UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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THE BANK OF NEW YORK MELLON,

Petitioner,

v. 11 Civ. 5988 (WHP)

WALNUT PLACE LLC, et al.,

Respondents.

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RETIREMENT BOARD OF THE POLICEMEN'S ANNUITY AND BENEFIT FUND OF THE CITY OF CHICAGO, et al.,

Plaintiffs,

v. 11 Civ. 5459 (WHP)

THE BANK OF NEW YORK MELLON,

Defendant.

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New York, N.Y.
September 21, 2011
10:30 a.m.

Before:

HON. WILLIAM H. PAULEY III

District Judge

APPEARANCES

MAYER BROWN LLP
Attorneys for Petitioner
BY: MATTHEW D. INGBER
CHRISTOPHER J. HOUPT

APPEARANCES

DECHERT LLP
Attorneys for Petitioner
BY: HECTOR GONZALEZ

WARNER PARTNERS P.C.
Attorneys for Intervenor investors
BY: KENNETH E. WARNER

GIBBS & BRUNS LLP
Attorneys for Intervenor investors
BY: ROBERT J. MADDEN

GRAIS & ELLSWORTH LLP
Attorneys for Defendants
BY: DAVID J. GRAIS
OWEN L. CYRULNIK

SCOTT & SCOTT LLC
Attorneys for Plaintiff Retirement Board
BY: BETH KASWAN

REILLY POZNER LLP
Attorneys for Respondent AIG
BY: DANIEL M. REILLY
MICHAEL A. ROLLIN

KELLER ROHRBACK LLP
Attorneys for Federal Home Loan Bank of Boston, Chicago, and Indianapolis
BY: DAVID S. PREMINGER

SCHLAM STONE & DOLAN LLP
Attorneys for Intervenor Liberty View LLC
BY: BRADLEY NASH

WOLLMUTH MAHER & DEUTSCH LLP
Attorneys for Respondent Western and Southern Life Insurance Company
STEVEN S. FITZGERALD

(Case called)

THE COURT: Good morning. This is oral argument on The Bank of New York Mellon's motion to remand. Do you wish to be heard, Mr. Ingber?

MR. INGBER: I do, your Honor. May I take the podium?

THE COURT: Yes, please.

MR. INGBER: Your Honor, this is not a mass action. There are no claims for monetary relief. There are no 100 persons bringing claims. There is no claims to be tried jointly. On top of that, your Honor, Walnut is not a defendant with the power to remove. And if Walnut could jump through each and every one of those hoops and the others that we have identified in our papers, Walnut then hits a wall in the form of the securities exception under CAFA and the Second Circuit's decision in Greenwich.

What the trustee filed, your Honor, was a time-honored Article 77 proceeding that the trustee had the right to commence, that trustees are encouraged to commence, to give an opportunity to trust beneficiaries to weigh in on a particular issue and to get judicial instructions. That is what the trustee did here. The action that the trustee filed does not meet the statutory definition of a mass action, and it is nothing like the types of actions that Congress had in mind when it passed CAFA.

Your Honor, today I'd like to focus on three principal

arguments. The first is Walnut's argument that the trustee has asserted claims for monetary relief. The second is Walnut's argument that it is a defendant that has the power to remove. The third is the trustee's argument that the securities exception under CAFA applies.

THE COURT: Before you turn to those arguments, can we clear the forest on arguments that you are no longer advancing. You did not reply to Walnut's argument regarding the timeliness of their removal. Should I conclude from that that you concede that the removal was timely?

MR. INGBER: We are not conceding that point. We don't waive that point, because Walnut --

THE COURT: Just you don't have any further argument to make in light of Walnut's argument?

MR. INGBER: We made our argument in the opening brief, and we stand by the arguments that we made there. There is no other response that we need to make to Walnut's point.

THE COURT: Walnut made a powerful argument on that point, didn't it? So powerful that you couldn't come up with anything to reply on it?

MR. INGBER: The response is that --

THE COURT: There was no response.

MR. INGBER: The response was that Walnut treated itself as a party for all purposes prior to the filing of the notice of removal. In that sense there was standing, so to

speak, for Walnut to remove at that point.

Your Honor, there are many arguments to be made here. We focused on four of them in our reply papers. We would like to focus on three of them today. But there were multiple arguments that support remand in this case.

THE COURT: Let's stick on timeliness, since you're insisting that you are not giving up that argument. How could the case have been removed before anyone intervened in it?

MR. INGBER: Your Honor, in this case Walnut acted as a party in the case. After it intervened, the intervention motion was pending, it filed orders to show cause, it appeared at conferences in front of Justice Kapnick, it sought to make substantive changes to the settlement agreement.

THE COURT: How could any party remove a case before intervention was granted?

MR. INGBER: Your Honor, it really boiled down to the timing of Justice Kapnick's granting of the motion to intervene. She acknowledged to the parties that the motions to intervene would be granted when there were arguments made before her. It was just a question of timing. There were other parties who were intervening, who were seeking to intervene, and she was waiting until all those parties came forward before she issued an order that would apply equally to all of them.

