831 (PAC), slip op. (S.D.N.Y. July 29, 2010) (denying § 1292(b) certification for order that denied remand in '33 Act class action); *Carducci v. Aetna U.S. Healthcare*, 2002 WL 31262100, at *3 (D.N.J. July 24, 2002) (denying § 1292(b) certification for order that denied remand); *Binkley v. Loughran*, 714 F. Supp. 774, 775-76 (M.D.N.C. 1989) (same), *aff'd mem.*, 940 F.2d 651 (4th Cir. 1991); *see also Ingram v. Union Carbide Corp.*, 34 F. App'x 152 (5th Cir. 2002); *Aucoin v. Matador Servs., Inc.*, 749 F.2d 1180, 1181 (5th Cir. 1985); *see generally Caterpillar Inc. v. Lewis*, 519 U.S. 61, 74 (1996) (Congress intended to reserve § 1292(b) review for "exceptional" cases); *Couch v. Telescope Inc.*, 611 F.3d 629, 633 (9th Cir. 2010) (§ 1292(b) is "narrow exception"). The authorization for interlocutory review of orders denying remand of class actions, *see* 28 U.S.C. § 1453(c), is inapplicable here for the same reasons that § 1453(c)'s exception to § 1447(d)'s review bar is inapplicable here. *See supra* note 16.

federal judiciary and thus will do nothing to resolve the entrenched conflict in the federal district courts. In any event, state courts have produced only one appellate decision on the issue – *Countrywide* – and are unlikely to produce additional decisions, for several reasons. First, discretionary interlocutory review is as disfavored under state law as it is under 28 U.S.C. § 1292(b). Petitioner's petitions for such review were both denied. *See supra* at 11. Second, the likelihood of settlement, *see supra* at 14, is even greater in state court than in federal court. Because most of the Reform Act's reforms are inapplicable in state court, the problem of "extortionate settlements" is even greater in state court than in federal court. *Dabit*, 547 U.S. at 81; *supra* at 6, 14. Third, a decision by a California Court of Appeal for one appellate district is binding on *all* California trial courts, even those lying within a *different* appellate district.[21] Thus, *Countrywide* effectively bars *all* California state trial courts from entering jurisdictional dismissals, threshold or otherwise. *Every* defendant in a '33 Act class action must accordingly litigate through discovery, final judgment, and appeal before getting a meaningful opportunity to obtain a jurisdictional dismissal. That extra burden, along with the high likelihood of settlement before or during appeal, *see supra* at 14, insulates *Countrywide* from appellate correction. Finally, federal district court

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

decisions denying remand[22] have inherently reduced state-court litigation of the question presented.

The disarray in the lower courts and the lack of appellate guidance strongly favor a grant of certiorari. The federal-court split will not go away unless this Court acts.

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

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

The Court of Appeal's order is a "[f]inal judgment[]" under § 1257(a). Where, as here, an original proceeding is brought in a state appellate court purely to challenge the lower court's assertion of jurisdiction, a judgment terminating that original proceeding is final even if other proceedings continue in the trial court.[24]

---

[22] *See* Appendices F, G.

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

[24] *Madruga v. Superior Court of Cal.*, 346 U.S. 556, 557 & n.1 (1954); *Fisher v. Dist. Court of Sixteenth Judicial Dist. of Mont.*, 424 U.S. 382, 385 n.7 (1976) (per curiam); *see also Board of Educ. v. Superior Court of Cal.*, 448 U.S. 1343, 1345-46 (1980) (Rehnquist, J., in chambers) (citing *Madruga* and *Fisher*); *Press-Enterprise Co. v. Superior Court of Cal.*, 464 U.S. 501, 504-05 (1984); *see generally Franchise Tax Bd. v. Hyatt*, 538 U.S. 488, 491-94 (2003); *World-Wide*

The Court of Appeal's order was also rendered by the "highest court of a State in which a decision could be had." 28 U.S.C. § 1257(a). This requirement of § 1257(a) was satisfied because a petition for review of the Court of Appeal's order was denied by the Supreme Court of California.[25] Thus, the Court of Appeal's order is the reviewable judgment.[26]

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

---

Volkswagen Corp. v. Woodson, 444 U.S. 286, 289-91 (1980); *Rescue Army v. Municipal Court of Los Angeles*, 331 U.S. 549, 565 (1947); *Bandini Petroleum Co. v. Superior Court of Cal.*, 284 U.S. 8, 14 (1931); *Mich. Cent. R.R. v. Mix*, 278 U.S. 492, 494 (1929).

[25] *See, e.g.*, *Am. Ry. Express Co. v. Levee*, 263 U.S. 19, 20-21 (1923) (where state's highest court has jurisdiction to grant discretionary review of lower court judgment, "it [i]s necessary for the petitioner to invoke that [discretionary] jurisdiction in order to make it certain that the case could go no farther," but "when the jurisdiction was declined[, the intermediate appellate court] was shown to be the highest Court of the State in which a decision could be had" (citations omitted)); STEPHEN M. SHAPIRO ET AL., *Supreme Court Practice* (10th ed. 2013) ("SHAPIRO") at 176 n.46.

[26] *See* SHAPIRO at 440 ("When the highest court denies review without passing on the merits, the petition for certiorari should be addressed to the intermediate state court . . . ."); *id.* at 171-72.

this case on a purely federal ground. *See Sears v. Upton*, 561 U.S. 945, 946 n.1 (2010).[27]

b. There is no benefit to waiting for federal or state appeals courts to resolve the conflict over the question presented. Because of the roadblocks to review of remand orders and because of the high likelihood of settlement, *see supra* at 13-15, the ordinary process of federal review is exceedingly unlikely to result in any appellate decisions, let alone a uniform line of decisions that will eliminate conflict and obviate the need for review by this Court.[28] State-court litigation will not obviate the need for review: state cases are not binding on federal courts and thus will not resolve the federal-court split. In any event, state cases have resulted in only one appellate decision, for reasons discussed *supra* at 16-17.

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

While the benefit of waiting for appellate decisions in other cases or for final judgment here is nil, the cost

---

[27] *See* SHAPIRO at 153 (requirement is satisfied where case "relat[es] to the construction and application of" federal statutes).

[28] Unavailingly, class-action plaintiffs rely on dicta in certain federal appellate decisions. Those decisions are off-point for many reasons, including the fact that they involved only state-law claims and/or analyzed only SLUSA's removal provisions, not SLUSA's amendment to the jurisdictional portion of Section 22(a).

of waiting is high. The number of '33 Act cases brought in state court has spiked since issuance of *Countrywide*[29] – on which the Respondent Court's decision is based, *see* 4a-20a – and such unabashed forum-shopping shows no sign of abating. Turning down this opportunity for review will only add to the confusion concerning what standards govern '33 Act class actions. Moreover, the uncertainty and divisions in the federal courts undermine the integrity of the judicial system, as like cases are not being treated alike. In these cases, the deciding factor – as litigants and the public readily perceive – is not a uniform principle of law but rather the particular judge assigned. And with every passing month absent appellate guidance, SLUSA's policy of providing exclusive federal jurisdiction for '33 Act class actions, and hence of preventing circumvention of the Reform Act, will be eroded.[30]

Finally, insisting that certiorari be unavailable until after defendants litigate through discovery to final judgment will make the decision below effectively unreviewable. This Court's recent decisions in securities class actions are the proof. Of those decisions, *not one involved a final judgment entered after discovery*.

---

[29] *See supra* at 9.

[30] *See Construction & Gen. Laborers' Union v. Curry*, 371 U.S. 542, 549-50 (1963) (postponing Supreme Court review until after trial court enters final judgment on merits would "seriously erode the [federal] policy" of barring state courts from adjudicating labor disputes and of giving exclusive jurisdiction to National Labor Relations Board).

