

No. _____

**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

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

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CORPORATE DISCLOSURE STATEMENT

The Bank of New York Mellon (“BNYM”) 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 discussed below: 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 the “defendant.”

Here, the district court’s denial of BNYM’s motion to remand this case to state court misapplied each of these limits on federal jurisdiction in a manner that both will cause pervasive confusion in the administration of CAFA and undermine the clear statutory purpose. Its decision states a rule that will eviscerate CAFA’s “securities exception,” in the process misstating the principle of this Court’s recent decision in *Greenwich Fin. Servs. Distressed Mortg. Fund 3 LLC v. Countrywide Fin. Corp.*, 603 F.3d 23 (2d Cir. 2010); it also invites manipulation and the tortured recharacterization of pleadings so as to circumvent CAFA’s other express limits on the exercise of federal jurisdiction. Because interlocutory review of decisions concerning removal under CAFA is appropriate when, as here, the question presented is “important and consequential, and a decision [by this Court] will

alleviate uncertainty in the district courts” (*Estate of Pew v. Cardarelli*, 527 F.3d 25, 29 (2d Cir. 2008))—and because the questions here arise in a case that is itself immensely important, involving the status of an \$8.5 billion settlement—immediate review by this Court pursuant to 28 U.S.C. § 1453(c)(1) is imperative.¹

QUESTION PRESENTED

Whether the Court should hear this appeal of the denial of BNYM’s motion to remand the removed proceeding to state court. The following are among the issues that would be raised on the appeal:

1. Whether a claim falls outside CAFA’s securities exception—which precludes the exercise of federal jurisdiction over certain claims that “relate[]” to rights or duties created by a security—simply because New York common law imposes implied duties on the indenture-trustee relationship created by the securities contracts at issue.

2. Whether a request under CPLR Article 77 for a judicial determination that a trustee acted reasonably in settling trust claims is a claim for “monetary relief” within the meaning of CAFA’s “mass action” provision.

3. Whether investors in such trusts who chose to participate in the action because they object to the settlement may remove the case as “defendants.”

¹ All further federal statutory references are to Title 28 of the United States Code.

RELIEF SOUGHT

BNYM asks this Court to accept an appeal of the district court's ruling, reverse the district court's order, and direct the remand of this case to New York state court.²

FACTUAL BACKGROUND

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. Order at 1-2 (A1-2); Art. 77 Pet. ¶¶ 2-3 (A29). Countrywide Home Loans, Inc. and various affiliates, now owned by Bank of America Corporation (collectively, "Countrywide"), is a counterparty to these PSAs, having conveyed residential mortgages into the trusts. Order at 2 (A2). Investors purchased certificates or notes evidencing various categories of ownership interest in the trusts. *Id.*

Beginning in June 2010 and continuing through October 2010, a group of these investors (the "Institutional Investors"), eventually numbering 22 and

² The Court may "grant [the] petition for leave to appeal . . . [and] elect to decide the merits of the appeal simultaneously." *Cardarelli*, 527 F.3d at 29. Given the importance of the issues presented, however, we submit that the Court's consideration of the case would be materially assisted by expedited plenary briefing on the merits if the Court agrees to entertain the appeal.

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 (now BAC Home Loans Servicing LP) had failed to comply with its obligations. Order at 1-3 (A1-3); PSA § 2.03 (A80). The investors maintained that the PSAs obligated Countrywide to repurchase noncomplying and defaulting mortgages. Order at 2-3 (A2-3).

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 (A72, 82) (assignment of rights); *id.* §§ 8.01-8.02 (A84-86) (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 (A87)), any more than a shareholder may sue on a corporation's claim.

In November 2010, BNYM, Countrywide, Bank of America, and the Institutional Investors commenced settlement discussions. Order at 3 (A3). In June 2011, BNYM reached an agreement with Countrywide (the "Settlement

Agreement”) to resolve claims seeking to enforce repurchase and servicing obligations under the PSAs, pursuant to which BNYM serves as trustee. *Id.* at 4 (A4). 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, along with other relief that would have been impossible to obtain through litigation. *Id.* at 5 (A5); Art. 77 Pet. ¶ 11 (A32).

B. The Article 77 Proceeding And Remand

1. A condition precedent to implementation of the Settlement Agreement is the entry of a judgment approving the settlement by the New York State Supreme Court pursuant to CPLR Article 77, which provides a mechanism for resolving questions relating to trust administration. Accordingly, on June 29, 2011, BNYM initiated this Article 77 proceeding in New York state court. Order at 4 (A4). 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 (A57-58). As a corollary to that determination, BNYM’s Proposed Final Order and Judgment directs the “consummat[ion]” of the Settlement Agreement, A64, and extinguishes all claims by investors relating to the settlement. A67-69; Order at 5 (A5). No claim for money damages is asserted in the Article 77 proceeding. *See generally* A60-70.