THE COURT: Once again, let's get to basics, how could

a party possibly file a notice of removal in this court without having an order in the state court granting it leave to intervene?

MR. INGBER: Your Honor, this actually relates to the waiver point, which is that, as I said, Walnut treated itself as a party and certainly could have made the argument that it had been treated as a party by the court up until the time and including the time that the motion to intervene was granted.

The point, your Honor, is that we are not pushing that argument. We have made the argument in our opening papers. We obviously didn't reply to that argument in our reply brief. We are not going to be arguing the point today. We think there are many, many other arguments.

THE COURT: Most judges would say you abandoned that argument. You're unwilling to acknowledge that today, but it is clear to me that you have because you have no argument to rebut Walnut's opposing brief.

Why don't you turn to the arguments that you are advancing. Before you do that, I'd like to get some understanding of, first of all, why are there 530 trusts. And just in the most general terms give me an overview of what the structure of those trusts are. How many certificate holders are there in any given trust? Are they in equal amounts of corpus?

MR. INGBER: Your Honor, there are 530 trusts because

that constitutes the bulk of the Countrywide trust for which The Bank of New York is the trustee.

THE COURT: Why 530? Why not 1 or 1,000? How did it come to be 530?

MR. INGBER: It came to be 530, your Honor, because The Bank of New York received an instruction with respect to -- it started out as 65 trusts. We received an instruction from holders which today I believe hold more than $40 billion of holdings in these 530 trusts. They had the requisite percentage of holdings to instruct the trustee. That's how this all started.

The institutional investors sent a letter of direction to The Bank of New York Mellon as trustee for those trusts and instructed the trustee to investigate and eventually to file claims against Bank of America and Countrywide relating to those trusts. As discussions commenced and were under way, many trusts were added to that initial list, trusts for which these holders, these institutional investors, had the requisite holdings to instruct the trustee.

Then, through discussions with Bank of America and Countrywide and discussions with the institutional investors, the list grew to include now up to 530 trusts, in part because this represented the bulk of the Countrywide trusts over which The Bank of New York was the trustee.

THE COURT: Twice you have said the bulk of the trusts

over which The Bank of New York was trustee. Are there other Bank of New York Mellon trusts involving these Countrywide mortgages?

MR. INGBER: There are other Countrywide trusts as to which The Bank of New York Mellon is the trustee that are not a part of this settlement.

THE COURT: How many?

MR. INGBER: I don't know exactly how many, your Honor, but it's not a very significant number. It's perhaps a few dozen. Perhaps I'll be corrected by counsel for the institutional investors.

THE COURT: How is it that those trusts are not part of this proposed settlement?

MR. INGBER: Those trusts had certain characteristics that made it much more difficult for them to be a part of the settlement and made it logistically much more difficult.

THE COURT: What kind of characteristics did they have that made it so difficult to include them?

MR. INGBER: Some of them were second lien trusts that are fully wrapped and other parties had rights with respect to those trusts.

THE COURT: What is the dollar value?

MR. INGBER: I don't know, your Honor.

THE COURT: Can you approximate it?

MR. INGBER: I'd be guessing to say what the dollar

value of those trusts was.

THE COURT: You know what, I'll take your best guess.

MR. INGBER: Your Honor, I just don't know what the unpaid principal balance of those trusts is.

THE COURT: Wouldn't that be something that one could consider material in deciding whether, as the trustee, you should come forward recommending a settlement in these cases?

MR. INGBER: No, your Honor. The trustee was presented with a settlement that involved these 530 trusts, and it had to make a decision with respect to these 530 trusts. The decision it made to enter into the settlement was based on a number of factors, including some of the issues that we discussed at the last conference, one of which was whether, after several years of litigation, the trustee on behalf of the trust would be likely to recover any more than what Bank of America and Countrywide were willing to pay.

THE COURT: That raises an interesting question, doesn't it? If your client made the decision for 530 trusts to settle but not others, doesn't that suggest that there are more than one plaintiff?

MR. INGBER: No. The trustee is The Bank of New York Mellon in its capacity as trustee.

THE COURT: You just told me that it made 530 separate decisions and decided with respect to other trusts not to settle. Am I correct about that?

MR. INGBER: There was not a trust-by-trust decision about whether to settle.

THE COURT: Doesn't the law require that?

MR. INGBER: There was a pool of trusts that was presented to the trustee, and the trustee had to make a decision about whether to settle with respect to those 530 trusts. That decision, as I said, was based on a number of factors, including the ability of the trustee to pursue litigation and recover a judgment that would exceed the amount of the settlement payment that was being offered.

It took into account whether other investors, who would otherwise get nothing, would actually recover something out of this settlement. It took into account whether the servicing improvements that were being offered by Bank of America and Countrywide were the types of servicing improvements that you could negotiate without having a settlement on a global basis. It took into account Countrywide's ability to pay and the trustee's ability to recover from Bank of America on theories of successor liability.

THE COURT: Didn't The Bank of New York Mellon have an obligation to make that determination on a trust-by-trust basis?

