

Nos. 11-5309, -5314

IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

THE BANK OF NEW YORK MELLON (as Trustee under various Pooling and Servicing
Agreements and Indenture Trustee under various Indentures),

Petitioner-Appellant,

v.

WALNUT PLACE LLC *et al.*,

Respondents-Appellees.

Appeal from the United States District Court for the
Southern District of New York

No. 1:11-cv-05988-WHP

(Permission granted December 27, 2011)

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CORPORATE DISCLOSURE STATEMENT

The Bank of New York Mellon is a wholly owned subsidiary of The Bank of New York Mellon Corp., a Delaware corporation, which is a publicly held company. No publicly held company owns 10% or more of The Bank of New York Mellon Corp.'s stock.

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INTRODUCTION

In the Class Action Fairness Act (“CAFA”), Congress expanded the jurisdiction of the federal courts over specified categories of class and “mass” actions, providing for the removal from state to federal court of cases falling into these categories. Even as it did so, however, Congress imposed significant limitations on this expanded removal jurisdiction, including three that are especially pertinent to this case: jurisdiction under CAFA does not extend to cases that (i) “relate” to securities; (ii) do not involve claims for “monetary relief”; or (iii) were not removed by a “defendant.” The district court’s denial of appellant The Bank of New York Mellon’s (“BNYM”) motion to remand misapplied each of these limits on CAFA jurisdiction in a manner contrary to Congress’s clear intent.

Consistent with CAFA’s plain text and this Court’s prior decision in *Greenwich Financial Services Distressed Mortgage Fund 3 LLC v. Countrywide Financial Corp.*, 603 F.3d 23 (2d Cir. 2010), the Court should hold that CAFA’s “securities exception” applies and, having done so, direct the district court to remand the action to state court for lack of jurisdiction. If, however, the Court holds that the securities exception does not apply, it should reverse on the merits and conclude that this case is not a removable “mass action.”

JURISDICTIONAL STATEMENT

The district court lacked subject matter jurisdiction both because BNYM's claim falls within CAFA's "securities exception," § 1332(d)(9)(C), and because this case is not removable under CAFA as a "mass action" under § 1332(d)(11)(B)(i).¹ The district court found to the contrary when it entered an order denying BNYM's motion to remand the action to state court on October 19, 2011. JA 28. On October 31, 2011, BNYM filed a timely petition for permission to appeal under CAFA's provision authorizing interlocutory review of orders disposing of remand motions, § 1453(c)(1). On December 27, 2011, this Court granted BNYM's petition for permission to appeal and consolidated this appeal with a parallel one filed by certain "Institutional Investors." *See* Dkt. No. 73, No. 11-4554; Dkt. No. 52, No. 11-4571 (JA 26).

This Court has "jurisdiction to determine [its] jurisdiction." *Greenwich*, 603 F.3d at 27. If the Court holds that the securities exception applies, that is the end of the matter in federal court, as neither this Court nor the district court has jurisdiction to proceed further, except to remand to state court. *See* §§ 1332(d)(9)(C), 1453(c)(1). If, on the other hand, the Court agrees with the district court's ruling that the securities exception does not apply, the Court has

¹ All further federal statutory references are to Title 28 of the United States Code. Excerpts of Sections 1332, 1441, 1446, and 1453 are reproduced *infra* in the statutory addendum required by Fed. R. App. P. 28(f).

appellate jurisdiction to determine whether this case otherwise is removable under CAFA—*i.e.*, whether it is a removable “mass action” and whether it was properly removed by a “defendant.” *See id.* The jurisdictional issues are more fully discussed in Point I of the Argument.

STATEMENT OF ISSUES

In granting the petitions for leave to appeal the district court’s order denying BNYM’s motion to remand to state court, this Court directed briefing of three issues, *see* Dkt. No. 52, No. 11-4571 (JA 26):

1. Whether the case was removable under CAFA as a “mass action” under § 1332(d)(11)(B)(i) and whether this Court has appellate jurisdiction over the case as a “class action” under § 1453(c)(1).
2. Whether the case falls under the securities exception to CAFA jurisdiction. *See* §§ 1332(d)(9)(C), 1453(d)(3).
3. Whether the case was properly removed by a “defendant or defendants” pursuant to §§ 1446(a), 1453(b).

STATEMENT OF THE CASE

On June 29, 2011, BNYM brought a proceeding in New York Supreme Court under CPLR Article 77, which provides for expeditious judicial resolution of questions relating to trust administration. The Walnut Place entities (collectively “Walnut”) intervened and, purporting to invoke CAFA’s “mass action” provision,

§ 1332(d)(11), removed the action to federal court on August 26. The district court (Pauley, J.) denied BNYM’s motion to remand on October 19, rejecting each of BNYM’s arguments that federal jurisdiction is not conferred by CAFA and that this case falls within a specific exception to CAFA jurisdiction. This Court granted permission to appeal on December 27.

STATEMENT OF FACTS

A. The Trusts And The Settlement Agreement

Pursuant to various Pooling and Servicing Agreements or Sale and Servicing Agreements (collectively, “PSAs”; the Appendix includes excerpts of a representative PSA), BNYM acts as trustee for 530 mortgage-securitization trusts that are governed by New York law.² Order at 1-2 (JA 28-29); Art. 77 Pet. ¶¶ 2-3 (JA 131). Countrywide Home Loans, Inc. and certain of its affiliates (now owned by Bank of America Corporation) (collectively, “Countrywide”), are counterparties to these PSAs, having conveyed residential mortgages into the trusts. Order at 2 (JA 29). Investors purchased certificates or notes reflecting various categories of ownership interest in the trusts. *Id.*

² The majority of the trusts are New York common-law trusts; a few are Delaware trusts that issued notes as to which BNYM serves as indenture trustee pursuant to indentures governed by New York law. The differences between the New York and Delaware trusts are not material to the issues presented here.

Beginning in June 2010 and continuing through October 2010, a group of these investors (the “Institutional Investors”)—eventually numbering 22 and consisting of some of the world’s most sophisticated financial entities—notified BNYM of allegations that Countrywide had sold mortgages to the trusts that did not comply with representations and warranties set forth in the PSAs, and that the entity that serviced the loans (formerly a Countrywide affiliate, later BAC Home Loans Servicing LP, and now Bank of America, N.A.) had failed to comply with its obligations. Order at 1-3 (JA 28-30); PSA § 2.03 (JA 241). The investors maintained that the PSAs obligated Countrywide to repurchase nonconforming and defaulting mortgages. Order at 2-3 (JA 29-30).

The investors brought their complaints to BNYM because the PSAs empower BNYM as trustee to assert claims against Countrywide, seek relief for breaches of the PSAs, and otherwise enforce the repurchase and servicing obligations. PSA §§ 2.01, 2.04 (JA 233, 243-244) (assignment of rights); *id.* §§ 8.01-8.02 (JA 248-250) (duties of trustee). This is consistent with the fundamental trust-law principle that the trustee, and not the trust itself or its beneficiaries, is vested with legal title and is the real party in interest. *E.g.*, *Lazenby v. Codman*, 116 F.2d 607, 609 (2d Cir. 1940); *Henning v. Rando Mach. Corp.*, 620 N.Y.S.2d 867, 870 (4th Dep’t 1994). No individual investor may sue Countrywide

directly (PSA § 10.08 (JA 251)), just as a shareholder may not sue directly on a corporation's claim.