All involved a motion to dismiss, a motion to remand, or a motion for class certification.[31]

c. This case is an ideal vehicle for review. The question presented was squarely raised below and is a pure issue of law. The Respondent Court's decision rested clearly and exclusively on federal grounds. A reversal by this Court will terminate the litigation altogether. There are no unusual facts that will limit the guidance provided by a decision from this Court. There is no middle ground or gray area either; state courts have jurisdiction or they do not. Moreover, the Complaint alleges only '33 Act claims, and this case is undisputedly a covered class action.

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

3. In prior cases, a lower-court split prompted a grant of certiorari even absent a Circuit conflict. *See, e.g.*, *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 477 & n.3 (1981) (where, as here, question presented was whether state courts have concurrent subject matter jurisdiction over action arising under federal statute, split comprised five conflicting decisions issued by federal district courts and state intermediate appellate courts); *Mistretta v. United States*, 488 U.S. 361, 371 & n.6 (1989) (noting "disarray among the Federal District

[31] The 14 decisions issued since 2000 are listed in Appendix K.

Courts" and granting certiorari even though – unlike here – federal appellate review was available).[32]

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

The Respondent Court's holding – like the holding in *Countrywide* and numerous federal cases – subverts both the Reform Act and SLUSA, to the detriment of national securities markets. Certiorari should be granted to correct those erroneous holdings. This Court's guidance will vindicate congressional intent to curb abusive securities class actions, to enact uniform rules effectuating those curbs, and to stop forum-shopping.[33]

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

---

[32] *See also Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 349 & n.2 (1999); *Heffron v. Int'l Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 646 & n.9 (1981); *Dawson Chemical Co. v. Rohm & Haas Co.*, 448 U.S. 176, 179, 185 & n.4 (1980); *Curtis v. Loether*, 415 U.S. 189, 191 & n.2 (1974).

[33] This Court has repeatedly granted certiorari in cases concerning construction of the federal securities laws. *See* SHAPIRO at 271.

court. The difference incentivizes the forum-shopping that SLUSA sought to eliminate.

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

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

at 82 (brackets and internal quotation marks omitted); *Kircher*, 547 U.S. at 636.

SLUSA closed the state-court loophole. Targeting state-court securities class actions regardless of whether they allege federal- or state-law claims, SLUSA (1) eliminated state-court jurisdiction over class actions alleging '33 Act claims and (2) precluded most class actions alleging state-law securities claims. 15 U.S.C. §§ 77v, 77p. SLUSA thereby made federal court the "exclusive venue for most securities class action lawsuits." SLUSA Conf. Rep. at 13.

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

[34] The *Countrywide* court analyzed Section 16 and held that, because Sections 16(b), 16(c), and 16(d) dealt with state-law claims and not federal-law claims, "nothing, then, in [Section 16] describes this case[, which involved '33 Act claims], and thus, nothing in [Section 16] puts this case into the exception to the rule of concurrent jurisdiction." 195 Cal. App. 4th at 797. The Supreme Court of California denied review. 2011 Cal. LEXIS 9830 (Cal. Sept. 14, 2011). This Court then denied certiorari. 132 S. Ct. 832 (2011).

Countrywide would transform the California state court system into a haven for class-action plaintiffs alleging '33 Act claims.[35] The predictions came true: in California state courts after *Countrywide*, the number of class actions alleging '33 Act claims has increased by a factor of *seventeen*. *See supra* at 9 & note 4. The decision below, which relied on *Countrywide*, confirms the trend. 4a-20a.[36]

As a result, a key SLUSA provision has been largely nullified. Congress enacted SLUSA – the *Uniform* Standards Act – with the goal of providing uniform standards for securities class actions. The *elimination* of state-court jurisdiction over '33 Act class actions was meant to further that goal by having all such cases heard in federal court subject to federal standards. That makes sense: as Congress found abusive securities class actions to be harming the *national* economy, *Dabit*, 547 U.S. at 81, so SLUSA, by directing such litigation into federal court, ensured that securities class actions would be reformed *nationally*.[37] But under

---

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

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

[37] Had Congress intended to permit '33 Act class actions to proceed in state court, it would have addressed the Reform Act's applicability in state court.

Countrywide and similar cases, state courts – even as they are stripped of jurisdiction over state-law claims – still retain jurisdiction over federal-law claims. Class-action plaintiffs and lawyers are taking full advantage.

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

The practical consequences for litigants are even stranger. Under *Countrywide* and similar holdings, an issuer defendant can now face two securities class actions challenging the same IPO, one filed in federal court and the other filed in state court. That defendant can be forced to litigate simultaneously in different forums with separate procedural regimes – the antithesis of uniform national standards. Nor is this a mere hypothetical. Plaintiffs in federal-court class actions challenging IPOs have actually brought parallel state-court class actions under the '33 Act. In that state-court litigation, plaintiffs have sought and obtained discovery despite the Reform Act's automatic discovery

stay, which bars discovery pending a motion to dismiss.[38]

The consequent patchwork of legal regimes "undermine[s] the principal purpose of SLUSA," "makes no sense," and is "absurd," "bizarre," "inconceivable," "anomalous," "counter-intuitive," and "directly contrary to the stated intent of Congress."[39]

2. The Respondent Court's holding was incorrect. SLUSA's text and purpose, as well its legislative history, demonstrate that Congress "affirmatively oust[ed]" state courts of concurrent jurisdiction over covered class actions alleging only '33 Act claims. *See Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740, 748 (2012) (citation omitted).

a. Plaintiffs allege only '33 Act claims. Plaintiffs also concede that this is a "covered class action." *Supra*

---

[38] *Compare Buelow v. Alibaba Group Holding Ltd.*, No. CIV 535692, slip op. (Cal. Super. Ct. San Mateo Cty. Apr. 1, 2016) (refusing to stay state-court class action – which alleged '33 Act claims – in deference to federal-court class action alleging '34 Act claims, where both actions arise out of IPO), *with In re Etsy, Inc. S'holder Litig.*, No. CIV 534768, slip op. (Cal. Super. Ct. San Mateo Cty. Feb. 29, 2016) (staying state-court action – which alleged '33 Act claims – in deference to federal-court action alleging '33 Act and '34 Act claims, where both actions arise out of IPO). *See also supra* note 7 (noting parallel federal class action under '34 Act).

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

at 9. SLUSA amended the '33 Act's jurisdictional provision, Section 22, by eliminating concurrent state jurisdiction over "covered class actions" that allege "offenses and violations under [the '33 Act]." 15 U.S.C. § 77v(a). Thus, the Respondent Court lacked subject matter jurisdiction.

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

In *Knox*, the court explained that SLUSA eliminated state-court jurisdiction over covered class actions alleging '33 Act claims. 613 F. Supp. 2d at 425

---

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

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

To answer this question, the *Knox* court examined the meaning of the Jurisdictional Amendment by looking to Section 16 and each of its subsections. 613 F. Supp. 2d at 423-24. The court found that "[t]he reference to Section 16 does not add a substantive limitation to the exception to concurrent jurisdiction in Section 22(a); rather it simply points the reader to the definition of a 'covered class action.'" *Id.* at 424. This interpretation "also harmonizes with the rest of SLUSA." *Id.* at 425. It is "consistent with SLUSA's addition to the anti-removal provision," which addition "prevents plaintiffs from frustrating removal of state-law based

covered class actions by adding a non-removable individual ['33] Act claim to an otherwise removable state-law based covered class action." *Id.* It also "is consistent with Congress's general remedial intent in passing SLUSA: 'to prevent certain State private securities class action lawsuits alleging securities fraud from being used to frustrate the objectives of the [Reform Act].'" *Id.* (citation omitted). Finding that the state court lacked jurisdiction, the *Knox* court denied the motion to remand.