MR. INGBER: The Bank of New York Mellon could look at each trust, but it could make a decision on a global basis as

to whether this settlement is in the best interests of each of those trusts.

THE COURT: Didn't it owe a fiduciary duty to each trust independently.

MR. INGBER: The Bank of New York Mellon didn't owe --

THE COURT: Did or did not?

MR. INGBER: -- did not owe a fiduciary duty to each of the trusts. The Bank of New York Mellon's duties are defined by the pooling and servicing agreements, and they don't include fiduciary duties.

THE COURT: What is a trustee then?

MR. INGBER: A trustee in this case is administering the trusts. Its duties are defined by contract. There is a pooling and servicing agreement that defines the rights, duties, and obligations of the parties to that contract. The parties to that contract are in this case Bank of America and Countrywide, Bank of New York Mellon, and the depositor. The certificate holders are not parties to that contract. And all of the trustee's rights are defined specifically by that contract.

THE COURT: What authority does Bank of New York Mellon cite for the proposition that the trustee does not owe any duties outside of those expressed in the PSA?

MR. INGBER: We looked first to the PSA's themselves, and the PSA's themselves say the trustee has no duties unless

they are expressly set forth in the contract.

THE COURT: What about, for instance, the duty to avoid conflicts of interest?

MR. INGBER: Those are duties, your Honor, that arise as a result of the trustee's role that is defined by the PSA's.

THE COURT: The PSA doesn't say anything about conflicts of interest, does it?

MR. INGBER: There is no specific reference to conflicts of interest, but there is certainly a reference to the trustee acting in good faith, which could encompass no self-dealing or avoiding conflicts of interest. But that is still a duty that goes back to the PSA's.

THE COURT: Isn't that a duty that is grounded in common law in New York?

MR. INGBER: There certainly is a duty of loyalty under New York common law. The PSA's are the documents that define what the trustee's duties are. The trustee in this case is a trustee that is administering trusts that are created, that are formed as a result of a securitization process, and all of the rights and obligations of the duties and parties are reflected in that document.

THE COURT: If the PSA was silent about the duty to avoid conflicts, could the trustee self-deal?

MR. INGBER: It is silent about the duty to avoid conflicts, but it is not silent as to the trustee's duty --

THE COURT: Can BONY self-deal, since it is not in the PSA?

MR. INGBER: I would argue that it would fall within the good faith standard that is outlined in the PSA.

THE COURT: That is a duty that arises out of New York law, isn't it?

MR. INGBER: Which duty, your Honor?

THE COURT: The duty of good faith and not to self-deal.

MR. INGBER: The duty not to self-deal, the duty to act in good faith, and the duty of loyalty is common law duty of a trustee. But it is a duty in this case that is defined specifically in the pooling and servicing agreements, and it is in accordance with those duties that the trustee --

THE COURT: Where is good faith defined in the PSA?

MR. INGBER: It is not defined in the PSA. The good faith duty is set forth in the PSA.

THE COURT: Where is that duty defined?

MR. INGBER: The duty of good faith, your Honor, its set forth in the PSA.

THE COURT: Where?

MR. INGBER: It can be defined --

THE COURT: Just show me where.

MR. INGBER: The definition of good faith is not in the PSA.

THE COURT: You have to look to New York law, don't you?

MR. INGBER: You can look to New York law.

THE COURT: Where else would you look, Mr. Ingber?

MR. INGBER: That's where you would look, your Honor.

THE COURT: All right. You can continue.

MR. INGBER: Thank you.

Your Honor, on the issue of monetary relief, claims for monetary relief, CAFA doesn't apply to cases seeking equitable or declaratory relief. We submit, your Honor, that that is the relief that we are seeking here. It's true that the effect of the entry of the final order and judgment in this case could be or should be that a condition of the settlement agreement is satisfied, that as a result of that condition being satisfied the settlement agreement is effective and the parties are obligated to perform under the settlement agreement, and as a result of that, Bank of America and Countrywide will have to make a settlement payment. But that doesn't mean that this proceeding that was initiated by the trustee asserts a claim for monetary relief.

THE COURT: Isn't that exalting form over substance?

MR. INGBER: No. Declaratory judgment actions always have concrete implications, sometimes financial and monetary implications, on the parties. In fact, the Kitazato court that we cited in our papers, the District of Hawaii court, really

addressed this issue. They were asked to determine whether a declaratory judgment action constituted a claim for monetary relief.

They acknowledged and recognized that the relief would be costly to the removing party if the plaintiff got the relief that it was seeking. But the fact that it was going to be costly to the removing party, the fact that there was a monetary element to it, didn't convert it into a claim for monetary relief.

THE COURT: Does monetary relief mean strict legal relief, money damages?

MR. INGBER: What the case law and the statute and the legislative history and we think common sense support is that a claim for monetary relief has to be a claim by a plaintiff against a defendant in which the plaintiff is seeking money. It is supported, we think, by the Kitazato case that I mentioned. It's supported by the Lowry case from the Eleventh Circuit, which distinguishes between equitable relief and monetary relief and said CAFA doesn't apply to equitable and declaratory relief cases.