In November 2010, BNYM, Countrywide, Bank of America, and the Institutional Investors commenced settlement discussions. Order at 3 (JA 30). In June 2011, BNYM reached an agreement with Countrywide and Bank of America (the "Settlement Agreement") to resolve claims seeking to enforce repurchase and servicing obligations under the PSAs. *Id.* at 4 (JA 31). The Settlement Agreement calls for a payment of \$8.5 billion to the trusts (and indirectly to the investors) and also mandates significant improvements to Countrywide's mortgage-servicing process, relief that would have been impossible to obtain through litigation. *Id.* at 5 (JA 32); Art. 77 Pet. ¶ 11 (JA 134). This settlement is both of unparalleled practical significance and, in BNYM's view, widely beneficial.³

B. The Article 77 Proceeding And Removal

1. A condition precedent to implementation of the Settlement Agreement is the entry of a judgment by the New York State Supreme Court approving the settlement pursuant to CPLR Article 77, which provides a mechanism for resolving

³ That conclusion is supported by detailed reports, written by independent advisors retained by BNYM, calculating that the \$8.5 billion settlement is a fair measure of the value of the trusts' claims against Countrywide, even without accounting for Countrywide's defenses and the legal risks, litigation costs, and other uncertainties that might reduce the prospects for any recovery through litigation. *See, e.g.*, JA 150-160.

questions relating to trust administration and allowing trustees to receive judicial instruction *before* taking action that affects a trust. Accordingly, on June 29, 2011, BNYM initiated this Article 77 proceeding in New York state court. Order at 4 (JA 31).⁴ The proceeding seeks an order finding that BNYM acted reasonably and in good faith as a trustee when it entered into the Settlement Agreement with Countrywide. Art. 77 Pet. ¶¶ 92, 96 (JA 159-160). As a corollary to that determination, BNYM’s Proposed Final Order and Judgment extinguishes any claims by investors relating to the settlement. JA 168-170; Order at 5 (JA 32). No claim for money damages is asserted in the Article 77 proceeding. *See generally* JA 162-172.

At the outset of the proceeding, Justice Barbara Kapnick approved a scheduling order (the “Preliminary Order”) setting an August 30, 2011 deadline for objections to the relief sought. Order at 5 (JA 32). In accordance with this order, BNYM implemented an extensive program to give notice of the settlement to beneficiaries of the trusts, including establishing a website to provide access to information of interest (*e.g.*, court filings) to investors and to other persons

⁴ An Article 77 proceeding is one of several special proceedings under the CPLR. “A special proceeding is a quick and inexpensive way to implement a right. It’s as plenary as an action, culminating in a judgment, but is brought on with the ease, speed, and economy of a mere motion. Combining the best of both worlds, the special proceeding is of course preferable to the ordinary action, but it may be used only when explicitly authorized by law in a particular case.” David D. Siegel, *New York Practice*, § 547 (5th ed. 2011 update).

potentially interested in the trusts. *See Countrywide RMBS Settlement Website, available at <http://www.cwrmbssettlement.com/>* (last visited January 16, 2012). A number of trust beneficiaries intervened in the Article 77 proceeding, some to support the settlement (*i.e.*, the Institutional Investors) and others to oppose it.

Walnut was one of the intervenors opposing the settlement. On August 4, Walnut requested discovery from BNYM, Countrywide, and the Institutional Investors who participated in the negotiation of the Settlement Agreement, as well as modification of the Preliminary Order to give trust beneficiaries the right to “opt out.” Order at 8 (JA 35). The following day, after hearing argument on these issues, Justice Kapnick ruled that Walnut could not “opt out” because an Article 77 proceeding is “not a class action.” *Id.* at 5 (JA 32). Justice Kapnick also denied Walnut’s request for an extension of the August 30 deadline for lodging objections.

2. On August 26, only after receiving these unfavorable rulings from the state court, Walnut removed the Article 77 proceeding to federal district court, invoking CAFA’s “mass action” provision, § 1332(d)(11). Dkt. No. 1 (JA 120). BNYM, joined by the Institutional Investors, moved to remand. Dkt. Nos. 51, 55, 78.

The district court (Pauley, J.) denied this motion on October 19, rejecting each of BNYM’s arguments that the exercise of federal jurisdiction is barred by a specific provision of CAFA. Judge Pauley recognized that cases “seeking only

non-monetary relief, such as injunctions, cannot be removed under CAFA” but characterized the Article 77 proceeding as seeking a “court-ordered transfer of \$8.5 billion” from Countrywide to the trusts—notwithstanding that Countrywide is not even a party to that proceeding—and so found that it involved “monetary relief” claims. Order at 9-10 (JA 36-37). Judge Pauley also concluded that Walnut was a “defendant” entitled to remove the Article 77 proceeding because it opposed the Settlement Agreement, even at the same time that he acknowledged that Walnut “will receive a payment . . . if the settlement is approved.” *Id.* at 12 (JA 39).

Finally, Judge Pauley held that the securities exception was inapplicable. Order at 16 (JA 43). He recognized that the PSAs are instruments that create and define securities, and that the standards for evaluating BNYM’s conduct as trustee were at least in part determined by the PSAs. But he held that the securities exception did not apply because New York common law also imposed implied duties on BNYM. *Id.* at 16-18 (JA 43-45).

Judge Pauley concluded by opining that the “issue here implicates core federal interests in the integrity of nationally chartered banks” and “[a] controversy touching on these paramount federal interests should proceed in federal court.”

Order at 21 (JA 48).⁵ In so saying, he may have overlooked that BNYM is a *New York*-chartered bank.

3. The district court subsequently ordered that discovery—including third-party discovery—begin on November 17, 2011. *See* Dkt. No. 131, No. 1:11-cv-05988-WHP. Discovery is continuing.⁶

C. Proceedings In This Court

On October 31, 2011, BNYM filed a timely petition for permission to appeal under CAFA’s provision authorizing interlocutory review of orders disposing of remand motions, § 1453(c)(1). *See also* Fed. R. App. P. 26(a)(3). On the same day, the Institutional Investors also petitioned for permission to appeal, raising similar issues. *See* Dkt. No. 1, No. 11-4554. The Court granted petitioners’ motions to

⁵ Despite the absence of fact-finding or discovery, the district court appears to suggest impropriety on BNYM’s part. *See, e.g.*, Order at 1 (BNYM invoked “arcane summary procedure”), 3 (referring to BNYM’s “torpor”), 4 (referring to “clique” of investors), 17 (BNYM “only just recognized” its trust obligations) (JA 28, 30-31, 44). BNYM disagrees with these characterizations but will not address them further here because they are not material to any issue before this Court.

⁶ The district court’s Scheduling Order for discovery states that it is “on consent.” *See* Dkt. No. 131 at 1, No. 1:11-cv-05988-WHP. BNYM and the Institutional Investors consented only to the schedule of dates set by the district court for discovery requests and document production. Beyond that, however, BNYM and the Institutional Investors, citing the pendency of appellate proceedings before this Court, objected to the making of any rulings on other issues in the case, including, for example, motions to intervene or discovery disputes. The district court did not rule on those objections.

expedite consideration of their respective petitions. *See* Dkt. No. 55, No. 11-4554; Dkt. No. 39, No. 11-4571.

On December 27, 2011, the Court granted leave to appeal the district court's order denying BNYM's motion to remand the case to state court and consolidated the appeals. *See* Dkt. No. 73, No. 11-4554; Dkt. No. 52, No. 11-4571 (JA 26). The Court directed the parties to submit briefs addressing the three particular issues reproduced *supra* at page 3. JA 27.

SUMMARY OF ARGUMENT

The decision below disrupts a streamlined state proceeding that BNYM invoked to determine the validity of a settlement that affects hundreds of trusts, thousands of investors, and billions of dollars. In denying remand, the district court misinterpreted CAFA's securities exception; misconstrued CAFA's definition of a removable "mass action"; and misapplied the traditional rule, left unaltered by CAFA, that an action properly may be removed only by a "defendant." This Court has jurisdiction to correct these erroneous legal rulings, the reversal of any one of which would compel remand to state court.