Hung addressed the same question as *Knox* and adopted *Knox*'s reasoning and holding. *See* 2016 U.S. Dist. LEXIS 8389, at *5-14. *Hung* included two other relevant holdings. First, it held that SLUSA's addition to the '33 Act's removal bar of the phrase "Except as provided in [Section 16(c)]" is "not relevant" where only federal-law securities claims are alleged. *Id.* at *6. Second, it rejected the plaintiff's reading of the Jurisdictional Amendment. According to the plaintiff's reading, the Amendment means "except with respect to those state-law class actions removable under [Section 16](c) and precluded by [Section 16](b)"; that is, the plaintiff argued, the Amendment stripped state courts of jurisdiction over cases removable under Section 16(c). *Id.* at *8. But, as the court explained, the plaintiff's reading is precluded by *Kircher*, which held that a defendant can elect to leave a removable case in state court. *Id.* at *9. The plaintiff's reading also makes Section 22(a) internally inconsistent, by giving "state courts jurisdiction over *federal* claims 'except' for certain *state* claims" when "state claims, of course,

are not a subset of federal claims, excisable through an exception."[41] *Id.* at *9-10 (emphasis added). Finally, the plaintiff's reading produces the "odd result" of having state-law claims removed and dismissed but having federal-law claims stay in state court and proceed without application of the Reform Act's reforms. *Id.* at *12. According to the plaintiff's reading, "the [Reform Act] and SLUSA would encourage plaintiffs to litigate federal securities class actions in state court, with lessened procedural protections, and they would prohibit defendants from removing such cases to federal court." *Id.* at *12-13. "This outcome is implausible given the purpose of the Acts in question." *Id.* at *13.

Even apart from this analysis of statutory text and purpose, SLUSA's legislative history shows that Congress affirmatively withdrew concurrent jurisdiction. The SLUSA Congress wanted to "prevent plaintiffs from seeking to evade the protections that Federal law provides against abusive litigation by filing suit in State, rather than in Federal, court." SLUSA Conf. Rep. at 13. Thus, SLUSA was enacted to "make[] Federal court the exclusive venue for most securities class action lawsuits" – *i.e.*, for securities class actions meeting the definition of a covered class action. *Id.*; *see also*

[41] The term "except" in Section 22(a)'s removal bar performs a parallel function. The removal bar addresses a general category comprising (a) cases alleging only '33 Act claims and (b) "mixed" cases (*i.e.*, cases alleging a '33 Act claim and a state-law claim). The term "except" then carves out, and thus permits removal of, the "mixed" cases. *See* LOWENTHAL at 788 n.215; *In re Tyco Int'l, Ltd. Multidistrict Litig.*, 322 F. Supp. 2d 116, 120 (D.N.H. 2004).

SLUSA, Pub. L. No. 105-353, § 2(2), 112 Stat. 3227 (expressing concern about the "number of securities class action lawsuits" that "have shifted from Federal to State courts"). Under SLUSA, "certain class actions could not be based on state law and could only be maintained in federal courts." S. Rep. No. 105-182, 2d Sess., at 9-10 (1998).

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

First, such decisions violate principles of statutory interpretation.

By holding that *no* covered class actions under the '33 Act are excluded from concurrent jurisdiction, those decisions render the Jurisdictional Amendment a nullity. According to a favorite argument of class-action plaintiffs, those decisions hold that the Jurisdictional Amendment excluded only those state-law claims precluded by Section 16(b) and removable by Section 16(c). Under this reading, Section 22's Jurisdictional Amendment merely reiterates or "acknowledges" what is already stated in Section 16. That is far from the "real and substantial effect" Congress intends when it "acts to amend a statute." *Stone v. INS*, 514 U.S. 386, 397 (1995). Further, to acknowledge Section 16, the amendment need only have stated "except as provided in Section 16." The reference to "covered class action" under this reading is surplusage. As this Court has explained, however, "legislative enactments should not be construed to render their provisions mere surplusage." *Dunn v. CFTC*, 519 U.S. 465, 472 (1997).

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

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

Second, *Countrywide* and similar federal holdings urge a bizarre result that contradicts congressional intent: state courts lack jurisdiction to hear state-law

securities class actions but retain jurisdiction over '33 Act class actions.

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

That courts have split on the import of the Jurisdictional Amendment may call into question what the statutory language really means. But SLUSA's structure, as described in *Knox* and *Hung*, *see supra* at 28-31, reveals Congress's intent and makes clear the proper reading: that state courts no longer have jurisdiction over class actions under the '33 Act. *See King v. Burwell*, 135 S. Ct. 2480, 2492 (2015) ("Given that the text is ambiguous, we must turn to the broader structure of the Act to determine the meaning of [the provision].").

———♦———

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

BORIS FELDMAN
Counsel of Record
IGNACIO E. SALCEDA
GIDEON A. SCHOR
BENJAMIN M. CROSSON
DORU GAVRIL
WILSON SONSINI GOODRICH & ROSATI
PROFESSIONAL CORPORATION
650 Page Mill Road
Palo Alto, CA 94304
(650) 493-9300
boris.feldman@wsgr.com
isalceda@wsgr.com
gschor@wsgr.com
bcrosson@wsgr.com
dgavril@wsgr.com
Attorneys for Petitioners

APPENDIX A

IN THE COURT OF APPEAL OF
THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

FIREEYE, INC. et al.,
Petitioners,
v.
THE SUPERIOR COURT OF SANTA CLARA COUNTY,
Respondent;
IBEW LOCAL UNION 363 – MONEY PURCHASE PENSION PLAN et al.,
Real Parties in Interest.

H043576
Santa Clara County No. CV266866

BY THE COURT:

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

(Premo, Acting P.J.; Bamattre-Manoukian, J.; and Mihara, J. participated in this decision.)

Date: SEP 8 – 2016 /s/ Premo Acting P.J.

AFFIDAVIT OF TRANSMITTAL

I am a citizen of the United States, over 18 years of age, and not a party to the within action: that my business address is 333 West Santa Clara Street, Suite 1060, San Jose, CA 95113; that I served a copy of the attached material in envelopes addressed to those persons noted below.

That said envelopes were sealed and shipping fees fully paid thereon, and thereafter were sent as indicated via the U.S. Postal System from San Jose, CA 95113.

I certify under penalty of perjury that the foregoing is true and correct.

Clerk of the Court

/s/ [Illegible] SEP 8 – 2016
Deputy Clerk Date

CASE NUMBER: H043576

Santa Clara County Superior Court
191 North First Street
San Jose, CA 95113 Material Sent YES: ✓

Boris Feldman
Wilson Sonsini Goodrich & Rosati
650 Page Mill Rd.
Palo Alto, CA 94304-1050

Material Sent YES: ✓

Daniel H. Bookin
O'Melveny & Meyers LLP
Two Embarcadero Center
28th Floor
San Francisco, CA 94111

Material Sent YES: ✓

Francis Alexander Bottini
Bottini & Bottini, Inc.
7817 Ivanhoe Avenue, Suite 102
La Jolla, CA 92037

Material Sent YES: ✓

John T. Jasnoch
Scott & Scott LLP
707 Broadway Ste 1000
San Diego, CA 92101

Material Sent YES: ✓

APPENDIX B

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SANTA CLARA

In Re FireEye, Inc. Securities Litigation Consolidated Action, Including: *IBEW Local Union 363 v. FireEye, Inc.* *Platt v. FireEye, Inc.*	Case No.: 1-14-CV-266866 (Lead Case) [Consolidated With: Case No. 1-14-CV-268110] **ORDER AFTER HEARING ON APRIL 1, 2016** **Motion by the FireEye Defendants for Judgment on the Pleadings for Lack of Subject Matter Jurisdiction**

The above-entitled matter came on regularly for hearing on Friday, April 1, 2016, at 9:00 a.m. in Department 1 (Complex Civil Litigation), the Honorable Peter H. Kirwan presiding. The Court reviewed and considered the written submission of all parties and issued a tentative ruling on March 30, 2016. No party contested the tentative ruling; as such, the Court orders the tentative ruling, attached as Exhibit A, be adopted and incorporated herein as the Order of the Court.

IT IS ORDERED.