It is supported by the statute. Your Honor, if you compare Rule 23, a regular class action, there is a minimal diversity requirement and there is an amount in controversy requirement. There are two requirements there. If you compare that to the mass action provisions, among other things,

plaintiffs have to satisfy the minimal diversity requirement or the removing defendant would have to show that there is minimal diversity. They would have to show that there is a claim for monetary relief. They would also have to satisfy the amount in controversy requirement.

So you have those two requirements under Rule 23, you have the three requirements under the mass action provision. If claims for monetary relief meant only that money has to be involved, there has to be monetary implications of a case, then that claim for monetary relief requirement would be superfluous, it wouldn't be necessary under those circumstances. We think it has to mean and does mean that it is a claim seeking money from a defendant.

THE COURT: Aren't you seeking a payment of $8.5 billion for the trusts?

MR. INGBER: Not through this proceeding we are not, your Honor. We negotiated a settlement that resulted in a settlement agreement that has as one of its components, among many others, a settlement payment of $8.5 billion. That monetary relief was obtained before we filed the Article 77 proceeding. We filed this proceeding for really one reason. At bottom, we were seeking a ruling that the trustee's decision to enter into the settlement was within the bounds of reasonableness.

THE COURT: Where is the $8.5 billion at this time?

MR. INGBER: I assume, your Honor, it is sitting in accounts at either Bank of America or Countrywide.

THE COURT: The settlement isn't sitting in any escrow account of the trustee, right?

MR. INGBER: It is not sitting in an account at the trustee.

THE COURT: It's never been tendered?

MR. INGBER: Correct.

THE COURT: OK. So it's not a settlement.

MR. INGBER: It is a settlement. We have agreed to terms of a settlement. One of the terms of the settlement or one of the conditions of the settlement was that this proceeding be filed and that we get a ruling from the Court that the trustee acted within the bounds of reasonableness in entering into the settlement.

It also had the benefit -- and this is why trustees are encouraged to file Article 77 proceedings; otherwise, certificate holders may be without rights to exercise their voice or to weigh in -- it had the benefit, and this was a key reason for filing the Article 77 proceeding, it had the benefit of allowing certificate holders to get notice of this settlement, to have an opportunity to be heard, to weigh in in support or in opposition to the settlement.

We are having this hearing today because certificate holders were put on notice of the settlement and were able to

file intervention motions or file objections or file statements in support of the settlement. We are all here because the trustee filed a proceeding that gave certificate holders this right. Your Honor, it is our position that there really is no other way to give certificate holders this right, the benefit of coming into the proceeding and exercising a voice in support of or in opposition to the settlement.

The purpose of filing this Article 77 proceeding was not to ask the Court to direct Bank of America and Countrywide to give the trustee $8½ billion. The purpose of the proceeding was to seek declaratory relief, to get judicial instructions with respect to the trustee's reasonableness in entering into the settlement.

THE COURT: I thought your proposed order sought to direct the trustee and Bank of America to consummate the settlement. Isn't that what you are seeking?

MR. INGBER: There are a number of provisions of the final order and judgment. That is one of them. To consummate the settlement is to make the settlement effective. It is satisfying a condition of the settlement agreement that allows the parties to then fulfill obligations that they have under the settlement agreement.

But a direction or a provision of the final order and judgment that says the settlement agreement should be consummated is not an award of money, a judgment awarding money

to the trustee. That is a lot different than a claim for damages. It's a lot different than a claim by a plaintiff against a defendant seeking money.

If you think of the reasons why the mass action provision was passed in the first place, there were multiple plaintiffs filing multiple claims against defendants seeking damages, seeking money for injury to person, injury to property. You had plaintiffs identifying states that had no class action rules, and they were filing in those jurisdictions, and they were consolidating all of those damages claims for trial. That is what led to the passage of the mass action provision of CAFA. It was to make sure that that type of gamesmanship couldn't occur.

It is that context and that background that makes the reference to claims for monetary relief make a lot of sense. What Congress was thinking about when it passed the mass action provision was that there were plaintiffs suing defendants for a lot of money and trying to take advantage of the absence of class action rules in two states, Mississippi and West Virginia. That's what led to the passage of the mass action provision. We think that gives some context to what those words mean.

THE COURT: Who presented the settlement to the trustee?

MR. INGBER: The settlement was a product of

negotiation involving Bank of America and Countrywide, the trustee, and the institutional investors.

THE COURT: Who was it who negotiated the settlement? Was it the institutional investors?

MR. INGBER: It was a combination of those three parties, your Honor.

THE COURT: I take it that BlackRock is highly supportive of Bank of New York Mellon's petition since they managed on both occasions that they have been before me to sit as close to you as possible in the well of the courtroom. Are they the architects of the settlement?

MR. INGBER: Your Honor, I don't know if there is a single architect of the settlement. The settlement came about through a series of meetings and discussions among three parties: The institutional investors, the trustee, and Bank of America and Countrywide. I don't know that there is a single architect of this deal. It's something that evolved over the course of eight or nine or ten months.