I

A. CAFA expanded the jurisdiction of the courts of appeals to hear appeals of orders disposing of motions to remand. § 1453(c)(1). The statute makes unambiguously clear that this appellate jurisdiction embraces remand orders in

cases removed under CAFA as purported “mass actions,” in addition to remand orders in cases removed as traditional “class actions.” *See* Point I.A, *infra*.

B. CAFA also created an “exception to appellate jurisdiction over remand orders,” § 1453(d)(1), that is “identical to the [securities] exception[] to CAFA’s grant of original federal diversity jurisdiction” to the federal district courts, § 1332(d)(9)(C). *Greenwich*, 603 F.3d at 27. Walnut’s claim that this provision entirely deprives this Court of jurisdiction to entertain this appeal is specious, both because jurisdiction to consider the mass-action questions depends on the disposition of the merits of the securities-exception issue and because the Court always has “jurisdiction to determine [its] jurisdiction.” *E.g.*, *Greenwich*, 603 F.3d at 27; *Estate of Pew v. Cardarelli*, 527 F.3d 25, 28 (2d Cir. 2008). And if the Court determines that CAFA’s securities exception does apply here (as it should), it would follow *both* that the district court lacked subject matter jurisdiction *and* that this Court lacks appellate jurisdiction over the remainder of the merits of this appeal; accordingly, the Court should stop there and direct remand of this case to state court. *See* Point I.B, *infra*.

II.

The securities exception does apply, a conclusion that is compelled by both CAFA’s statutory text and this Court’s decision in *Greenwich*. That exception precludes the exercise of federal jurisdiction over claims that “relate[]” to rights,

duties, or obligations created by a security, and BNYM’s claim unquestionably relates to the nature and application of obligations under securities-creating instruments. Moreover, a claim does not fall outside CAFA’s securities exception simply because state common law imposes implied duties on the trustee relationship created by securities contracts such as those at issue here. The gravamen of the Article 77 proceeding is the judicial evaluation of BNYM’s conduct *as trustee under the PSAs* in entering into the Settlement Agreement to resolve its claims *as trustee under the PSAs* against Countrywide. That manifestly is a claim that relates to—indeed, centers on—the rights and duties created by a security, and so falls within the securities exception. *See Point II, infra.*

III.

If the Court nevertheless determines that the securities exception is inapplicable, then it has appellate jurisdiction over BNYM’s remaining arguments. Exercising that jurisdiction, the Court should determine that this case was not properly removed under CAFA and must be remanded. That is so for two independent reasons: this case is not a removable “mass action” under CAFA, and Walnut is not a “defendant” empowered to remove the case. Put simply, a request under Article 77 for a judicial determination that a trustee acted reasonably in settling trust claims is not a claim for “monetary relief” within the meaning of CAFA’s “mass action” provision. And an investor in the trusts who chooses to

intervene in the Article 77 proceeding because it objects to the settlement is not a “defendant.” *See* Point III, *infra*.

STANDARD OF REVIEW

On appeal from the denial of a motion to remand for lack of subject matter jurisdiction, the district court’s legal conclusions are reviewed *de novo* and its factual findings are reviewed for clear error. *Blockbuster, Inc. v. Galeno*, 472 F.3d 53, 56 (2d Cir. 2006). In particular, review of a district court’s interpretation of a federal statute is *de novo*. *United States v. Williams*, 551 F.3d 182, 185 (2d Cir. 2009). “The party opposing remand generally bears the burden of showing that federal jurisdiction is proper. However, once the general requirements of CAFA jurisdiction are established, [the party seeking remand has] the burden of demonstrating that remand is warranted on the basis of one of the enumerated exceptions,” such as the securities exception. *Greenwich*, 603 F.3d at 26 (citation omitted).

ARGUMENT

I. THIS COURT HAS JURISDICTION TO ENTERTAIN THIS APPEAL AND DIRECT A REMAND TO STATE COURT.

The Court has directed the parties to brief whether it has appellate jurisdiction over the case under § 1453(c)(1). *See* Dkt. No. 52, No. 11-4571 (JA 27). The short answer is that it does. Walnut’s opposition to the petitions for permission to appeal argued that (1) CAFA does not grant authority to appeal

removal of mass actions and (2) if the CAFA securities exception applies (as we argue), this Court lacks jurisdiction over the case. *See* Opp. 5-11. Both arguments are wrong.

As for the first contention, by its terms § 1453(c)(1) confers appellate jurisdiction over orders disposing of remand motions in a “class action,” a term that is defined, via statutory cross-reference, to include “mass actions,” which are explicitly deemed to be class actions for purposes of § 1453. Consequently, just as a remand order in a traditional “class action” is expressly made reviewable by § 1453(c)(1), a remand order in a “mass action” is as well.

Walnut’s other jurisdictional argument fares no better. Although a determination by this Court that CAFA’s securities exception applies would mean that the Court lacks jurisdiction to consider BNYM’s other points on appeal, it would entail as a necessary consequence that the *district court*, too, lacked jurisdiction, which this Court is empowered to remedy by directing remand of the case to state court.

A. Section § 1453(c)(1) Authorizes Interlocutory Appeals Of Orders Resolving Motions To Remand Cases Removed As “Mass Actions.”

In arguing that § 1453(c)(1) does not confer appellate jurisdiction over remand orders in “mass actions,” as opposed to traditional class actions, Walnut

proposed a tortured interpretation of the plain statutory text to reach an absurd result that Congress surely did not intend.

1. Section 1453(c)(1) provides that the Court “may accept an appeal from an order . . . granting or denying a motion to remand a class action.” In turn, § 1453(a) provides that, “[i]n this section, the term[] . . . ‘class action’ . . . shall have the meaning[] given . . . under [§] 1332(d)(1).” Walnut contended that § 1453(c)(1) is inapplicable to a removed “mass action,” which is defined in § 1332(d)(11), not § 1332(d)(1). Opp. 5-6. But § 1332(d)(11)(A) provides that, “[f]or purposes of *this subsection* and *section 1453*, a mass action shall be deemed to be a class action removable under paragraphs (2) through (10) if it otherwise meets” the requirements of those paragraphs. (Emphasis added.) Thus, a “mass action” straightforwardly *is* a “class action” for “purposes of . . . [§] 1453”—including § 1453(c)(1)’s appellate review provision. And because “this subsection” (*i.e.*, all of § 1332(d)) includes the definition of a “class action” at § 1332(d)(1) that is cross-referenced by § 1453(a), CAFA actually *twice* provides that a “mass action” is a “class action” for purposes of appellate review.

Indeed, taken at face value, Walnut’s argument is self-defeating: whatever counts as a “class action” for purposes of § 1453(b) (authorizing removal in the first instance) must be the same as what counts as a “class action” for purposes of § 1453(c)(1) (authorizing interlocutory appellate review). *See Nat’l Credit Union*

Admin. v. First Nat'l Bank & Trust Co., 522 U.S. 479, 501 (1998) (“[S]imilar language contained within the same section of a statute must be accorded a consistent meaning.”); *United States v. Cunningham*, 292 F.3d 115, 118 (2d Cir. 2002) (same). If remand orders in mass actions were not subject to interlocutory *appellate review*, that same statutory reading necessarily would preclude the *removal* of such actions in the first place.

In arguing to the contrary and contending that mass actions are treated as class actions for purposes of removal but not for purposes of appeal, Walnut paraphrased § 1332(d)(11)(A) as stating that “mass actions are deemed to be class actions for purposes of removal only.” Opp. 7. But CAFA says nothing of the sort. There is no “only” in the statute. In fact, that subsection provides that, “[f]or purposes of [§ 1332(d)] and [§] 1453,” a mass action “shall be deemed” a “class action removable under paragraphs (2) through (10).” Indisputably, an order disposing of a motion to remand a *traditional* “class action removable under paragraphs (2) through (10)” is subject to interlocutory appellate review under § 1453(c)(1). It follows that a remand order of a purported mass action, which is “deemed” to be such an action, is as well—and it does *not* follow that simply because Congress characterized an action as “removable,” it implicitly intended that same action to be nonappealable. If Congress intended the strange result

Walnut proposes, it certainly picked an obscure way of saying what it could have said directly in § 1453(c)(1).