Dated: 4/1/16 /s/ Peter H. Kirwan
Honorable Peter H. Kirwan
Judge of the Superior Court

EXHIBIT A

Calendar Line 4

Case Name: *In re FireEye, Inc. Securities Litigation*
Case No.: 2014-1-CV-266866

This is a consolidated securities putative class action against defendant FireEye, Inc. ("FireEye"), its top executives and directors, and the underwriters of FireEye's second public offering of securities on March 6, 2014 (the "Second Offering"), in which FireEye sold 14 million shares. The lead case (1-14-CV-266866) is brought by plaintiffs IBEW Local Union 363 – Money Purchase Pension Plan, IBEW Local Union 363 – Pension, IBEW Local Union 363 – Welfare Plan, IBEW Local Union 363 – Supplemental Unemployment Benefit Fund, and IBEW Local Union 363 Joint Apprenticeship Training Fund (collectively "IBEW 363") on behalf of a class of those who purchased FireEye's common stock pursuant to or traceable to its Offering and Registration Statement in connection with the Secondary Offering. Another consolidated case (1-14-CV-268110) is brought by Steven Platt ("Platt") on behalf of the same class of purchasers or acquirers of FireEye common stock pursuant/traceable to the Registration

Statement and Prospectus in connection with the Second Offering. Both actions allege violations of the Securities Act of 1933, 15 U.S.C., §§ 77k, 771(a)(2), and 77o (the "Securities Act") based on materially misleading statements and omissions in the Registration Statement and Prospectus regarding the true state of FireEye's business, its decelerating revenue growth, and problems FireEye was having with acquisitions and its securities breach detection software.

On January 30, 2015, the Court granted institutional investor DeKalb County Employees Retirement Plan ("DeKalb") leave to file a Complaint in Intervention. On March 4, 2015, IBEW 363, DeKalb and Platt (collectively "Plaintiffs") filed a Consolidated First Amended Class Action Complaint for Violations of the Securities Act of 1933 (the "First Amended Complaint" or "FAC").

In the FAC, Plaintiffs allege that FireEye is a security company providing automated threat forensics and dynamic malware protection against cyber threats. According to Plaintiffs, FireEye's September 20, 2013 initial public offering price was $20 per share, trading up to $36 per share by the close of its first day. After going public, FireEye allegedly made several positive statements about its technology in a November 7, 2013 announcement of record financial results for the third quarter of 2013, a November 14, 2013 Form 10-Q, a January 2, 2014 announcement of the acquisition of cybersecurity software firm Mandiant Corporation ("Mandiant"), and a February 11, 2014 announcement of record financial results for the fourth quarter of

2013, all of which caused the price of FireEye shares to rise until it reached a record-closing high of $95.63 on March 5, 2014.

Plaintiffs allege, however, that FireEye's top executives and directors were planning to dump over eight million shares of their personal holdings of FireEye shares into the market through a secondary offering in order to reap nearly $700 million in resulting insider selling proceeds. On February 3, 2014, FireEye filed an initial registration statement on Form S-1 to register a large block of additional FireEye shares for sale to the public in a secondary public offering. After two subsequent amendments dated March 3 and 6, 2014, the final terms of the Second Offering were for 14 million shares at $82.00 per share (which Plaintiffs allege was an 8.5% discount compared to the closing market price of $88.19 earlier that day). Only 5.58 million of these shares (valued at $460 million) were to be sold by FireEye itself to raise funds for the company, with the remaining 8.417 million shares (valued at roughly $690 million) to be sold by and for the exclusive benefit of existing FireEye insiders and other large shareholders, including the Individual Defendants.

Plaintiffs allege that the March 6, 2014 Registration Statement continued to tout the company's business, products and performance, including claims that FireEye's platform provided a "comprehensive" and "complete" solution for cybersecurity threats with "negligible" false-positive rates, and that FireEye's software has the ability to "identify and block" known and previously unknown cybersecurity threats. The

Registration Statement also contained representations concerning the purported benefits of Mandiant as a "significant opportunity [for FireEye] to leverage the inherent synergies between products and services." Plaintiffs allege that these representations were materially misleading in the following ways:

- FireEye's "virtual machine" was not a "complete solution" because it was not as capable as more traditional signature-based Intrusion-Prevention Systems ("IPS") software at detecting known threats, so customers would have to use FireEye and IPS;
- FireEye products generated numerous "alerts" that were false or which failed to contain enough information to help customers identify the problem;
- FireEye software was likely to perform poorly in head-to-head testing by an influential and well-regarded independent software testing company NSS Labs;
- FireEye was experiencing difficulties integrating Mandiant into FireEye's business;
- The implementation of FireEye's business plans would require it to increase its expenditures, particularly on research and development, at a tremendous rate, with the result that the Registration Statement's claim that "profitability was becoming more achievable" was materially incorrect and misleading;

- The Second Offering was timed to occur just before FireEye would have to disclose a significant slowdown in product revenue growth, a significant increase in operating costs, and significantly diminished prospects for profitability in the foreseeable future.

Plaintiffs allege that a March 13, 2014 *Bloomberg Businessweek* magazine article exposed FireEye's involvement in the Target Corporation ("Target") data breach that occurred in late November 2013 and resulted in roughly 40 million credit card numbers being stolen from Target's computer systems. According to the *Businesweek* [sic] report, FireEye's "complete solution" had been installed at Target, but Target had "turned off" the automatic "kill" features because of concerns about the technology's ability to identify and attack only dangerous malware without inadvertently shutting down important computer systems that were not being attacked or that were otherwise not at risk. Similarly, on March 13, 2014, *Reuters* reported that the "vast majority" of FireEye's customers had turned off the automatic kill function because of such concerns. In response to the Target data breach and media coverage, FireEye's share price fell over $4.00 from $79.93 on March 13 to $75.87 on March 14.

Plaintiffs further allege that on April 2, 2014, NSS Labs reported that FireEye's threat-detection products had scored "below average" in security effectiveness compared to five other security companies and received the worst score of all systems tested in overall

breach detection. In response, FireEye shares fell $10.14 to close at $54.86.

On May 6, 2014, FireEye announced its first quarter results for 2014, with revenue far below analysts' estimates, and slowing demand for core products, forcing it to rely on its lower margin, service-based offerings, which could not provide the same level of profitability. In response to further disclosures of significant weaknesses in FireEye's business, shares fell sharply, closing at $28.65 on May 7, 2014.

The FAC asserts causes of action for violations of Sections 11, 12(a)(2), and 15 of the Securities Act. The first and second causes of action are brought against FireEye, its top executives and directors David DeWalt ("DeWalt"), Michael J. Sheridan ("Sheridan"), Ashar Aziz ("Aziz"), Enrique Salem, Gaurav Garg, Promod Hague, Ronald E. F. Codd, William M. Coughran Jr. ("Coughran"), and Robert F. Lentz (the "Individual Defendants") (collectively the "FireEye Defendants"), and the underwriters of the Second Offering, including Morgan Stanley & Co. LLC, Barclays Capital Inc., J.P. Morgan Securities LLC, Goldman, Sachs & Co., UBS Securities LLC, Deutsch Bank Securities Inc., Citigroup Global Markets Inc., Pacific Crest Securities LLC, and Nomura Securities International, Inc. (the "Underwriter Defendants"). The third cause of action is brought against the Individual Defendants.

Plaintiffs seek to represent a putative class "consisting of all those who purchased FireEye's common stock pursuant or traceable to the Company's Offering

and Registration Statement and who were damaged thereby (the 'Class'). Excluded from the Class are Defendants; the officers and directors of the Company at all relevant times; members of their immediate families and their legal representatives, heirs, successors or assigns; and any entity in which Defendants have or had a controlling interest."

On August 11, 2015, the Court overruled demurrers brought by the FireEye Defendants (with the exception of defendant Coughran on the Section 12(a)(2) claim) and the Underwriter Defendants.

The FireEye Defendants now move for judgment on the pleadings on the ground that this Court has no subject matter jurisdiction.