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 (A5). In accordance with this order, BNYM implemented an extensive program to provide notice of the settlement to beneficiaries of the trusts. A number of trust beneficiaries intervened in the Article 77 proceeding, some in support of the settlement (*e.g.*, the Institutional Investors) and others to oppose it.

Walnut Place LLC intervened to oppose the settlement. On August 4, it 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 (A8). 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.” Order at 5 (A5). Justice Kapnick also denied Walnut’s request for an extension of the August 30 deadline for lodging objections.

2. On August 26, after receiving these unfavorable preliminary rulings, Walnut removed the Article 77 proceeding to federal district court, invoking CAFA’s “mass action” provision, § 1332(d)(11). Dkt. No. 1 (A22-27). BNYM, joined by the Institutional Investors, promptly 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. The court 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 (A21).³ In so saying, the court may have overlooked that BNYM, the only bank party to the proceeding, is a *New York*-chartered bank.

REASONS THE APPEAL SHOULD BE ALLOWED

Under CAFA, a court of appeals may “accept an appeal” of a district court’s order “granting or denying a motion to remand” if “application is made to the court of appeals” within ten days of the order’s entry. § 1453(c)(1). This “discretion granted under [§] 1453(c) [to hear interlocutory CAFA removal appeals] is designed, in large part, to develop a body of appellate law interpreting” CAFA. *Coll. of Dental Surgeons of P.R. v. Conn. Gen. Life Ins. Co.*, 585 F.3d 33, 38 (1st Cir. 2009) (quotation marks omitted). And “[a] sound exercise of [this] discretion will be guided by consideration of the importance and novelty of the issues raised by the case.” *Cardarelli*, 527 F.3d at 29; *see also Coleman v. Estes Express Lines, Inc.*, 627 F.3d 1096, 1100 (9th Cir. 2010) (“[i]f the CAFA-related question is

³ Although there had been no fact-finding or discovery below, 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). While space limitations prevent addressing this point in detail here, BNYM strongly takes issue with these characterizations.

unsettled, immediate appeal is more likely to be appropriate, particularly when the question ‘appears to be either incorrectly decided [by the court below] or at least fairly debatable’”).

Here, these factors weigh heavily in favor of granting the petition for review: The district court’s decision unquestionably is important, consequential, and (at a minimum) fairly debatable. That ruling leaves the law governing CAFA’s exceptions confused in significant respects. It raises doubt about the proper interpretive approach to the CAFA mass-action provision—an important element of the statute that this Court has yet to address. And a determination that the district court lacks jurisdiction made *after* final judgment could well come too late to save a settlement that is both of unparalleled practical significance and, in BNYM’s view, widely beneficial.

The acute need for immediate review is confirmed by looking at the particulars of the district court’s ruling. It held that 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 (A16). But because “any securities claim under state law will necessarily ‘involve’” issues that look beyond the bare text of the instrument, the district court’s reading of the securities exception leaves it “essentially meaningless.” *Greenwich*, 603 F.3d at 31-32. The ruling below thus has wide-reaching implications, opening the federal courts to

virtually *all* class actions involving securities; by their nature, such cases inevitably involve *some* state-law questions of contract interpretation or implied duty. Because this issue is important and recurring, and particularly given this Court’s central role in establishing the Nation’s law relating to securities, guidance from this Court on this important element of the congressional scheme is essential.

The decision below also has other highly debatable aspects that require this Court’s immediate attention. The district court concluded that a proceeding brought to obtain approval of a settlement entered into by a trustee—a traditional office of equity—asserts a claim for “monetary relief” in which the parties who will receive the settlement proceeds are “defendants.” Order at 9-10, 12-13 (A9-10, 12-13). But both elements of this conclusion leave the governing standard uncertain: Other courts properly have interpreted CAFA’s “monetary relief” language to exclude equitable claims; and it is not apparent what principle makes Walnut—which is not the target of *any* claim—a “defendant.” If these confusing and questionable rules are to be the law, they should be stated by this Court.

A. CAFA’s Securities Exception Requires Remand

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). Judge Pauley agreed 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 (A16) (quoting *Greenwich*, 603 F.3d at 30). But he deemed the securities exception inapplicable because the Article 77 proceeding would “necessarily involve[] New York common law”—*i.e.*, BNYM’s “duty [as trustee] to avoid conflicts of interest”—and “not simply the terms of the PSAs.” *Id.* at 17, 19 (A17, 19). That holding rests on a plain misreading of the statute and governing precedent.

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 requirements is satisfied.