THE COURT: Words matter, and I assume that you carefully selected your words in the petition that you filed across the street. I was rereading it last night. It struck me as so lawyerlike that I want to explore it further with you. You say in paragraph 10, "Since November 2010 the institutional investors, with the participation of the trustee, have engaged in extensive arm's length negotiations with Countrywide and

Bank of America in an attempt to reach a settlement for the benefit of the trusts."

That statement conveys a certain passiveness on the part of the trustee to me. Was that what you intended?

MR. INGBER: What was intended when those words were -- I actually don't remember exactly what was intended when those words were written. But the effect of those words is to make clear that there were three parties to the negotiations -- there was the institutional investors, Bank of America, and Countrywide -- and that the trustee participated in those discussions.

THE COURT: How did those investors organize themselves for this negotiation?

MR. INGBER: I don't know how they organized themselves. What I know is that the investors as a group were looking to instruct the trustee to take certain action before settlement negotiations commenced. Once settlement discussions commenced, once Countrywide and Bank of America, the institutional investors, and the trustee got in a room and started discussing resolutions to what is a very difficult and complicated problem, the outlines of a settlement came into focus. The trustee participated in those discussions.

The trustee didn't necessarily lead those discussions, but we were an active participant in those discussions, as were the institutional investors and Bank of America and

Countrywide. That's why I don't know that there is a single architect of this deal. But it was through discussions in which the trustee participated that the outlines of the settlement came about, outlines of a settlement that, again, the trustee thinks is reasonable for a host of reasons that we laid out in the petition.

THE COURT: Is that the time-honored way for certain well-placed investors to weigh in?

MR. INGBER: The Article 77 proceeding?

THE COURT: Yes.

MR. INGBER: It is, your Honor. We are not aware of any other proceeding that would have allowed investors to weigh in here. There was a settlement, a settlement agreement was entered into, and the proceeding was filed so that investors could weigh in.

These investors don't have claims of their own. The Greenwich court, the New York State court when the Greenwich case was remanded, that is what the Greenwich court held. There are no independent claims that certificate holders have. That putative class action was dismissed.

If there was, for example, a class action filed, under Walnut's theory The Bank of New York in its multiple capacities would be the class, would be the plaintiff class. Presumably Bank of America and Countrywide would be the defendants in that class action. But where would that leave Walnut and the other

investors? They wouldn't be defendants that would be in a position to remove. They wouldn't be class members who would have a right to object or opt out. They would be really left in the dark.

This Article 77 proceeding is a way to give them an opportunity to object or support the settlement. And this opt-out issue, your Honor, has nothing to do with the proceeding that the trustee filed. Opt-out was never an option from the day that the certificate holders purchased their certificates in the trust. The PSA's are very clear that the certificate holders have no direct claims, no independent claims to bring.

THE COURT: Is the Article 77 proceeding an adversarial proceeding?

MR. INGBER: We didn't view it and don't view it as an adversarial proceeding.

THE COURT: In your petition didn't you state that intervenor objectors may become adverse?

MR. INGBER: We did.

THE COURT: Why doesn't that make them adverse parties for the purposes of an Article 77 proceeding?

MR. INGBER: It may make them parties in this proceeding. It doesn't make them a defendant as that term is used for --

THE COURT: Are they adverse? When someone objects to

what you are proposing, do you think they are adverse?

MR. INGBER: They are adverse in the sense that they disagree with what the trustee is trying to achieve here.

One other point, your Honor, that I wanted to make on this requirement that there be claims for monetary relief. If this order is entered and a condition of the settlement agreement is satisfied, and Bank of America and Countrywide have to perform under that agreement and they make a settlement payment, among other things, and they implement servicing improvements and other provisions of the settlement agreement, and if that is monetary relief, from whom is the trustee seeking monetary relief? If we accept the argument that those are claims for monetary relief, from whom are we seeking it?

The answer is Bank of America and Countrywide and not Walnut. We think that we cannot view the claim for monetary relief requirement and the defendant requirement in isolation. There is really a spectrum here. Claim for monetary relief is on one end of the spectrum. The defendant might be on the other end of the spectrum. The closer Walnut gets to arguments that it is a defendant because there are claims being asserted against it, the farther removed it gets from any notion that we are seeking monetary relief.

THE COURT: Does CAFA require monetary relief to be against Walnut and other noteholders?

MR. INGBER: No. CAFA uses the words "monetary relief

claims." But I think the only reading of CAFA is that it has to be claims for money against a defendant. I think any other reading would make other provisions of CAFA impossible to apply or totally incoherent. I have one example, your Honor, that I would like to walk you through. If I may, can I hand up 28 U.S.C. 1332?

THE COURT: Sure.

MR. INGBER: Thank you. Your Honor, I have highlighted section (d)(4)(A)(i). This is the local controversy exception. It reads, "that the district court shall decline to exercise jurisdiction under paragraph 2 over a class action in which," and then it lists a few requirements here. I want to focus on Roman numeral II. "At least one defendant is a defendant whose alleged conduct forms a significant basis for the claims asserted by the proposed plaintiff class." In this case there is no alleged conduct asserted against Walnut that forms a significant basis for any claims asserted by the trustee.