The FireEye Defendants assert that the original Securities Act of 1933 (the "Securities Act") granted federal and state courts concurrent jurisdiction over claims arising under the Securities Act. The FireEye Defendants argue that the Securities Litigation Uniform Standards Act of 1998 ("SLUSA") divested state courts of jurisdiction over class actions, such as this one, in which Plaintiffs assert purely federal claims[1] involving nationally traded securities under the Securities Act. The FireEye Defendants acknowledge that courts are split on this issue, but contend that this Court should follow decisions such as *Knox v. Agria Corp.* (S.D.N.Y. 2009) 613 F.Supp.2d 419 that have

[1] It is undisputed that Plaintiffs assert only causes of action under the Securities Act and that this claim is a "covered class action" as defined in Section 16(f) of the Securities Act.

ruled that SLUSA eliminated state court jurisdiction over Securities Act covered class actions.

Section 22(a) of the Securities Act states, in relevant part:

> The district courts of the United States and the United States courts of any Territory shall have jurisdiction of offenses and violations under this subchapter and under the rules and regulations promulgated by the Commission in respect thereto, and, concurrent with State and Territorial courts, except as provided in section 77p of this title with respect to covered class actions, of all suits in equity and actions at law brought to enforce any liability or duty created by this subchapter.

(15 U.S.C. § 77v(a).)

Section 16 of the Securities Act, to which Section 22(a) refers, has several sections concerning "covered class actions." Subdivision (b) states:

> (b) Class action limitations
>
> No covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging –
>
> > (1) an untrue statement or omission of a material fact in connection with the purchase or sale of a covered security; or
> >
> > (2) that the defendant used or employed any manipulative or deceptive

> device or contrivance in connection with the purchase or sale of a covered security.

(15 U.S.C. § 77p(b).)

Subdivision (c) states:

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

(15 U.S.C. § 77p(c).)

Subdivision (d) states, in relevant part:

> (d) Preservation of certain actions
>
> (1) Actions under State law of State of incorporation
>
> (A) Actions preserved
>
> Notwithstanding subsection (b) or (c), a covered class action described in subparagraph (B) of this paragraph that is based upon the statutory or common law of the State in which the issuer is incorporated (in the case of a corporation) or organized (in the case of any other entity) may be maintained in a State or Federal court by a private party.

(B) Permissible actions

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

(i) the purchase or sale of securities by the issuer or an affiliate of the issuer exclusively from or to holders of equity securities of the issuer; or

(ii) any recommendation, position, or other communication with respect to the sale of securities of the issuer that –

(I) is made by or on behalf of the issuer or an affiliate of the issuer to holders of equity securities of the issuer; and

(II) concerns decisions of those equity holders with respect to voting their securities, acting in response to a tender or exchange offer, or exercising dissenters' or appraisal rights.

(15 U.S.C. § 77p(d).)

Lastly, subdivision (f) defines "covered class action" as follows:

(2) Covered class action –

(A) In general

The term "covered class action" means –

(i) any single lawsuit in which –

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

prospective class members, and questions of law or fact common to those persons or members of the prospective class, without reference to issues of individualized reliance on an alleged misstatement or omission, predominate over any questions affecting only individual persons or members; or

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

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

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

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

(15 U.S.C. § 77p(f)(2)(A).)

The FireEye Defendants argue that Section 22(a) of the Securities Act, specifically the language "except as provided in section 77p of this title with respect to covered class actions," indicates that all covered class actions are excluded from concurrent jurisdiction with state courts. The FireEye Defendants contend that the reference to "covered class actions" necessarily refers to subdivision (f) of Section 16 (15 U.S.C. § 77p(f)(2)(A)) which defines "covered class actions." In making this argument, the FireEye Defendants rely on [sic] most heavily on the case of *Knox v. Agria Corp.*, *supra*.

The *Knox* court found the following:

> The exception in the jurisdictional provision of Section 22(a) exempts covered class actions raising 1933 Act claims from concurrent jurisdiction. By excluding these covered class actions from concurrent state and federal jurisdiction, federal courts alone have jurisdiction to hear them. After SLUSA, state courts were no longer "court[s] of competent jurisdiction" to hear covered class actions raising 1933 Act claims.

(*Knox v. Agria Corp.*, *supra*, 613 F.Supp.2d at p. 425.)

This statement was based on the conclusion that "[t]he reference to Section 16 does not add a substantive limitation to the exception to concurrent jurisdiction in Section 22(a); rather, it simply points the reader to the definition of a 'covered class action.'" (*Knox v. Agria Corp.*, *supra*, 613 F.Supp.2d at p. 424.)

While there have been courts that agree with *Knox*, other courts have held otherwise. In *Luther v. Countrywide Financial Corp.* (2011) 195 Cal.App.4th 789, the court specifically disagreed with the analysis and holding of *Knox.* The *Luther* court stated:

> [W]hen it interpreted section 77v, *Knox*, like defendants here, deemed the statutory reference to section 77p to be a reference to definition of "covered class action" in section 77p(f)(2). Rather than analyzing the application of the other parts of section 77p, *Knox* found that those subsections were irrelevant to the analysis because they dealt exclusively with state law claims. Then, based merely on the definition of "covered class action," *Knox* concluded that all covered class actions are exempted from concurrent jurisdiction. (*Id.* at p. 425.) In other words, *Knox* ignored the verb in the statute, and reached its conclusion by looking only at the noun.
>
> Whatever merit *Knox* may have with respect to removal issues, we cannot agree with its reading of sections 77v in other respects. Section 77v does not say "except as provided in section 77p(f)(2)," the definition of covered class action. Instead, it refers to all of section 77p, not just the definitional provision.

(*Luther v. Countrywide Financial Corp.*, *supra*, 195 Cal.App.4th at pp. 797-798.)

The *Luther* court ultimately held: "We conclude that concurrent jurisdiction of this case survived the amendments to the 1933 Act. We are not persuaded

otherwise by defendants' citation to *Knox v. Agria Corp.* (S.D.N.Y.2009) 613 F.Supp.2d 419, or to several federal trial court opinions." (*Luther v. Countrywide Financial Corp.*, *supra*, 195 Cal.App.4th at p. 797.)

The FireEye Defendants contend that *Luther is* not relevant because the securities in that case were not traded on a national exchange. The analysis in *Luther*, however, did not depend on the nature of the securities. The *Luther* court simply examined the language of the relevant statutes. This Court finds *Luther* persuasive and agrees with its reading of the statutes. The Court notes that *Luther* is not alone in its interpretation. (See, e.g., *Niitsoo v. Alpha Natural Resources, Inc.* (S.D.W. Va. 2012) 902 F.Supp.2d 797, 805, fn. 4; see also *Rajasekaran v. CytRx Corp.* (C.D. Cal. 2014) 2014 WL 4330787, *5; see also *West Palm Beach Police Pension Fund v. Cardionet, Inc.* (S.D. Cal. 2011) 2011 WL 1099815, *2; see also *West Virginia Laborers Trust Fund v. STEC Inc.* (C.D. Cal. 2011) 2011 WL 6156945, *5, fn. 5.)

The FireEye Defendants' reading of the statutory language ignores the fact that the reference to covered class actions in Section 22 does not limit itself to the definitional portion of Section 16 (i.e. subdivision (f)). As explained in *Luther*, because Section 22 incorporates Section 16 in its entirety, the Court must also look at all subdivisions of Section 16 that relate to "covered class actions," including subdivision (b) that actually places a limit on the ability to maintain certain covered class actions (e.g. those based on state law claims involving an untrue statement or omission of a

material fact in connection with the purchase or sale of a covered security or the use of a manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security).

In their reply papers, Defendants cite to the recent case of *Hung v. Idreamsky Technology Limited* (S.D.N.Y. 2016) 2016 WL 299034, in which the court stated:

> Defendants interpret "except as provided in section 77p with respect to covered class actions" to mean "except with respect to covered class actions, as defined in section 77p." The statutory language is amenable to this reading, and the phrase "covered class action" is a term of art with no meaning absent a reference to some definition.

(*Hung v. Idreamsky Technology Limited*, *supra*, 2016 WL 299034, *2.)