First, the Article 77 proceeding “solely involves” a claim that relates to a security: the *single* claim BNYM asserts seeks judicial guidance on whether its entry into the Settlement Agreement is consistent with its rights and duties 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 the alleged breach of its obligations under the PSAs. PSA §§ 2.01, 2.04, 10.08 (A72, 82, 87); *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 we have noted, all parties 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 the question in this case.

2. In rejecting this plain reading of CAFA, the district court reasoned that, although the Article 77 proceeding concerns the reasonableness of BNYM’s exercise of its contractual rights and duties as trustee under the PSAs, BNYM’s 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. But this analysis guts the securities exception and calls into question the import of one of this Court’s decisions.

First, a claim need not relate *exclusively* to securities-based rights, duties, and obligations 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. And “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 (A16); *accord id.* at 19 (A19). That holding misunderstands this Court’s direction: because the claim here arises in the first instance from the PSAs,⁴ it is immaterial that the claim might *also* touch on other, ancillary rights and duties.⁵

⁴ The “source of the right that the [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, to BNYM as trustee, *id.* §§ 2.01(b), 2.04; and define BNYM’s duties as trustee, *id.* §§ 8.01-8.02. *See* A72-86. The Article 77 proceeding seeks judicial approval of 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. *Accord Cardarelli*, 527 F.3d at 33 (securities exception applies to suits involving “duties imposed on persons who administer securities”).

⁵ 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.”

Second, the district court’s decision is erroneous for the related reason that its distinction between contractual and common-law rights and duties is *foreclosed* by the language of the statute. In fact, the securities exception expressly is triggered by (among other things) claims relating to “fiduciary duties,” which *necessarily* are (at least in part) non-contractual in nature.⁶ § 1332(d)(9)(C). If claims fall outside the securities exception simply because they involve a relationship that is subject to implied duties and require consideration of materials beyond the instrument’s “bare text,” CAFA’s “fiduciary duties” parenthetical is either meaningless or nonsensical—an interpretation of the statute 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). The district court’s decision leaves in doubt what this CAFA language means.

Third, the district court’s “bare text” standard also is inconsistent with the Court’s holding in *Greenwich* that “[t]he fact that a certificate holder’s rights may

Greenwich, 603 F.3d at 31-32 (emphasis added).

⁶ 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) (“[T]he focus [in a fiduciary-breach action] is on whether a noncontractual duty was violated . . .”).

be enumerated in an instrument other than the security itself is not material [to application of the securities exception].” *Greenwich*, 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 (A14-16). But *Greenwich* said no such thing. There, the Court applied the exception to preclude removal of claims against an entity that was not even a party to the PSAs 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 exception to claims invoking an asserted duty that “d[id] not appear on the [security] certificates” themselves (*id.*) and thus necessarily arose outside their “bare text.” For this reason, too, the securities exception applies and bars the exercise of CAFA jurisdiction—and the district court’s contrary decision leaves the meaning of *Greenwich* uncertain.⁷

⁷ This Court recognized in *Greenwich* that, because the securities exception applies both to CAFA’s special provision authorizing appellate review of remand orders, § 1453(c)(1), and to CAFA jurisdiction itself, § 1453(d)(3), “if the district court

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

The need for this Court’s guidance is not confined to the securities exception. Only cases in which “monetary relief claims” are proposed to be tried jointly may be removed under CAFA’s mass action provision. § 1332(d)(11)(B)(i). 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 (A10). 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 issue that will be litigated in the proceeding is whether BNYM acted reasonably in entering into the Settlement Agreement as trustee pursuant to the PSAs. To be sure, the parties envisioned money changing hands upon the

lacked CAFA jurisdiction over the class action because it falls within the [securities] exception, [the court of appeals] similarly lack[s] jurisdiction to review the order remanding the action.” 603 F.3d at 27. That is not an obstacle to exercising review here, however, because (as also noted in *Greenwich*), this Court always has “jurisdiction to determine [its] jurisdiction.” *Id.* The Court accordingly has the authority to determine that the securities exception applies to this case—a determination that necessarily will establish that the case must be remanded to state court. If the Court wishes to direct remand of the case but is unsure about its authority to do so under its appellate jurisdiction, it could exercise its mandamus authority. *See Stein v. KPMG, LLP*, 486 F.3d 753, 759 (2d Cir. 2007).

conclusion of the Article 77 proceeding, but that is because Countrywide is *contractually* committed to pay; the action does not seek to impose liability on Countrywide (or on anyone else), and therefore cannot be viewed as a suit for “monetary relief” in the usual understanding of that term. Thus, 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 (A10).⁸