If you look to Roman numeral III, "Principal injuries resulting from the alleged conduct or any related conduct of each defendant." If Walnut is a defendant for removal purposes, how can it be that -- this refers specifically to injuries resulting from the alleged conduct or any related conduct of each defendant. There is no alleged conduct of Walnut or the investors that is at issue. There is no

misconduct that we have alleged. We are not seeking money or any relief as a result of any conduct on the part of the investors here.

It goes on in Romanette (ii), "During the three-year period preceding the filing of the class action, no other class action has been filed asserting the same or similar factual allegations against any of the defendants." There is no factual allegations against Walnut or any of the investors here.

This is consistent. When you read this provision, it is consistent with what I said about the legislative history, about the reasons why Congress passed the mass action provision and what Congress was guided by, the types of claims that were guiding Congress when they passed the mass action provision.

So, monetary claims has to be claims seeking monetary relief, seeking money, from the defendant. You can't argue on the one hand that there are claims for monetary relief but those claims for monetary relief are against someone else and you're still a defendant for removal purposes. It makes incomprehensible or incoherent the whole of CAFA.

Your Honor, that is actually a good segue into the second argument that we wanted to make, which is that Walnut isn't a defendant for removal purposes. We cited in our brief the Shamrock Oil case, which is very clear that the phrase "defendant or defendants" has to be construed very narrowly for

removal purposes.

The words of the Supreme Court in Shamrock Oil were that defendants have to be viewed in the traditional sense as parties against whom claims are asserted. It was Judge Easterbrook in the First Bank case last year who said that if Congress wanted to expand the type of party that can remove a case, it certainly had the ability to do it. They could have used the word "party," like the bankruptcy removal statute does, but they didn't. It was a very narrow definition under the removal statute.

Your Honor, Congress could have used the phrase "adverse parties" or "interred parties." They could have used absent class members a class action the ability to remove a case. And they actually considered doing that. There was language in the draft bill that was going to allow absent class members to remove a case to federal court, and they took that out.

Now, in Walnut's brief I though they refer to the trustee in multiple capacities as a class. But they also really equate themselves with members of a class. If they equate themselves with members of a class objecting to a settlement, a class settlement, which we don't think this is, obviously, Congress considered giving those types of persons an opportunity to remove a case, but they said no in the final version of CAFA that ultimately became law.

THE COURT: But you didn't file a class action here.

MR. INGBER: No.

THE COURT: I don't see the relevance of that argument.

MR. INGBER: This isn't a class action. In some respects I agree that we are thinking about this in a lot of different ways because Walnut, as we have said in our papers, is trying to fit a square peg in a round hole. You have to think about what Congress contemplated when it used the term "defendant or defendants" and what it contemplated when it passed CAFA and had the opportunity to expand that very narrow definition of "defendant or defendants." It considered giving class members who might object to settlement an opportunity to remove.

I agree with you that they are not class members, they can't be members of a class. But it is what they are trying to achieve here, that is, to object to a settlement as a group here, that in some respects they have equated to members of a class trying to object to a settlement.

I agree with you, your Honor, this isn't a class action, it can't be a class action. They haven't disputed that this can't be a class action. But they are using words and phrases in their papers that suggest that they view themselves as members of a class objecting to a settlement.

The point is that Congress considered expanding

"defendant or defendants" to include other parties and decided not to. So we need to think about what that phrase means and we need to think of it in the narrow sense of the word that was articulated in the Shamrock Oil case.

The statute says "defendant or defendants." We think Walnut isn't a defendant at all. Again, no claims are being asserted against Walnut. We are not looking to recover anything from Walnut. We are looking for a ruling by the Court that the trustee's decision to enter into the settlement was not outside the bounds of reasonableness, that is a settlement that, if we get that ruling and a condition of the settlement agreement is satisfied and B of A and Countrywide perform pursuant to that settlement agreement, will result in a payment to Walnut. Not from Walnut, to Walnut.

Finally, in this Article 77 proceeding, we are not acting against them, we are acting for them.

THE COURT: The settlement would extinguish Walnut's rights, wouldn't it?

MR. INGBER: What rights, your Honor? Walnut doesn't have their own rights to bring a claim, so it is not extinguishing Walnut's rights. The trustee is releasing its claim that it has a right to bring under the PSA's. Walnut doesn't have those rights.

This is like a shareholder asserting rights of a corporation. The shareholder doesn't have standing to bring

those types of claims. Walnut doesn't have standing here, absent extraordinary circumstances, doesn't have standing to bring any type of claim, and they never have standing to bring claims directly. They don't have their own independent claims.

So, we are not extinguishing any rights of Walnut. We have entered into a settlement that, for whatever reason, Walnut doesn't support. We think Walnut should be standing side by side with the trustee given the nature of this deal, given the fact that after many, many years of litigation we don't think we would be able to recover an amount approximating or exceeding $8½ billion. We think they should be standing by our side because the servicing improvements in the settlement agreement are servicing improvements that really can only be negotiated on a global basis.