The *Hung* court's reading of Section 22 requires the addition of language that was not put there by Congress – "as defined in." There is no basis for the Court to add nonexistent language to a statute that could have been included when the statute was written. Rather, the absence of such language supports Plaintiffs' view that Section 22 refers to all of Section 16, not just the definitional portion. Moreover, the language "except as provided in section 77p with respect to covered class action" must be read in the context of the entire section, which concerns the conferring of jurisdiction on the courts; the exception more logically refers to the

limitations in Section 16 on the maintenance of covered class actions, not just the definition. Such a conclusion does not require the alteration or addition of language to the statute.

The FireEye Defendants argue that the legislative history of these statutes supports their interpretation. In light of the fact that the plain statutory language supports Plaintiffs' position, however, there is "no need for recourse to legislative history." (*Luther v. Countrywide Financial Corp.*, *supra*, 195 Cal.App.4th at pp. 799.)

The instant action is not based on state law and therefore does not fall within the exception to concurrent jurisdiction in Section 22(a). Accordingly, the FireEye Defendants motion for judgment on the pleadings is DENIED.

– oo0oo –

APPENDIX C

Court of Appeal, Sixth Appellate District –
No. H043576

S237267

IN THE SUPREME COURT OF CALIFORNIA

En Banc

(Filed Nov. 9, 2016)

FIREEYE, INC. et al., Petitioners,

v.

SUPERIOR COURT OF SANTA CLARA COUNTY,
Respondent;

IBEW LOCAL UNION 363 – MONEY PURCHASE
PENSION PLAN et al., Real Parties in Interest.

The petition for review is denied.

Chin, J., was recused and did not participate.

CANTIL-SAKAUYE
Chief Justice

APPENDIX D

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

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

15 U.S.C. § 77v(a).

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

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

(b) Class action limitations

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

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

(c) Removal of covered class actions

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

(d) Preservation of certain actions

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

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

(B) Permissible actions

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

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

(2) State actions

(A) In general

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

(B) "State pension" plan defined

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

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

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

(4) Remand of removed actions

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

(e) Preservation of State jurisdiction

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

(f) Definitions

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

(1) Affiliate of the issuer

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

(2) Covered class action

(A) In general

The term "covered class action" means –

(i) any single lawsuit in which –

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

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

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

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

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

(B) Exception for derivative actions

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

(C) Counting of certain class members

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

(D) Rule of construction

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

(3) Covered security

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

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

15 U.S.C. § 77p.

APPENDIX E

Westmoreland Cty. Emp. Ret. Fund v. Inventure Foods Inc., No. CV-16-01410-PHX-SMM, slip op. (D. Ariz. Aug. 10, 2016); *Rivera v. Fitbit, Inc.*, Nos. 16-cv-02890-SI, 16-cv-03381-SI, 2016 U.S. Dist. LEXIS 98202 (N.D. Cal. July 27, 2016); *Pytel v. Sunrun Inc.*, Nos. C 16-2566-CRB, C 16-2568-CRB, C 16-02569-CRB, C 16-02570-CRB, C 16-02572-CRB, C 16-202573-CRB, 2016 U.S. Dist. LEXIS 90417 (N.D. Cal. July 11, 2016); *Carlson v. Ovascience, Inc.*, No. 15-14032-WGY, 2016 WL 3002368 (D. Mass. May 23, 2016); *Oklahoma Police Pension & Ret. Sys. v. Sientra, Inc.*, Nos. 5:15-cv-05549-EJD, 5:15-cv-05550-EJD, 5:15-cv-05553, 2016 U.S. Dist. LEXIS 67563 (N.D. Cal. May 20, 2016); *Electrical Workers Local #357 Pension and Health & Welfare Trusts v. Clovis Oncology, Inc.*, No. 16-cv-00933-EMC, 2016 WL 2592947 (N.D. Cal. May 5, 2016); *Fortunato v. Akebia Therapeutics, Inc.*, No. 15-13501-PBS, 2016 WL 1734073 (D. Mass. Apr. 29, 2016); *Badri v. TerraForm Global, Inc.*, No. 15-cv-06323-BLF, 2016 U.S. Dist. LEXIS 28127 (N.D. Cal. Mar. 3, 2016); *Iron Workers Mid-South Pension Fund v. TerraForm Global, Inc.*, No. 15-cv-6328-BLF, 2016 WL 827374 (N.D. Cal. Mar. 3, 2016); *Patel v. TerraForm Global, Inc.*, No. 16-cv-00073-BLF, 2016 WL 827375 (N.D. Cal. Mar. 3, 2016); *Carlson v. Ovascience, Inc.*, No. 15-14032-WGY, 2016 WL 2650707 (D. Mass. Feb. 23, 2016); *Buelow v. Alibaba Grp. Holding Ltd.*, No. 15-cv-05179-BLF, 2016 U.S. Dist. LEXIS 7444 (N.D. Cal. Jan. 20, 2016); *Kerley v. MobileIron Inc.*, No. 15-cv-04416-VC, slip op. (N.D. Cal. Nov. 30, 2015); *Cervantes v. Dickerson*, No. 15-cv-3825-PJH,

2015 U.S. Dist. LEXIS 143390 (N.D. Cal. Oct. 21, 2015); *City of Warren Police & Fire Ret. Sys. v. Revance Therapeutics, Inc.*, 125 F. Supp. 3d 917 (N.D. Cal. 2015); *Liu v. Xoom Corp.*, No. 15-CV-00602-LHK, 2015 U.S. Dist. LEXIS 82830 (N.D. Cal. June 25, 2015); *Pac. Inv. Mgmt. Co. LLC v. Am. Int'l Grp., Inc.*, No. SA CV 15-0687-DOC (DFMx), 2015 U.S. Dist. LEXIS 75355 (C.D. Cal. June 10, 2015); *Rosenberg v. Cliffs Natural Res., Inc.*, No. 1:14CV1531, 2015 U.S. Dist. LEXIS 48915 (N.D. Ohio Mar. 25, 2015); *Plymouth County Ret. Sys. v. Model N, Inc.*, No. 14-cv-04516-WHO, 2015 U.S. Dist. LEXIS 1104 (N.D. Cal. Jan. 5, 2015); *Rajasekaran v. CytRx Corp.*, No. CV 14-3406-GHK (PJWx), 2014 U.S. Dist. LEXIS 124550 (C.D. Cal. Aug. 21, 2014); *Desmarais v. Johnson*, No. C 13-03666 WHA, 2013 U.S. Dist. LEXIS 153165 (N.D. Cal. Oct. 22, 2013); *Toth v. Envivo, Inc.*, No. C 12-5636 CW, 2013 U.S. Dist. LEXIS 147569 (N.D. Cal. Oct. 11, 2013); *City of Birmingham Ret. & Relief Sys. v. MetLife, Inc.*, No. 2:12-cv-02626-HGD, 2013 U.S. Dist. LEXIS 147675 (N.D. Ala. Aug. 23, 2013); *Reyes v. Zynga, Inc.*, No. C 12-05065 JSW, 2013 WL 5529754 (N.D. Cal. Jan. 23, 2013); *Niitsoo v. Alpha Natural Res., Inc.*, 902 F. Supp. 2d 797 (S.D. W. Va. 2012); *Harper v. Smart Techs., Inc.*, No. C 11-5232 SBA, 2012 WL 12505217 (N.D. Cal. Sept. 28, 2012); *Young v. Pac. Biosci. of Cal., Inc.*, No. 5:11-cv-05668 EJD, 2012 U.S. Dist. LEXIS 33695 (N.D. Cal. Mar. 13, 2012); *W. Va. Laborers Trust Fund v. STEC Inc.*, No. SACV 11-01171-JVS (MLGx), 2011 U.S. Dist. LEXIS 146846 (C.D. Cal. Oct. 7, 2011); *W. Palm Beach Police Pension Fund v. Cardionet, Inc.*, No. 10cv711-L(NLS), 2011 U.S. Dist. LEXIS 30607 (S.D. Cal. Mar. 24, 2011); *Parker v. Nat'l*