This error has consequences that extend far beyond the facts of this case. There can be no serious dispute that, as the district court acknowledged, matters of trust administration are generally equitable in nature. Order at 9 (A9); *accord In re Salkin*, 170 N.Y.S.2d 191, 194 (Sup. Ct. N.Y. County 1957) (“inherent nature of the action . . . is in equity”), *aff’d*, 178 N.Y.S.2d 613 (1st Dep’t 1958). 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

⁸ BNYM anticipates that respondents will assert that BNYM has switched positions in this regard. Not so. In opposing the motion to intervene by the Attorney General of New York (“NYAG”), BNYM argued merely that the NYAG lacks standing to “block the settlement of private claims seeking monetary relief on behalf . . . of sophisticated private investors.” BNYM’s Mem. in Opp. to Mot. to Intervene by NYAG at 4. Nobody disputes that BNYM’s claims as trustee against Countrywide for breaches of the PSAs would be “monetary relief” claims, but that is immaterial: The *Article 77 proceeding* does not seek monetary relief.

CAFA uses the phrase “monetary relief” as a term of art that “does not extend to actions seeking solely equitable relief.” *Lowery v. Ala. Power Co.*, 483 F.3d 1184, 1202 n.45 (11th Cir. 2007); accord *Kitzato v. Black Diamond Hospitality Invs., LLC*, 2009 WL 3824851, at *5 (D. Haw. 2009).⁹

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 change hands; only a claim that requests the payment of money is removable under CAFA’s mass action provision.¹⁰ The district court’s contrary ruling, under which any claim that could result in the payment of money is a “monetary relief claim,” would sweep into federal court numerous cases seeking only declaratory or injunctive relief. And that

⁹ This distinction comports with longstanding usage. See, e.g., *U.S. 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”).

¹⁰ 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. *DiTolla v. Doral Dental IPA of New York*, 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.”

conclusion, too, leaves the controlling rule in a state of uncertainty.

C. Walnut Is Not A “Defendant”

We mention here one other 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 v. DJL Props, LLC*, 598 F.3d 915, 917-18 (7th Cir. 2010). Accordingly, a removing defendant must be a “part[y] against whom the plaintiff asserts claims.” *Fed. Ins. Co. v. Tyco Int’l Ltd.*, 422 F. Supp. 2d 357, 373 (S.D.N.Y. 2006).¹¹ That assuredly is not the case here.

The district court disagreed with this premise, stating that it does not “matter that 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 (A12). 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 *Ackert* on the ground that Walnut was not “aligned as [a] plaintiff[]” alongside BNYM because the Article 77 proceeding “seeks to settle the trusts’ claims” against Countrywide over Walnut’s objection.

¹¹ CAFA’s language supports the conclusion that Congress had it in mind that a “defendant” is 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).

Order at 12-13 (A12-13).

The district court’s analysis on this point, however, directly contradicts its 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 (A25)) and securing a “court-ordered transfer of \$8.5 billion” from Countrywide to the trusts, Order at 10 (A10), Countrywide would be the defendant against which the claims are asserted; Walnut, which would *receive* money, would in *no* sense be a “defendant.” Thus, Walnut cannot simultaneously show that that the proceeding seeks “monetary relief” *and* that it is a “defendant.” By accepting both propositions, the district court left the law in a state of confusion that will “greatly complicate the work of district judges faced with suits for which jurisdiction is asserted under CAFA.” *Greenwich*, 603 F.3d at 30.¹²

* * *

Tellingly, the decision below concludes with the observation that this case “should proceed in federal court” because it “implicates core federal interests in

¹² BNYM also advanced other arguments below against removal (*e.g.*, that Walnut waived its right to remove by participating in the state-court proceeding and seeking removal only after it received unfavorable rulings). Although BNYM believes that these arguments have merit, space limitations make it impossible to elaborate upon them in this petition. Their omission here is not intended to waive them in the event plenary briefing is authorized.

the integrity of nationally chartered banks and the vitality of the national securities markets.” Order at 21 (A21). But even assuming that the court’s factual premise were correct, this Court could not have been clearer in explaining that “generalized legislative purpose cannot override” CAFA’s text. *Greenwich*, 603 F.3d at 32. An “action’s importance to the nation as a whole” does not trump the “concrete criteria for federal jurisdiction under CAFA” and the “specific language [that] define[s] exceptions to that jurisdiction.” *Id.* This Court should grant review to apply the statute as Congress wrote it.

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.

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CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This petition complies with the page limitation of Fed. R. App. P. 5(c), because it is 20 pages, excluding the disclosure statement, the proof of service, and the accompanying documents required by Fed. R. App. P. 5(b)(1)(E).

2. 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: October 31, 2011

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 31st day of October 2011, I filed the foregoing with the Clerk of the Court of the United States Court of Appeals for the Second Circuit by hand.

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