2. The plain statutory reading is confirmed by CAFA’s legislative history, which states unequivocally that, “[u]nder [§] 1332(d)(11), any [mass action] . . . will be treated as a class action for jurisdictional purposes.” S. Rep. No. 109-14, at 44 (2005). And that is not surprising: Congress could not possibly have wanted to limit appellate review of remand orders in CAFA-removed cases to traditional “class actions.” To the contrary, “subsection 1453(c) provides discretionary appellate review of remand orders under *this legislation*”—*i.e.*, CAFA. *Id.* at 43 (emphasis added). After all, Congress intended interlocutory appellate review to help “develop a body of appellate law interpreting the legislation” by encouraging “appellate courts to review cases that raise jurisdictional issues likely to arise in future cases.” *Id.* at 46. That being so, it would be more than a little strange for Congress to have impeded the development of law over the subject where guidance is *most* likely to be needed—CAFA’s newly created category of “mass actions.” While Walnut has pointed to certain ways (immaterial here) in which traditional class actions and mass actions differ (Opp. 8-9), it offers no reasoned basis for differentiating the availability of appellate review for the two forms of potentially removable actions.

Finally, it is notable that five courts of appeals have exercised appellate jurisdiction pursuant to § 1453(c)(1) over appeals of orders granting or denying remand in cases removed as purported mass actions. *E.g.*, *BP Am., Inc. v. Okla. ex rel. Edmondson*, 613 F.3d 1029, 1030-31 (10th Cir. 2010) (“CAFA expressly provides that ‘a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand a class action [including a mass action]’”) (alteration in original); *accord La. ex rel. Caldwell v. Allstate Ins. Co.*, 536 F.3d 418 (5th Cir. 2008); *Koral v. Boeing Co.*, 628 F.3d 945, 946 (7th Cir. 2011); *Tanoh v. Dow Chem. Co.*, 561 F.3d 945 (9th Cir. 2009); *Lowery v. Ala. Power Co.*, 483 F.3d 1184 (11th Cir. 2007). Because these courts would have been obligated to dismiss the appeals *sua sponte* under Walnut’s reading of the statute, Walnut’s argument presumes that each of them ignored “clear” and “plain” statutory language denying them appellate jurisdiction. Opp. 6-8. That proposition is, to say the least, implausible.

B. If The Court Agrees With BNYM’s Submission That CAFA’s “Securities Exception” Applies, It Should Direct The District Court To Remand The Case To State Court.

For several reasons, Walnut’s other jurisdictional argument—that a decision by this Court finding the securities exception applicable in this case would have no practical effect because the *only* consequence of such a ruling would be dismissal of the appeal (Opp. 10-11)—is also without merit.

First, there can be no question that, as *Greenwich*, *Cardarelli*, and this Court’s order granting permission to appeal in this case make clear, this Court has “jurisdiction to determine [its] jurisdiction.” *Greenwich*, 603 F.3d at 27; *see also Cardarelli*, 527 F.3d at 28; Dkt. No. 52, No. 11-4571 (JA 27). If the Court agrees with us that the securities exception applies, that would mean that the *district court* does not, and never did, have subject matter jurisdiction. *See Greenwich*, 603 F.3d at 27 (§ 1453(c)(1) exception is “identical to the . . . exception[] to CAFA’s grant of original federal diversity jurisdiction”); *Cardarelli*, 527 F.3d at 31(“[B]oth original and appellate jurisdiction depend on whether [the case] fall[s] within CAFA’s exception for claims that relate to rights, duties and obligations related to or created by or pursuant to a security.”).

And if this Court reaches that conclusion, it is empowered to—and must—direct the district court to remand the action to state court for want of subject matter jurisdiction under CAFA, even though the determination that the securities exception applies concomitantly means this Court also lacks jurisdiction to reach the merits of the other CAFA-related issues in this appeal. The Supreme Court has made clear that when an appellate court lacks jurisdiction—as when “the requirements of Article III no longer are (or indeed never were) met”—it is *not* prevented from “hold[ing] that a district court lacked Article III jurisdiction in the first instance, vacat[ing] the decision, and remand[ing] with directions to dismiss.”

U.S. Bancorp Mortg. Co. v. Bonner Mall P’ship, 513 U.S. 18, 21 (1994); *see, e.g., Blackwelder v. Safnauer*, 866 F.2d 548, 550 & n.2 (2d Cir. 1989). This is but one example of the general principle that an appellate court that “lack[s] jurisdiction to reach the merits of an appeal” nonetheless is “not without power to act” and may “dismiss the appeal and remand the cause with instructions.” *In re Wallace & Gale Co.*, 72 F.3d 21, 25 (4th Cir. 1995); *see also, e.g., U.S. Bancorp Mortg.*, 513 U.S. at 21; *Karcher v. May*, 484 U.S. 72, 82 (1987); *United States v. Fuller*, 332 F.3d 60, 64-65 (2d Cir. 2003), *abrogation on other grounds recognized by United States v. Frias*, 521 F.3d 229, 232 (2d Cir. 2008).

The exercise of this power is all the more necessary when, as here, the appellate court’s conclusion that *it* lacks jurisdiction *necessarily* means that the *lower court* also lacked jurisdiction *for exactly the same reason*.⁷ Just as an

⁷ *See, e.g., U.S. Bancorp Mortg.*, 513 U.S. at 21 (absence of Article III standing); *Nasca v. Peoplesoft*, 160 F.3d 578, 578, 580 (9th Cir. 1998) (concluding that “the magistrate judge acted without jurisdiction”; holding that the magistrate judge’s “lack of jurisdiction . . . deprive[d] this court of appellate jurisdiction”; “dismiss[ing] . . . appeals for lack of appellate jurisdiction”; and “direct[ing] the [judge] to withdraw his remand order and fee award”); *Travelers Ins. Co. v. H.K. Porter Co.*, 45 F.3d 737, 744 (3d Cir. 1995) (“In sum, we conclude that [the appellant] . . . lacked standing to appeal, both in this Court and in the district court. We will therefore dismiss the appeal and remand the proceedings to the district court with directions to vacate its judgment and to enter an order dismissing the appeal from the bankruptcy court.”); *Kahn v. Kahn*, 21 F.3d 859, 860 (8th Cir. 1994) (“dismiss[ing] the appeal and direct[ing] the district court on remand to dismiss the action for lack of subject matter jurisdiction” because “the domestic relations exception to diversity of citizenship jurisdiction applies and precludes the

(footnote continued)

appellate “court always has jurisdiction to consider its jurisdiction,” this Court also has “a limited jurisdiction not only to decide that [it] lacked jurisdiction to adjudicate . . . [the] appeal . . . , but also to take those *steps appropriate to implement a decision declining jurisdiction.*” See *Hertzner v. Henderson*, 292 F.3d 302, 304 (2d Cir. 2002) (emphasis added). The “appropriate” step in this context plainly is to direct the district court to remand the action to state court for want of jurisdiction because CAFA’s securities exception applies.

Second, even were this Court to lack the authority to *order* a remand in the course of dismissing the appeal for lack of jurisdiction on the basis of the securities exception, it hardly follows that the case “would proceed in the district court.” Opp. 11. A determination by this Court in the course of settling *its* jurisdiction that there is *no federal jurisdiction at all* over this action surely would require the district court to itself change course and remand this action to state court. See § 1447(c) (“If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.”).