They are objecting or disagreeing with a decision that the trustee made to enter into the settlement, but none of the claims are being extinguished, because they have no claims. That is absolutely fundamental and that is right out of the PSA. That's right out of section 10.08, the no-action clause of the PSA.

You don't have to take my word for it. Justice Kapnick, in the Greenwich case when it was remanded to her, said they have no ability to bring claims on their own. It was a putative class action that was filed by the lawyers for Walnut with Greenwich as the lead class plaintiff. When it was

remanded to the court, Justice Kapnick said there are no claims here, you need to satisfy the provisions of the no-action clause, and under no circumstances can you sue directly as certificate holders.

Again, your Honor, there are no claims that are being asserted against Walnut, there are no claims of Walnut's that are being extinguished as a result of this settlement. There are claims that belong to the trustee and not to the certificate holders here.

On this point that we are acting in their interests in filing the Article 77 proceeding, I wanted to mention the Matter of Scarborough case. That was a New York Court of Appeals case. That involved the trustee seeking judicial instructions or approval of a sale of assets of the trust. At the end of the decision, the court said something that I think is very important.

For being brought into the Article 77 proceeding and having to argue points with respect to the sale and having to object to the sale, the trust were seeking their attorney's fees. The court said we are not giving you your attorney's fees because by filing this Article 77 proceeding the trustee is acting in the interests of the beneficiaries, it is not acting against the interests of the trust beneficiaries.

That is such a fundamental point, your Honor. I know Walnut and a few of the other investors disagree, but the

trustee filed this Article 77 proceeding so that they would have an opportunity to be heard, they would get notice of this settlement, and everything that we are debating right now could be debated.

They have alleged conflicts of interest, they have alleged that the settlement amount isn't enough, and they have alleged a variety of other things in their papers. We disagree with all of that. But there is going to be a forum for them to be heard. There is going to be a forum, an opportunity, a hearing in which a judge, we think it should be Justice Kapnick, will have to make a decision about whether the trustee acted reasonably.

So we are not acting against them. We are acting in their interest. They disagree with us. There is a disagreement about whether this settlement should happen or not, but we are really acting in their interest, and that is supported by the Matter of Scarborough case.

THE COURT: On that point, if I could return to something we talked about earlier this morning.

MR. INGBER: Sure.

THE COURT: Did Bank of New York Mellon play any role in organizing who the institutional investors were --

MR. INGBER: No.

THE COURT: -- who spearheaded the negotiations?

MR. INGBER: No.

THE COURT: So they self-selected themselves?

MR. INGBER: The institutional investors?

THE COURT: Yes.

MR. INGBER: I can't tell you the process by which this group of institutional investors came to be. What I know is that this group of institutional investors requested that Bank of New York Mellon as trustee for trusts take certain steps to enforce repurchase obligations of Countrywide under the pooling and servicing agreements and to pursue issues relating to alleged violations of servicing obligations under the PSA's. I can't tell you, your Honor, how that group came to be.

THE COURT: As trustee, did Bank of New York Mellon solicit other institutional investors?

MR. INGBER: No.

THE COURT: Did Bank of New York Mellon tell all of the certificate holders that there was a group of institutional investors who had selected themselves and banded together?

MR. INGBER: No. The Bank of New York Mellon actually doesn't know who all of the certificate holders in each of these trusts are. There could be hundreds, there could be thousands. It wasn't practicable to do that.

Also, your Honor, we have to take a step back and understand the structure of the relationship between the trustee and the certificate holders and the structure of the

pooling and servicing agreements. The trustee acted here because it received a letter from institutional investors that raised allegations against Countrywide and Bank of America with respect to servicing and with respect to breaches of representations and warranties.

That institutional investor group had sufficient holdings that are referred to specifically in the pooling and servicing agreements. They had more than 25 percent of the voting rights in the trusts that were at issue in the case when the settlement discussions commenced. It was that instruction and it was the nature of the holdings that these institutional investors had that triggered action by the trustee under the pooling and servicing agreements.

There weren't groups and groups and groups of certificate holders that were coming forward with the requisite holdings to instruct the trustee. This was a group of 20 some-odd institutional investors that had the requisite holdings under the pooling and servicing agreements and were looking to instruct the trustee to take certain actions.

One of those actions is to sue Bank of America and Countrywide and to have a lawsuit that involves multiple trusts, a lawsuit that could involve a loan-by-loan review for thousands and thousands of loans, a litigation that could last many years and result in a recovery for the trusts that, as I said before, could be significantly less that $8½ billion. It

could be more.

We also have to understand who has the obligation to pay that amount. The defendant that would be responsible for paying that is Countrywide, and Countrywide couldn't pay half of that amount. That assumes that there is no other exposure that Countrywide has.

So the trustee, instead of embarking on that litigation, instead of commencing an action and engaging in what could be five, six, seven years of litigation, commenced settlement discussions with the institutional investors and Bank of America and Countrywide. Those settlement discussions evolved, and they led eventually to the settlement agreement that was entered into in June.

THE COURT: Anything further?

MR. INGBER: I have just a few more minutes, if that's OK, your Honor.

THE COURT: On what subject?