City Corp., No. 1:08 NC 70012, 2009 U.S. Dist. LEXIS 132947 (N.D. Ohio Feb. 12, 2009); *Hamel v. GT Solar Int'l Inc.*, No. 1:08-cv-00437-PB, slip op. (D.N.H. Feb. 12, 2009); *Layne v. Countrywide Fin. Corp.*, No. CV 08-3262 MRP, 2008 U.S. Dist. LEXIS 123896 (C.D. Cal. July 8, 2008); *Unschuld v. Tri-S Sec. Corp*., No. 1:06-CV-2931-JEC, 2007 WL 2729011 (N.D. Ga. Sept. 14, 2007); *Bernd Bildstein IRRA v. Lazard Ltd*., No. 05 CV 3388 (RJD) (RML), 2006 WL 2375472 (E.D.N.Y. Aug. 14, 2006); *Pipefitters Local 522 & 633 Pension Trust Fund v. Salem Commc'ns Corp*., No. CV 05-2730-RGK (MCx), 2005 U.S. Dist. LEXIS 14202 (C.D. Cal. June 28, 2005); *Higginbotham v. Baxter Int'l, Inc.*, No. 04 C 4909, 2005 U.S. Dist. LEXIS 12006 (N.D. Ill. May 25, 2005); *Zia v. Medical Staffing Network, Inc.*, 336 F. Supp. 2d 1306 (S.D. Fla. 2004); *Steamfitters Local 449 Pension & Ret. Sec. Funds v. Quality Distrib., Inc.*, No. 8:04-cv-961-T-26MAP, 2004 U.S. Dist. LEXIS 32014 (M.D. Fla. June 25, 2004); *In re Tyco Int'l, Ltd., Multidistrict Litig.*, 322 F. Supp. 2d 116 (D.N.H. 2004); *Williams v. AFC Enters., Inc.*, No. 1:03-CV-2490-TWT, 2003 U.S. Dist. LEXIS 28623 (N.D. Ga. Nov. 20, 2003); *Haw. Structural Ironworkers Pension Trust Fund v. Calpine Corp.*, No. 03-cv-0714-BTM (JFS), 2003 U.S. Dist. LEXIS 15832 (S.D. Cal. Aug. 26, 2003); *Martin v. Bell-South Corp.*, No. 1:03-CV-728-WBH, 2003 U.S. Dist. LEXIS 28605 (N.D. Ga. July 2, 2003); *Nauheim v. Interpublic Group of Cos.*, No. 02-C-9211, 2003 WL 1888843 (N.D. Ill. Apr. 15, 2003); *In re Waste Mgmt. Inc. Sec. Litig*., 194 F. Supp. 2d 590 (S.D. Tex. 2002).

APPENDIX F

Iron Workers Dist. Council of New England Pension Fund v. MoneyGram Int'l, Inc., No. 1:15-cv-00402-LPS, 2016 WL 4585975 (D. Del. Sept. 2, 2016); *Hung v. iDreamSky Tech. Ltd.*, Nos. 15-CV-2514 (JPO), 15-CV-2944 (JPO), 15-CV-3484 (JPO), 15-CV-3794 (JPO), 2016 U.S. Dist. LEXIS 8389 (S.D.N.Y. Jan. 25, 2016); *Wunsch v. Am. Realty Capital Props.*, No. JFM-14-4007, 2015 U.S. Dist. LEXIS 48759 (D. Md. Apr. 14, 2015); *Lapin v. Facebook, Inc.*, Nos. C-12-3195 MMC, C-12-3196 MMC, C-12-3199 MMC, C-12-3200 MMC, C-12-3201 MMC, C-12-3202 MMC, C-12-3203 MMC, 2012 U.S. Dist. LEXIS 119924 (N.D. Cal. Aug. 23, 2012); *In re Fannie Mae 2008 Sec. Litig.*, No. 08 Civ. 7831 (PAC), 2009 U.S. Dist. LEXIS 109888 (S.D.N.Y. Nov. 24, 2009); *Knox v. Agria Corp.*, 613 F. Supp. 2d 419 (S.D.N.Y. 2009); *Pinto v. Vonage Holdings Corp*., No. 07-0062 (FLW), 2007 WL 1381746 (D.N.J. May 7, 2007); *Rubin v. Pixelplus Co*., No. 06 Civ. 2964 (ERK), 2007 WL 778485 (E.D.N.Y. Mar. 13, 2007); *Rovner v. Vonage Holdings Corp*., No. 07-178 (FLW), 2007 WL 446658 (D.N.J. Feb. 5, 2007); *In re King Pharms., Inc*., 230 F.R.D. 503 (E.D. Tenn. 2004); *Kulinski v. Am. Elec. Power Co.*, No. 02-03-412, slip op. (S.D. Ohio Jan. 7, 2004) (overruling objection to magistrate judge's report in *Kulinski v. Am. Elec. Power Co*., No. C-2-03-412, 2003 WL 24032299 (S.D. Ohio. Sept. 19, 2003)).

APPENDIX G

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

APPENDIX H

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

AFTER COUNTRYWIDE:

	Filing Date	Case Name	Case No.
1.	Nov. 18, 2016	Book v. ProNAi Therapeutics, Inc.	San Mateo County 16CIV02473
2.	Nov. 4, 2016	Hosey v. Costolo (Twitter, Inc.)	San Mateo County 16CIV02228
3.	Sept. 20, 2016	Jackie888, Inc. v. ReWalk Robotics Ltd.	San Mateo County 16CIV01454
4.	Sept. 1, 2016	Ramsay v. Pure Storage, Inc.	San Mateo County 16CIV01183
5.	Aug. 19, 2016	Jackie888, Inc. v. Tokai Pharmaceuticals, Inc.	San Francisco County CGC-16-553796
6.	Aug. 11, 2016	Bloom v. Goldman, Sachs & Co. (SunEdison, Inc.)	San Mateo County 16CIV00884
7.	Aug. 5, 2016	Torres v. Kryeziu (Code Rebel Corporation)	Los Angeles County BC629838
8.	May 20, 2016	Wagner v. NantKwest, Inc.	Los Angeles County BC621292
9.	Apr. 28, 2016	Rivera v. Fitbit, Inc.	San Mateo County CIV538403
10.	Apr. 19, 2016	Braun v. NRG Yield, Inc.	Kern County BCV-16-100867
11.	Apr. 13, 2016	Pytel v. Sunrun Inc.	San Mateo County CIV538215
12.	Apr. 4, 2016	Bloom v. SunEdison, Inc.	San Mateo County CIV538022
13.	Mar. 17, 2016	Beck v. Apigee Corporation	San Mateo County CIV537817
14.	Feb. 26, 2016	Geller v. LendingClub Corporation	San Mateo County CIV537300
15.	Feb. 17, 2016	City of Warren Police and Fire Retirement System v. Natera, Inc.	San Mateo County CIV537409
16.	Jan. 25, 2016	Giavara v. GoPro, Inc.	San Mateo County CIV537077
17.	Jan. 22, 2016	Electrical Workers Local #357 Pension And Health & Welfare Trusts v. Clovis Oncology, Inc.	San Mateo County CIV537068
18.	Jan. 14, 2016	Barnett v. Ooma, Inc.	San Mateo County CIV536959