Conversely, the Court would have appellate jurisdiction to reach the other CAFA-related issues in this appeal—*e.g.*, whether the case satisfies the requirements for “mass action” removable under CAFA and whether Walnut was a

exercise of federal jurisdiction”); *In re Caribbean Tubular Corp.*, 813 F.2d 533, 534-35 (1st Cir. 1987) (per curiam) (appeals from bankruptcy courts).

“defendant” entitled to remove it, *see* Point III, *infra*—only if it were first to conclude that the securities exception does not apply. *Cardarelli*, 527 F.3d at 29 n.1 (noting that CAFA’s other “boundaries used to limit the district court’s original jurisdiction” do *not* “double as limitations on appellate jurisdiction”).

Thus, Walnut was plainly in error in suggesting that the Court may properly just skip the securities-exception issue. One way or another, the Court must determine whether the CAFA’s securities exception bars the exercise of federal jurisdiction over this case. If it does, the Court should direct the district court to remand the action to state court without further ado; if it does not, the Court should proceed to decide BNYM’s other challenges to removability under CAFA.

II. THIS CASE FALLS UNDER CAFA’S “SECURITIES EXCEPTION” TO FEDERAL JURISDICTION.

On the merits, the question whether the securities exception applies is not a close one. A class or mass action that “[1] solely involves[] . . . a claim . . . that [2] relates to the rights, duties (including fiduciary duties), and obligations [3] relating to or created by or pursuant to any security” is not removable under CAFA. §§ 1332(d)(9)(C), 1453(d)(3). The district court recognized that this “securities exception would almost certainly apply” here if the “only relevant legal standards for evaluating [BNYM’s] conduct as trustee are found in the PSAs,” because “the PSAs are ‘instruments that create and define securities.’” Order at 16 (JA 43)

(quoting *Greenwich*, 603 F.3d at 30) (emphasis omitted).⁸ But the district court deemed the securities exception inapplicable because the Article 77 proceeding would “necessarily involve[] New York common law”—*i.e.*, it would be affected by BNYM’s “duty [as trustee] to avoid conflicts of interest”—and “not simply the terms of the PSAs.” Order at 17, 19 (JA 44, 46).

This holding, however, rests on a misreading of CAFA and of governing precedent. Because *any* “securities claim under state law will necessarily ‘involve’” issues that require a look beyond the bare text of the securities instrument—*e.g.*, state-law questions of contract interpretation, alter-ego liability, or implied duties—the district court’s reading of the securities exception leaves it “essentially meaningless.” *Greenwich*, 603 F.3d at 31-32. The broad language of the securities exception demonstrates, however, that Congress did not put in place such a crabbed and ineffectual provision.

1. “As with any question of statutory interpretation,” the analysis must “begin[] with the plain language of the statute.” *Jimenez v. Quarterman*, 555 U.S. 113, 118 (2009). Here, each of the securities exception’s elements is satisfied.

⁸ As this Court explained in *Greenwich*, “[t]he terms of these securitization transactions, as well as the rights and duties of the parties to them, were laid out in” the PSAs (603 F.3d at 25), which create the trusts that Certificateholders own and govern the transfer of loans into the trusts and the distribution of payments out of the trusts.

First, the Article 77 proceeding “solely involves” a claim that relates to a security: the *single* claim on which BNYM seeks judicial guidance is whether its entry into the Settlement Agreement is consistent with its rights, duties, and obligations as an indenture trustee under the PSAs. *Second*, this claim “relates to” rights, duties, and obligations under the PSAs—in particular, BNYM’s exercise of its powers as trustee under the PSAs to assert and settle claims against Countrywide for Countrywide’s alleged breach of its commitments under the PSAs, such as, for example, its repurchase and servicing obligations.⁹ PSA §§ 2.01, 2.03-2.04, 10.08 (JA 233, 241, 243, 251); *see, e.g., Greenwich*, 603 F.3d at 31 (“relates to” is a “broad phrase”); *Mizrahi v. Gonzales*, 492 F.3d 156, 159 (2d Cir. 2007) (“Congress’s use of the phrase ‘relating to’ . . . generally signals its expansive intent.”). This point is not debatable: Resolution of the Article 77 proceeding unquestionably would turn at least in part on the PSAs’ terms. And *third*, as noted, all parties (and the district court) agree that the right- and duty-creating instruments (the PSAs) are securities instruments. *See Greenwich*, 603 F.3d at 27-29. That is enough to resolve this case.

⁹ The use of Article 77 to adjudicate a trustee’s conduct in settling litigation on behalf of the trust is unobjectionable. *See, e.g., In re Application of IBJ Schroder Bank & Trust Co.*, No. 101530/98, slip op. at 6 (Sup. Ct. N.Y. Cnty. Aug. 16, 2000) (in Article 77 proceeding involving a securitization trust, holding that the trustee’s decision to compromise was reasonable), *on remand from In re IBJ Schroder Bank & Trust Co.*, 271 A.D.2d 322, 706 N.Y.S.2d 114 (1st Dep’t 2000).

2. In rejecting this interpretation of the seemingly unambiguous language of CAFA, the district court ruled that, although the Article 77 proceeding concerns the reasonableness of BNYM's exercise of its securities-related contractual rights and duties as trustee under the PSAs, the action nonetheless lies outside the scope of the securities exception because BNYM *also* has a non-contractual duty to avoid conflicts of interest under New York law. That is, according to the district court, CAFA's securities exception applies only when the claim can be resolved solely by reference to "the bare text of" the securities instruments at issue. Order at 16 (JA 43). This approach effectively guts the securities exception and runs counter to this Court's decisions in *Greenwich* and *Cardarelli*.

a. To begin with, a claim need not relate *exclusively* to securities-based rights, duties, and obligations in order to fall within the securities exception. This Court held just that in *Greenwich*, reasoning that, "[i]f Congress had intended [the securities exception] to apply only to class actions that involve no legal issues extraneous to the primary claim, [it] would have used language that was more clearly limiting." 603 F.3d at 31. Because "[a]lmost any securities claim under state law will necessarily 'involve'" issues of state contract or fiduciary-duty law, "disqualify[ing] such suits from the [securities] exception[] would mean that practically every state securities class action would be amenable to CAFA jurisdiction." *Id.* at 31-32. But "Congress cannot have intended its exceptions to

CAFA to be essentially meaningless.” *Id.* at 32. Yet the district court adopted the very misreading of CAFA that this Court rejected in *Greenwich*, deeming the securities exception inapplicable here because the relief BNYM seeks in the Article 77 proceeding requires consideration not only of the “legal standards . . . found in the PSAs,” but also those grounded in “New York’s common law of trusts.” Order at 16 (JA 43); *accord id.* at 19 (JA 46). That holding misunderstands this Court’s view of the securities exception, which is that because the claim here arises in the first instance from the PSAs, it is immaterial that the claim *also* might touch on other, ancillary rights and duties.¹⁰

In particular, the “source of the right that [BNYM’s] claim seeks to enforce,” *Greenwich*, 603 F.3d at 29, is unquestionably the PSAs themselves. The PSAs define the underlying warranties that Countrywide is alleged to have breached, PSA § 2.03; specify the repurchase remedy for such breaches, *id.* § 2.03(c); assign all related rights and interests, including the right to assert the repurchase remedy against Countrywide, to BNYM as trustee, *id.* §§ 2.01(b), 2.04;

¹⁰ As the Court explained in *Greenwich*, that conclusion is not altered by the statutory language referring to suits that “solely” involve claims relating to securities: “the phrase ‘solely involves’ ensures that federal jurisdiction under CAFA cannot be defeated by *adding* a claim that falls within a § 1332(d)(9) exception to a class action complaint advancing one or more other claims”; “[n]eedless to say, the phrase ‘solely involves’ cannot be stretched so far as to limit the [securities exception] to class actions that raise no collateral issues.” 603 F.3d at 31-32 (emphasis added).

and define BNYM's rights and duties as trustee, *id.* §§ 8.01-8.02. *See* JA 233-244, 248-250. The Article 77 proceeding seeks judicial approval of BNYM's conduct in relation to the Settlement Agreement, the sole purpose of which is to achieve a global resolution of the claims of BNYM as trustee against Countrywide arising out of the PSAs. *See Cardarelli*, 527 F.3d at 33 (securities exception applies to suits involving "duties imposed on persons who administer securities"). Whether or not BNYM obtains relief in the Article 77 proceeding is surely related to "the meaning" of the PSAs. *Id.* (quoting S. Rep. No. 109-14, at 43); *see also Greenwich*, 603 F.3d at 29. That brings BNYM's claim squarely within the core of the securities exception.

