

No. 11-4571

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,

v.

WALNUT PLACE LLC *et al.*,

Intervenors-Respondents.

Petition to Appeal
From the United States District Court for the
Southern District of New York
No. 1:11-cv-05988-WHP

REPLY IN SUPPORT OF PETITION FOR PERMISSION TO APPEAL ORDER DENYING REMAND PURSUANT TO 28 U.S.C. § 1453(c)(1)

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Walnut makes no effort at all to deny either the truly extraordinary practical importance of this case or its striking differences from the type of mass action Congress contemplated when enacting CAFA, and offers no serious reason to doubt the recurring and consequential nature of the CAFA issues presented in the petition. Instead, Walnut contends principally that this Court lacks jurisdiction over the appeal. But this argument is insubstantial: it proposes a tortured interpretation of the statutory text to reach an absurd result that Congress surely did not intend and that has not been embraced by any of the five courts of appeals that have entertained CAFA mass-action appeals in like circumstances. Because the make-weight arguments that Walnut offers on the questions actually presented in the petition are—to say the least—no better than “fairly debatable,” immediate review by this Court is warranted.

I. The Court Has Jurisdiction To Entertain BNYM’s Appeal Of The District Court’s Remand Order.

A. Section § 1453(c)(1) Authorizes Interlocutory Appeals Of Remand Orders In Cases Removed As Mass Actions.

Walnut devotes the most attention to its argument that § 1453(c)(1) does not confer appellate jurisdiction over remand orders in “mass actions,” as opposed to traditional class actions. Opp. 5-10. This argument is wrong: it would work a nonsensical departure from the plain statutory text.

In fact, the language of the statute clearly authorizes this appeal. 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 contends 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* [*i.e.*, § 1332(d), which includes the class action definition] *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” *is* a “class action” for purposes of § 1453—including § 1453(c)(1)’s reviewability provision.

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 coextensive with what counts as a “class action” for purposes of § 1453(c)(1) (which authorizes interlocutory appellate review). *See Nat’l Credit Union Admin. v. First Nat’l Bank & Trust Co.*, 522 U.S. 479, 501 (1998) (“similar language contained within the same section of a statute must be accorded a consistent meaning”). 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 instance.

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 paraphrases § 1332(d)(11)(A) as stating that “mass actions shall be ‘deemed’ to be class actions for purpose of removal only.” Opp. 6. But the statute actually says nothing of the sort. In fact, that subsection provides that a mass action “shall be deemed” a “class action removable under paragraphs (2) through (10)” “[f]or purposes of [§ 1332(d)] and [§] 1453.” There is no dispute that a *traditional* “class action removable under paragraphs (2) through (10)” is subject to interlocutory appellate review under § 1453(c)(1). It follows that a 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 had intended the strange result Walnut proposes, it certainly picked an obscure way of saying what it could have said directly in § 1453(c)(1).

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 46.¹ And that is not surprising: Congress could not possibly have wanted to limit

¹ Congress equated mass actions with class actions in other respects as well. For example, § 1332(d)(11)(D) tolls statutes of limitations while a mass action is pending in federal court, which parallels the tolling rule for class actions under

appellate review of remand orders in CAFA-removed cases to traditional “class actions.” 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 49. That being so, it would be passing strange for Congress to have impeded the development of law regarding CAFA’s newly created category of “mass actions,” where guidance is *most* needed. Thus, although Walnut has pointed to certain ways (immaterial here) in which traditional class actions and mass actions differ (Opp. 8-9), it offers no basis for differentiating the availability of appellate review for the two forms of potentially removable actions.²

American Pipe & Construction Co. v. Utah, 414 U.S. 538 (1974). The fact, relied on by Walnut (Opp. 9), that Congress did not gratuitously state a redundant rule for class actions lends no support to its position.

² 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 (7th Cir. 2011) (Posner, J.); *Tanoh v. Dow Chem. Co.*, 561 F.3d 945 (9th Cir. 2009); *Lowery v. Ala. Power Co.*, 483 F.3d 1184 (11th Cir. 2007). Walnut’s argument presumes that each of these courts ignored “clear” and “plain” statutory language denying them appellate jurisdiction. Opp. 6, 7, 8.

B. The Court May Reach The Applicability Of CAFA’s “Securities Exception” In This Appeal.

For several reasons, Walnut is equally wrong in its other jurisdictional argument—that a decision by this Court finding the securities exception applicable here would have no practical effect. Opp. 10-11.

First, there can be no question that, as *Greenwich* itself made clear, this Court has “jurisdiction to determine [its] jurisdiction.” *Greenwich*, 603 F.3d at 27. If the Court were to exercise jurisdiction and hold that the securities exception applies, that would mean that the district court does not, and never did, have subject matter jurisdiction. *See id.* (§ 1453(c)(1) exception is “identical to the . . . exception[] to CAFA’s grant of original federal diversity jurisdiction”). And if this Court reaches that conclusion, it is empowered to direct the district court to remand the action to state court for want of subject matter jurisdiction under CAFA. *See, e.g., U.S. Bancorp Mortg. Co. v. Bonner Mall P’ship*, 513 U.S. 18, 21 (1994) (that appellate court lacks jurisdiction for want of standing does not prevent it 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”).

Conversely, the Court would have jurisdiction to reach the mass-action issues only if it were first to agree with the district court’s ruling that the securities exception does not apply. Thus, Walnut is plainly in error in suggesting that the Court may properly just skip the securities-exception issue.