19.	Dec. 7, 2015	Beaver County Employees Retirement Fund v. Avalanche Biotechnologies, Inc.	San Mateo County CIV536488
20.	Dec. 1, 2015	Rezko v. XBiotech Inc.	Los Angeles County BC602793
21.	Nov. 19, 2015	Kleiman v. Sientra, Inc.	San Mateo County CIV536313
22.	Oct. 23, 2015	Fraser v. Wuebbels (TerraForm Global, Inc.)	San Mateo County CIV535963
23.	Oct. 5, 2015	Buelow v. Alibaba Group Holding Limited	San Mateo County CIV535692
24.	Aug. 24, 2015	Steinberg v. MobileIron, Inc.	Santa Clara County 1-15-CV-284761
25.	Aug. 11, 2015	Shen v. TrueCar, Inc.	Los Angeles County BC590999
26.	July 21, 2015	Cervantes v. Dickerson (Etsy, Inc.)	San Mateo County CIV534768
27.	June 2, 2015	Hunter v. Aerohive Networks, Inc.	San Mateo County CIV534070
28.	May 1, 2015	City of Warren Police and Fire Retirement System v. Revance Therapeutics, Inc.	San Mateo County CIV533635, transferred on Nov. 6, 2015 to Santa Clara County 15-CV-287794
29.	Apr. 2, 2015	Firerock Global Opportunity Fund LP v. Castlight Health, Inc.	San Mateo County CIV533203
30.	Mar. 20, 2015	O'Donnell v. Coupons.com, Inc.	Santa Clara County 1-15-CV-278399
31.	Jan. 29, 2015	City of Warren Police and Fire Retirement System v. A10 Networks, Inc.	Santa Clara County 1-15-CV-276207
32.	Jan. 6, 2015	Liu v. Xoom Corp.	San Francisco County CGC-15-543531
33.	Oct. 16, 2014	Berliner v. Pacific Coast Oil Trust	Los Angeles County BC560944
34.	Sept. 5, 2014	Plymouth County Retirement System v. Model N, Inc.	San Mateo County CIV530291
35.	June 20, 2014	In re FireEye, Inc. Securities Litigation	Santa Clara County 1-14-CV-266866
36.	Apr. 3, 2014	Rajasekaran v. CytRx Corp.	Los Angeles County BC541426
37.	Apr. 1, 2014	Beaver County Employees Retirement Fund v. Cyan, Inc.	San Francisco County CGC-14-538355
38.	July 10, 2013	Desmarais v. Johnson (CafePress Inc.)	San Mateo County CIV522744

39.	Oct. 19, 2012	Toth v. Envivio, Inc.	San Mateo County CIV517481
40.	Sept. 13, 2012	Robinson v. Audience, Inc.	Santa Clara County 1-12-CV-232227
41.	Aug. 1, 2012	Reyes v. Zynga Inc.	San Francisco County CGC-12-522876
42.	May 30, 2012	Lapin v. Facebook, Inc.	San Mateo County CIV514240
43.	Mar. 13, 2012	Marcano v. Nye (Zeltiq Aesthetics, Inc.)	Alameda County RG12621290
44.	Oct. 21, 2011	Young v. Pacific Biosciences of California, Inc.	San Mateo County CIV509210
45.	Sept. 27, 2011	Harper v. Smart Technologies, Inc.	San Francisco County CGC-11-514673
46.	July 1, 2011	West Virginia Laborers' Trust Fund v. STEC, Inc.	Orange County 30-2011-00489022

BEFORE COUNTRYWIDE:

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

APPENDIX I

Appellate Courts Case Information

CALIFORNIA COURTS

THE JUDICIAL BRANCH OF CALIFORNIA

6th Appellate District

Court data last updated: 11/16/2016 04:21 AM

Docket (Register of Actions)

FireEye, Inc. et al. v. Superior Court
Case Number H043576

Date	Description	Notes
05/18/2016	Filed petition for writ of:	mandate and/or prohibition or other relief
05/18/2016	Exhibits lodged**********	1 volume
05/19/2016	Filed petition for writ of:	corrected petition (only change is pagination)
05/19/2016	Exhibits lodged**********	1 volume – corrected (only change is pagination)
05/20/2016	Received copy of	petition and exhibits
05/31/2016	Opposition filed.	

06/01/2016	Default notice for responsive filing fee sent to:	RPI
06/03/2016	Filing fee received from:	RPI
06/10/2016	Reply filed to:	
06/10/2016	Filed proof of service.	Petitioners POS to reply brief filed
06/10/2016	Case fully briefed.	
06/14/2016	Email sent to:	Atty Salceda to mail hardcopy of reply filed
06/15/2016	Received copy of	reply
09/08/2016	Order denying petition filed	The petition for writ of mandate, prohibition, or other appropriate relief is denied. (Premo, Acting P.J.; Bamattre-Manoukian, J.; and Mihara, J. participated in this decision.)
09/08/2016	Case complete.	
09/16/2016	Petition for review filed in Supreme Court.	Jillian, filed 9/16/16
09/19/2016	Service copy of petition for review received.	

09/20/2016	Record transmitted to Supreme Court.	
10/07/2016	Received copy of Supreme Court filing	Answer of plaintiffs-real parties in interest to petition for review
10/17/2016	Received copy of Supreme Court filing	reply to answer to petition for review
11/09/2016	Petition for review denied in Supreme Court	Chin, J., was recused and did not participate.

APPENDIX J

Appellate Courts Case Information

CALIFORNIA COURTS
THE JUDICIAL BRANCH OF CALIFORNIA

Supreme Court

Court data last updated: 11/16/2016 04:21 AM

Docket (Register of Actions)

FIREEYE v. S.C. (IBEW LOCAL UNION 363-MONEY PURCHASE PENSION PLAN)
Case Number S237267

Date	Description	Notes
09/16/2016	Petition for review filed	Petitioner: FireEye, Inc. Attorney: Boris Feldman Petitioner: Ashar Aziz Attorney: Boris Feldman Petitioner: Ronald E.F. Codd Attorney: Boris Feldman Petitioner: William M. Coughran, Jr Attorney: Boris Feldman Petitioner: David G. DeWalt Attorney: Boris Feldman Petitioner: Gaurav Garg Attorney: Boris Feldman Petitioner: Promod Haque Attorney: Boris Feldman

		Petitioner: Robert F. Lentz Attorney: Boris Feldman
		Petitioner: Enrique Salem Attorney: Boris Feldman
		Petitioner: Michael J. Sheridan Attorney: Boris Feldman
09/16/2016	Record requested	Court of Appeal record imported and available electronically.
09/21/2016	Receive Court of Appeal record	one file folder/appendix
10/07/2016	Answer to petition for review filed	Real Party in Interest: IBEW Local Union 363 – Money Purchase Pension Plan Attorney: John T. Jasnoch
		Real Party in Interest: IBEW Local Union 363 – Pension Attorney: John T. Jasnoch
		Real Party in Interest: IBEW Local Union 363 – Welfare Plan Attorney: John T. Jasnoch
		Real Party in Interest: IBEW Local Union 363 – Supplement Unemployment Benefit Fund Attorney: John T. Jasnoch

		Real Party in Interest: IBEW Local Union 363 – Joint Apprenticeship Training Fund Attorney: John T. Jasnoch
		Real Party in Interest: DeKalb County Employees Retirement Plan Attorney: John T. Jasnoch (Filed pursuant to CRC, rule 8.25(b))
10/14/2016	Reply to answer to petition filed	Petitioner: FireEye, Inc. Attorney: Ignacio Evaristo Salceda
		Petitioner: Ashar Aziz
		Petitioner: Ronald E.F. Codd
		Petitioner: William M. Coughran, Jr.
		Petitioner: David G. DeWalt
		Petitioner: Gaurav Garg
		Petitioner: Promod Hague
		Petitioner: Robert F. Lentz
		Petitioner: Enrique Salem
		Petitioner: Michael J. Sheridan
11/09/2016	Petition for review denied	Chin, J., was recused and did not participate.

11/14/2016	Returned record	petition, 1 file folder, appendix

APPENDIX K

Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund, 135 S. Ct. 1318, 1324 (2015); *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2407 (2014); *Chadbourne & Parke LLP v. Troice*, 134 S. Ct. 1058, 1065 (2014); *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1194 (2013); *Janus Capital Grp., Inc. v. First Derivative Traders*, 564 U.S. 135, 140-41 (2011); *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 809 (2011); *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 36-37 (2011); *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 252 (2010); *Merck & Co. v. Reynolds*, 559 U.S. 633, 643 (2010); *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 155 (2008); *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 317 (2007); *Kircher v. Putnam Funds Trust*, 547 U.S. 633, 638-39 (2006); *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 76-77 (2006); *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 340 (2005).