It is immaterial that the PSAs do not supply the *exclusive* standards by which BNYM's claim is evaluated and that New York common law imposes *additional*, implied-in-law duties on BNYM as trustee that guide its actions under the PSAs. The securities exception applies so long as the claim at issue is at least in part "grounded in the terms of a document that creates and defines a security." *Greenwich*, 603 F.3d at 32.¹¹ And there can be no dispute that the Article 77

¹¹ The analysis in *Greenwich* and *Cardarelli* has been applied by a number of other courts, which likewise have interpreted the securities exception to cover claims that are "grounded in the terms of [a] security." *Bezich v. Lincoln Nat'l Life Ins. Co.*, 2010 WL 1382346, at *2 (N.D. Ind. Mar. 29, 2010), *appeal dismissed*, 610 F.3d 448 (7th Cir. 2010); *cf. New Jersey Carpenters Vacation Fund v. HarborView Mortg. Loan Trust 2006-4*, 581 F. Supp. 2d 581, 590 (S.D.N.Y. 2008) (applying

(footnote continued)

proceeding involves just such a claim—BNYM seeks a determination that its entry into the Settlement Agreement comports with its rights and duties under the PSAs, which unquestionably are securities-creating and securities-defining documents.

To avoid this conclusion, Walnut’s opposition to BNYM’s petition for permission to appeal attempted to recharacterize the Article 77 proceeding as one asserting “several claims for relief,” some of which Walnut said “expressly incorporate the New York common law obligation” to avoid conflicts of interest. Opp. 18. But the Article 77 proceeding requests an indivisible ruling and asserts a unitary claim: entry of a judgment pursuant to CPLR § 7701, which is New York’s statutory provision for “determin[ing] a matter relating to any express trust.” BNYM “advance[s] a single legal theory . . . applied to only one set of facts”—the evaluation of BNYM’s conduct as trustee under the PSAs in entering into the Settlement Agreement. *See Liberty Mut. Ins. Co. v. Wetzel*, 424 U.S. 737, 743 & n.4 (1976); *McNellis v. Merchants Nat’l Bank & Trust Co.*, 385 F.2d 916, 918-19 (2d Cir. 1967) (defining “claim” as the “aggregate of operative facts which give rise to a right enforceable in the courts”) (quotation marks omitted). It seeks a single, all-or-nothing, form of relief—a judicial determination that it acted

Cardarelli to reject argument that securities exception applied because the “claims [in that case did] *not* implicate the terms or meaning” of a security) (emphasis added).

reasonably as trustee under the PSAs in entering into the Settlement Agreement. There is no sense in which BNYM could “win” on a contract “claim,” for example, while “losing” on an implied-duty “claim.” Accordingly, Walnut’s attempt to read the proposed order as somehow asserting distinct state-law claims is wrong.¹²

b. The district court’s decision is erroneous for the related reason that its distinction between contractual and common-law rights and duties cannot be squared with the language of the statute. The statute expressly states that the securities exception is triggered by (among other things) claims relating to “fiduciary duties.” But such claims *necessarily* (at least in part) require consideration of common law standards.¹³ § 1332(d)(9)(C). If claims fall outside the securities exception simply because they involve consideration of legal principles beyond the instrument’s “bare text,” CAFA’s “fiduciary duties” parenthetical is either meaningless or nonsensical—an interpretation of the statute

¹² Walnut’s argument also fails on its own terms. Every single reference in BNYM’s claim to “applicable law”—which Walnut presumably views as the basis for a claim incorporating New York common law—is coupled with a reference to BNYM’s rights and duties under the “Governing Agreements,” or PSAs. However construed, the rights to be enforced in the Article 77 proceeding stem from the PSAs themselves.

¹³ *See EBC I, Inc. v. Goldman, Sachs & Co.*, 832 N.E.2d 26, 31 (N.Y. 2005) (“[F]iduciary ‘liability is not dependent solely upon an agreement or contractual relation between the fiduciary and the beneficiary but results from the relation.’”) (quoting RESTATEMENT (SECOND) OF TORTS § 874 cmt. b); *Apple Records, Inc. v. Capitol Records, Inc.*, 529 N.Y.S.2d 279, 282 (1st Dep’t 1998) (“the focus [in a fiduciary-breach action] is on whether a noncontractual duty was violated . . .”).

that “violates the cardinal principle of statutory construction that a statute ought . . . to be so construed that . . . no clause, sentence, or word shall be superfluous.” *United States v. Potes-Castillo*, 638 F.3d 106, 112 (2d Cir. 2011) (quotation marks omitted).

c. The district court’s “bare text” standard also is inconsistent with the holding in *Greenwich* that “[t]he fact that a certificate holder’s rights may be enumerated in an instrument other than the security itself is not material [to application of the securities exception].” 603 F.3d at 29. The Court explained that “[t]he focus of the inquiry is on the *source* of the right As long as a plaintiff’s claim seeks enforcement of a right that *arises from* an appropriate instrument, it falls within the exception.” *Id.* (emphasis added).

The district court interpreted *Greenwich* to require not only that the right or duty “arise” from the instrument but also that it be stated in “the bare text of the PSAs.” Order at 14-16 (JA 41-43). But *Greenwich* said no such thing. There, the Court applied the securities exception to preclude removal of claims against an entity that was not even a party to the PSAs in that case and where the “bare text” of the contracts did not mention the defendant at all; although proof of successor liability against that entity was an essential element of the removed claim, the Court found that to be a “collateral issue[]” that did not render the securities exception inapplicable. 603 F.3d at 31. Moreover, *Greenwich* applied the securities

exception to claims invoking an asserted duty that “d[id] not appear on the [security] certificates” (*id.*) and thus necessarily arose outside their “bare text.” For this reason, too, CAFA’s securities exception applies and bars the exercise of federal jurisdiction here. The Court should vacate the order denying remand to state court and return the case to the district court with directions that it be remanded to New York state court.

III. THIS CASE WAS NOT REMOVABLE AS A “MASS ACTION” BECAUSE BNYM’S CLAIM DOES NOT SEEK “MONETARY RELIEF” AND BECAUSE WALNUT IS NOT A “DEFENDANT.”

If the Court concludes that the securities exception does not apply, it will have appellate jurisdiction under § 1453(c)(1) to reach the merits of the other bases for BNYM’s appeal. We respectfully submit that, contrary to the decision below, this case was not properly removed under CAFA as a “mass action” and must be remanded to state court. Only cases in which “monetary relief claims” are proposed to be tried jointly are removable as “mass actions” under CAFA (§ 1332 (d)(11)(B)(i)), and only a “defendant” in the traditional sense of the word may remove under CAFA. §§ 1446(a), 1453(b); *First Bank v. DJL Props., LLC*, 598 F.3d 915, 917-18 (7th Cir.), *cert. denied*, 131 S. Ct. 506 (2010). Neither requirement is satisfied here.