Second, even if this Court lacks the authority to order a remand if the securities exception applies, Walnut would be wrong in contending that the Court “would have to deny the petitions” and “the case would proceed in the district court.” Opp. 11. Again, this Court has jurisdiction to determine its jurisdiction, and a holding that the securities exception applies in the circumstances here—and thus that the federal courts lack jurisdiction over such cases—would settle the law, resolving a legal issue of great importance. And were that to happen, the case surely would *not* “proceed in the district court”; a definitive 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).

Third, if there is any doubt on these points, the Court could, “without deciding whether [it] ha[s] appellate jurisdiction,” treat BNYM’s appeal as a petition for a writ of mandamus and “vacate the order[] below to the extent that [it] find[s] jurisdiction.” *Stein v. KPMG, LLP*, 486 F.3d 753, 759, 764 (2d Cir. 2007). The mandamus cases that Walnut cites (Opp. 10 n.4) are inapposite, as none addressed the unusual situation where this Court’s determination that it lacks appellate jurisdiction *necessarily* means that the district court’s exercise of jurisdiction was erroneous. Mandamus to correct the district court’s error in this action therefore surely is available, either now or in the highly improbable event

that the district court “proceeded” notwithstanding this Court’s determination that it has no jurisdiction because the securities exception applies. *Cf.* Opp. 11.

II. The District Court’s Ruling Is Erroneous And Calls For This Court’s Immediate Attention.

When Walnut finally reaches the merits of the district court’s order denying BNYM’s motion to remand, it has very little to say. None of its arguments comes to grips with the points made in the petition; if anything, they confirm the need for clarification of the law by this Court.

A. The Securities Exception Applies.

At the outset, Walnut, like the district court, misreads the securities exception to require that the claim at issue relate *exclusively* to rights, duties, and obligations that are related to, or created by or pursuant to, a security. Thus, Walnut focuses on the question whether New York common law imposes *additional*, implied-in-law duties on BNYM as trustee that address how it carries out its responsibilities under the PSAs. But it does not matter whether New York law is “central” or must be “appl[ied]” to resolve BNYM’s claim. Opp. 17. As the Petition explains (at 10-12), this Court made clear in *Greenwich* that the “broad” and “expansive language” of the securities exception is irreconcilable with limiting it “only to class actions that involve no legal issues extraneous to the primary claim.” 603 F.3d at 31. 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.” *Id.* at 32. And it cannot seriously be disputed that the Article 77 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 -defining documents.

To avoid this conclusion, Walnut tries to recharacterize the Article 77 proceeding as one asserting “several claims for relief,” some of which Walnut says “expressly incorporate the New York common law obligation” to avoid conflicts of interest. Opp. 18. But that proceeding requests a *indivisible* ruling and asserts a *unitary* claim: entry of a judgment pursuant to N.Y. C.P.L.R. § 7701, which is New York’s statutory provision for “determin[ing] a matter relating to any express trust.” A58, 60. It matters not that the proposed order seeks “multiple remedies” or “several different types of relief” because 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. *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”). Accordingly, Walnut’s attempt to read the proposed order as somehow asserting distinct state-law claims is wrong.

Furthermore, Walnut’s argument 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. The securities exception thus applies.

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

Walnut also is incorrect in contending that this action is one for monetary relief. Opp. 12. Because Countrywide and Bank of America are not even parties to the Article 77 proceeding (A28), the court entertaining that proceeding *could not* order any relief against them, let alone award “monetary relief” by “direct[ing] Bank of America and Countrywide to . . . pay[] \$8.5 billion.” Opp. 13. 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).

To be sure, as Walnut notes (Opp. 13), the proposed order submitted in the Article 77 proceeding directs that the underlying settlement be “consummate[d].” But as the Petition explains, all that language could possibly mean is that BNYM is a party to a contract under which it is entitled to payment from Bank of America and Countrywide. Pet. 16. If those entities refuse to satisfy that obligation, they would not be subject to 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 itself thus is not, by any stretch of the language, a claim for “monetary relief” within the meaning of CAFA.

C. Walnut Is Not A Defendant.

Finally, the Petition noted that Walnut cannot be a “defendant” if the suit truly is one that asserts a “monetary relief claim”; Walnut is not a “defendant” as to a claim that (purportedly) seeks to compel Bank of America and Countrywide to pay it money. Pet. 19. Walnut’s only response is the *non sequitur* that CAFA does not require the plaintiff to “seek[] monetary relief from the defendant that files the notice of removal.” Opp. 16. That misses that point: *Walnut is not a “defendant” at all.* In the CAFA context the defendant must be a target of *some* claim for relief, Pet. 18 & n.11, and if the Article 77 proceeding is one for “monetary relief” the *only* conceivable entities from which that relief even arguably is being sought are Bank of America and Countrywide. There simply are no other “defendants” against whom *any* form of relief is sought. The logic is inexorable: Even if this case presents a claim for monetary relief, Walnut is not a defendant.

CONCLUSION

The Court should grant the petition to appeal and, following briefing and argument, reverse the district court’s order denying BNYM’s motion to remand.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5), the typestyle requirements of Fed. R. App. P. 32(a)(6), and the form requirements of Fed. R. App. P. 32(c)(2), because the brief has been prepared using Microsoft Word 2007 in 14-point Times New Roman.

Dated: November 21, 2011

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 21st day of November 2011, 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); and
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