BNYM’s Article 77 proceeding was instituted to obtain a judicial declaration that, by entering into a settlement with Countrywide, BNYM acted

reasonably as a trustee; this is a traditional office of equity. The district court nonetheless concluded that BNYM was asserting a claim for “monetary relief” in which Walnut, which will receive a portion of the settlement proceeds, is a “defendant.” Order at 9-10, 12-13 (JA 36-37, 39-40). Both elements of this conclusion are impossible to square with each other—as well as the statute and with governing case law. CAFA’s “monetary relief” language excludes claims that sound in equity, such as that asserted in the Article 77 proceeding; and Walnut—which is not the target of *any* claim by BNYM—is not a “defendant.”

A. The Article 77 Proceeding Does Not Seek “Monetary Relief.”

The district court concluded that BNYM’s Article 77 request for judicial guidance is a claim for “monetary relief” because one consequence of approval of the Settlement Agreement is that Countrywide will pay money into the trusts pursuant to the settlement. Order at 10 (JA 37). That conclusion misunderstands, and would vastly broaden, the mass action provision.

In the Article 77 proceeding, BNYM neither asserts a cause of action nor seeks a money judgment against Countrywide (which is not even a party to the action). The only matter placed at issue is whether BNYM, as trustee, acted reasonably under the PSAs in entering into the Settlement Agreement. To be sure, the parties to the Settlement Agreement envision money changing hands if

BNYM's conduct is approved in the Article 77 proceeding, but that payment will be made pursuant to a *contract* entered into by Countrywide.

That dispositive fact is not changed by language in the proposed order submitted in the Article 77 proceeding, noted by Walnut in its opposition to the petition (at 12-13), that directs that the Settlement Agreement be "consummate[d]." JA 166. All that language could possibly mean is that BNYM has obtained the judicial approval for the settlement that is a condition precedent for payment by Bank of America and Countrywide. If those entities refuse to make good on that obligation, their default would not be remediable by enforcement of the order issued in the Article 77 proceeding; instead, BNYM would have to bring a *separate* breach-of-contract action to obtain an enforceable judgment against them.

The Article 77 proceeding thus is not, in any ordinary use of the language, a claim for "monetary relief" within the meaning of CAFA. It does not seek to impose liability on Countrywide (or on anyone else), and the district court's characterization of the proposed order as a "court-ordered transfer of \$8.5 billion" is materially inaccurate. *Cf.* Order at 10 (JA 37). Indeed, because Countrywide is not even a party to the Article 77 proceeding (JA 130, 162), the court entertaining that proceeding *could not* order any relief against it, let alone award "monetary relief"; it is elementary that a judgment cannot be "binding on a litigant who was

not a party or privy.” *Telenor Mobile Commc’ns AS v. Storm LLC*, 584 F.3d 396, 410 (2d Cir. 2009) (quotation marks omitted).

And beyond the particulars of this case, there can be no serious dispute that, as the district court itself acknowledged, matters of trust administration are generally equitable in nature. Order at 9 (JA 36). In fact, Article 77 embodies a centuries-old procedure, the petition for instructions, under which the “*equitable* powers of courts having jurisdiction over trusts” include the “power to grant instructions to trustees.” Restatement (Third) of Trusts § 71 cmt. a (2007) (emphasis added); *see, e.g., Mosser v. Darrow*, 341 U.S. 267, 274 (1951). And CAFA uses the phrase “monetary relief” as a term of art that “does not extend to actions seeking solely equitable relief.” *Lowery*, 483 F.3d at 1202 n.45; *Kitzato v. Black Diamond Hospitality Invs., LLC*, 2009 WL 3824851, at *5 (D. Haw. Nov. 13, 2009).¹⁴

Thus, a claim seeking equitable relief is not transformed into one seeking “monetary relief” within the meaning of CAFA simply because the likely *effect* of an order issued by a court sitting in equity is that money will later change hands; only a claim that requests a money judgment is removable under CAFA’s mass

¹⁴ This distinction comports with longstanding usage. *See, e.g., United States v. Tohono O’Odham Nation*, 131 S. Ct. 1723, 1729 (2011) (noting absence of “[r]emedial overlap” between “monetary relief” and “equitable relief”); *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 255 (1993) (contrasting “monetary relief” with “other appropriate equitable relief”).

action provision. The district court’s contrary ruling, under which any claim that could result in the payment of money is a “monetary relief claim,” would both cause great uncertainty about what claims qualify as ones for monetary relief (leaving unclear how close the nexus must be between the court’s order and the ultimate payment of money) and sweep into federal court numerous cases seeking only declaratory or injunctive relief that are far removed from the kind of case that prompted Congress to enact CAFA.¹⁵

B. Walnut Is Not A “Defendant.”

There is another flaw in the district court’s decision: Only a “defendant” in the traditional sense of the word may remove under CAFA. §§ 1446(a), 1453(b); *First Bank*, 598 F.3d at 917-18 (explaining that CAFA used the “unadorned word ‘defendant,’ a word with a settled meaning” under the removal statutes); *accord Palisades Collections LLC v. Shorts*, 552 F.3d 327, 336 (4th Cir. 2008);

¹⁵ None of the decisions cited by the district court supports a more expansive definition of monetary relief. *FTC v. Bronson Partners, LLC*, 654 F.3d 359 (2d Cir. 2011), addressed the court’s power to issue an ordinary “money judgment . . . once its equitable jurisdiction has been invoked,” pursuant to its “power . . . to award complete relief.” *Id.* at 366 (quotation marks omitted). *DiTolla v. Doral Dental IPA of New York, LLC*, 469 F.3d 271 (2d Cir. 2006), merely noted that “a request for an accounting [which is a ‘distinct cause of action rooted in equity’] typically accompanies a demand for restitution or other monetary relief.” *Id.* at 275. Finally, although *Bowen v. Massachusetts*, 487 U.S. 879 (1988), stated that “money damages” are not necessarily coextensive with “monetary relief,” it did not hold that any claim that might ultimately lead to money changing hands involves “monetary relief.”

Progressive W. Ins. Co. v. Preciado, 479 F.3d 1014, 1018 (9th Cir. 2007). Because CAFA “adher[ed] to the narrow and historical interpretation of ‘defendant,’ *Westwood Apex v. Contreras*, 644 F.3d 799, 807 (9th Cir. 2011), Walnut is empowered to remove the Article 77 proceeding only if it is a defendant in that sense—that is, a “part[y] against whom [BNYM] asserts claims.” *Fed. Ins. Co. v. Tyco Int’l Ltd.*, 422 F. Supp. 2d 357, 373 (S.D.N.Y. 2006) (quoting *First Nat’l Bank v. Curry*, 301 F.3d 456, 462-63 (6th Cir. 2002) (citing in turn *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941))).¹⁶ That assuredly is not the case here: Walnut is not the target of *any* claim.

The district court disagreed with this premise, stating that it does not matter that, far from being the target of a claim, “Walnut . . . will receive a payment . . . if the settlement is approved” because Walnut “has assumed a position adverse to BNYM” on the merits of the settlement. Order at 12 (JA 39). In reaching this conclusion, the court acknowledged that shareholders who object to a corporation’s settlement of a derivative suit are not “defendants” for removal purposes. *Ackert v. Ausman*, 217 F. Supp. 934, 936 (S.D.N.Y. 1963). But it sought to distinguish that principle on the ground that Walnut was not “aligned as [a] plaintiff[]” alongside

¹⁶ CAFA’s language supports the conclusion that Congress envisioned a “defendant” to be a party “from whom . . . relief is sought by . . . the plaintiff,” “whose alleged conduct forms a . . . basis for the claims asserted by the . . . plaintiff,” whose “alleged conduct or any related conduct” results in “injuries,” and “against whom the district court may . . . order[] relief.” § 1332(d)(4)-(5).

BNYM because the Article 77 proceeding “seeks to settle the trusts’ claims” against Countrywide over Walnut’s objection. Order at 12-13 (JA 39-40).

But in the context here, this conclusion is wrong. Walnut is doubtless unhappy with the relief sought in the Article 77 proceeding by BNYM. But that does not mean that BNYM is seeking relief *against* Walnut—and the conclusion that it is directly contradicts the district court’s characterization of the relief sought in the Article 77 proceeding as “monetary.” If that proceeding were actually about “try[ing] jointly the claims for monetary relief of the trusts” against Countrywide (as Walnut’s Removal Petition asserts at ¶ 11 (JA 123)) and securing a “court-ordered transfer of \$8.5 billion” from Countrywide to the trusts, Order at 10 (JA 37), Countrywide would be the only conceivable entity against which the claims are asserted. There simply are no other “defendants” against whom *any* form of relief is sought. And in particular, Walnut, which would *receive* money (indirectly) from Countrywide, would in *no* sense be a “defendant.”

Conversely, if Walnut is a defendant because it opposes the relief sought by BNYM in the Article 77 proceeding, then that is not a proceeding to obtain monetary relief. Thus, Walnut cannot simultaneously show that the Article 77 proceeding seeks “monetary relief” *and* that it is a “defendant.”

CONCLUSION

The Court should reverse the district court's order denying remand and direct the remand of this case to New York state court.

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Dated: January 17, 2012
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RULE 28(f) STATUTORY ADDENDUM

28 U.S.C. § 1332. Diversity of citizenship; amount in controversy; costs

* * *

(d)(1) In this subsection—

(A) the term “class” means all of the class members in a class action;

(B) the term “class action” means any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action;

(C) the term “class certification order” means an order issued by a court approving the treatment of some or all aspects of a civil action as a class action; and

(D) the term “class members” means the persons (named or unnamed) who fall within the definition of the proposed or certified class in a class action.

(2) The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of \$5,000,000, exclusive of interest and costs, and is a class action in which—

(A) any member of a class of plaintiffs is a citizen of a State different from any defendant;

(B) any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State; or

(C) any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state.

* * *

(4) A district court shall decline to exercise jurisdiction under paragraph (2)—

(A)

(i) over a class action in which—

(I) greater than two-thirds of the members of all proposed plaintiff classes in the aggregate are citizens of the State in which the action was originally filed;

(II) at least 1 defendant is a defendant—

(aa) from whom significant relief is sought by members of the plaintiff class;

(bb) whose alleged conduct forms a significant basis for the claims asserted by the proposed plaintiff class; and

(cc) who is a citizen of the State in which the action was originally filed; and

(III) principal injuries resulting from the alleged conduct or any related conduct of each defendant were incurred in the State in which the action was originally filed; and

(ii) during the 3-year period preceding the filing of that class action, no other class action has been filed asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons; or

(B) two-thirds or more of the members of all proposed plaintiff classes in the aggregate, and the primary defendants, are citizens of the State in which the action was originally filed.

* * *

(9) Paragraph (2) shall not apply to any class action that solely involves a claim—

(A) concerning a covered security as defined under 16(f)(3) of the Securities Act of 1933 (15 U.S.C. 78p(f)(3)) and section 28(f)(5)(E) of the Securities Exchange Act of 1934 (15 U.S.C. 78bb(f)(5)(E));

(B) that relates to the internal affairs or governance of a corporation or other form of business enterprise and that arises under or by virtue of the laws of the State in which such corporation or business enterprise is incorporated or

organized; or

(C) that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security (as defined under section 2(a)(1) of the Securities Act of 1933 (15 U.S.C. 77b(a)(1)) and the regulations issued thereunder).

* * *

(11)

(A) For purposes of this subsection and section 1453, a mass action shall be deemed to be a class action removable under paragraphs (2) through (10) if it otherwise meets the provisions of those paragraphs.

(B)(i) As used in subparagraph (A), the term “mass action” means any civil action (except a civil action within the scope of section 1711(2)) in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact, except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under subsection (a).

(ii) As used in subparagraph (A), the term “mass action” shall not include any civil action in which—

(I) all of the claims in the action arise from an event or occurrence in the State in which the action was filed, and that allegedly resulted in injuries in that State or in States contiguous to that State;

(II) the claims are joined upon motion of a defendant;

(III) all of the claims in the action are asserted on behalf of the general public (and not on behalf of individual claimants or members of a purported class) pursuant to a State statute specifically authorizing such action; or

(IV) the claims have been consolidated or coordinated solely for pretrial proceedings.

(C)(i) Any action(s) removed to Federal court pursuant to this subsection shall not thereafter be transferred to any other court pursuant to section 1407, or the rules promulgated thereunder, unless a majority of the plaintiffs in the action request transfer pursuant to section 1407.

(ii) This subparagraph will not apply—

(I) to cases certified pursuant to rule 23 of the Federal Rules of Civil Procedure; or

(II) if plaintiffs propose that the action proceed as a class action pursuant to rule 23 of the Federal Rules of Civil Procedure.

(D) The limitations periods on any claims asserted in a mass action that is removed to Federal court pursuant to this subsection shall be deemed tolled during the period that the action is pending in Federal court.

* * *

28 U.S.C. § 1441. Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

* * *

28 U.S.C. § 1446. Procedure for removal

(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.

(b) The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.

* * *

28 U.S.C. § 1453. Removal of class actions

(a) Definitions.—In this section, the terms “class”, “class action”, “class certification order”, and “class member” shall have the meanings given such terms under section 1332(d)(1).

(b) In general.—A class action may be removed to a district court of the United States in accordance with section 1446 (except that the 1-year limitation under section 1446(b) shall not apply), without regard to whether any defendant is a citizen of the State in which the action is brought, except that such action may be removed by any defendant without the consent of all defendants.

(c) Review of remand orders.—

(1) In general.—Section 1447 shall apply to any removal of a case under this section, except that notwithstanding section 1447(d), a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand a class action to the State court from which it was removed if application is made to the court of appeals not more than 10 days after entry of the order.

(2) Time period for judgment.—If the court of appeals accepts an appeal under paragraph (1), the court shall complete all action on such appeal, including rendering judgment, not later than 60 days after the date on which such appeal was filed, unless an extension is granted under paragraph (3).

(3) Extension of time period.—The court of appeals may grant an extension of the 60-day period described in paragraph (2) if—

(A) all parties to the proceeding agree to such extension, for any period of time; or

(B) such extension is for good cause shown and in the interests of justice, for a period not to exceed 10 days.

(4) Denial of appeal.—If a final judgment on the appeal under paragraph (1) is not issued before the end of the period described in paragraph (2), including any extension under paragraph (3), the appeal shall be denied.

(d) Exception.—This section shall not apply to any class action that solely

involves—

- (1) a claim concerning a covered security as defined under section 16(f)(3) of the Securities Act of 1933 (15 U.S.C. 78p(f)(3) [FN1]) and section 28(f)(5)(E) of the Securities Exchange Act of 1934 (15 U.S.C. 78bb(f)(5)(E));
- (2) a claim that relates to the internal affairs or governance of a corporation or other form of business enterprise and arises under or by virtue of the laws of the State in which such corporation or business enterprise is incorporated or organized; or
- (3) a claim that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security (as defined under section 2(a)(1) of the Securities Act of 1933 (15 U.S.C. 77b(a)(1)) and the regulations issued thereunder).

CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7), because it contains 9458 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because it has been prepared using Microsoft Word 2007 in 14-point Times New Roman.

Dated: January 17, 2012

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 17th day of January 2012, I caused the foregoing to be served on all parties required to be served by filing the foregoing via CM/ECF, which constitutes service on all Filing Users, *see* 2d Cir. L.R. 25.1(h).

Dated: January 17, 2012

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