MR. INGBER: I wanted to make one point on the defendant point, and then I wanted to address the securities exception, unless your Honor would prefer that I not.

THE COURT: I think we have already talked about the securities exception.

MR. INGBER: OK. Let me make a final point on this issue of whether Walnut is a defendant.

If the settlement isn't approved after this process

and Bank of New York then commences litigation against Bank of America and Countrywide, we are going to be aligned in interests. That's something that the Ackert court -- that was a Southern District case that we cited in our brief.

THE COURT: That was a class action, wasn't it?

MR. INGBER: It was a class action and it was a derivative action. It wasn't clear from the court's decision whether the two shareholders that were objecting were objecting to the settlement of the class action or the derivative action.

THE COURT: Didn't they intervene as plaintiffs?

MR. INGBER: No, they didn't intervene as plaintiffs. What the court said was that because their interests are aligned, they could have intervened as party plaintiffs. The point was they weren't parties. They objected to the settlement, but they weren't going to be realigned as defendants.

The court said there is no logic or merit to the notion that they are really defendants as we understand traditional defendants, in part because if this settlement isn't approved, they are going to be aligned with the plaintiff in pursuing relief against the defendants.

THE COURT: If Walnut intervenes in this action, is it a plaintiff?

MR. INGBER: Arguably, it could have intervened as a plaintiff. It didn't have to intervene at all. What we

contemplated when the Article 77 proceeding was filed was that there may be notices of appearance and objections, notices of appearance and statements in support, but there wasn't really consideration given to this notion that parties would need to intervene.

If they disagreed with the positions that the trustee was taking, they had the opportunity to express that disagreement as an objector or a supporter. So, from the trustee's perspective, they could have intervened if they wanted to as a plaintiff, they could have intervened as a respondent. They chose to intervene as a respondent, and we took no position on that petition to intervene.

We also said that it is not necessary to intervene, and that's because the order to show cause gives them the right to object or to support the settlement. The intervention motion wasn't, in our view, necessary.

Your Honor, to finish off, at its most basic level this is not a case that Congress ever contemplated would be subject to CAFA removal. We know that removal statutes, including CAFA, are supposed to be construed narrowly. We know that if there is any doubt about removal, the doubts should be resolved against removal. The principle underlying that point is that it's out of respect for the independence of state courts, it's based on principles of federalism.

So it is our view that really under any construction

of CAFA, and certainly a narrow construction of CAFA, this case has to be remanded to Justice Kapnick.

THE COURT: Thank you, Mr. Ingber.

MR. INGBER: Thank you, your Honor.

MR. WARNER: Your Honor --

THE COURT: Let me hear first from Mr. Cyrulnik. Then, Mr. Warner, if you want to be heard, I'll hear from you very briefly.

MR. WARNER: Thank you.

MR. CYRULNIK: Thank you, your Honor. Owen Cyrulnik for Walnut Place.

Let me start, if I may, by correcting what I think was a misstatement by Mr. Ingber regarding the rights of the certificate holders like Walnut Place that are being released by the Article 77 proceeding. Mr. Ingber told the Court that there are no rights, Walnut Place and other certificate holders have no rights and therefore are not truly adverse parties in this proceeding. I don't think that is true, for a number of reasons.

First, the notion that the PSA somehow says that certificate holders have no rights is simply not true. The PSA imposes conditions precedent on certificate holders that they must satisfy before they can exercise their rights.

THE COURT: Do the certificate holders have any right to sue Bank of America or Countrywide under the PSA?

MR. CYRULNIK: I believe they do. I believe at the same section that Mr. Ingber was referring to, section 10.08 of the PSA, specifically says that certificate holders cannot sue to enforce a provision of the PSA unless they comply with certain conditions precedent, which include getting 25 percent of the certificate holders together, making a demand on the trustee, waiting 60 days for the trustee to fail to comply with that demand. If they satisfy those conditions precedent, the contract itself gives certificate holders and investors the right to sue under the PSA.

THE COURT: Doesn't section 2.01 of the PSA give the right to the trustee and take it away from the certificate holders?

MR. INGBER: It gives the right to the trustee to enforce violations of the representations and warranties, but it doesn't take it away from the certificate holders. I think 10.08 makes that point very clear. It can't be that section 10.08 provides a set of conditions that a certificate holder must satisfy before suing if the purpose of the PSA is to say that certificate holders can never sue. That would make section 10.08 essentially an exercise of futility: Satisfy these conditions and then you still can't do anything.

Walnut Place has actually gone through this exercise, spending hundreds of thousands of dollars and many months developing a case, making the appropriate demands on the

trustee, providing the appropriate notice to Bank of America and Countrywide, and going through the exercise of filing a lawsuit which now has a motion to dismiss pending in the state court in front of Justice Kapnick, which I think proves the concept that certificate holders, if they act appropriately and follow the provisions of the PSA, can sue to enforce put-back rights.

The opinion that Justice Kapnick entered in the Greenwich case doesn't say otherwise. All it says, and literally the only thing, the only holding in that case is that the Greenwich plaintiffs did not jump through the hoops necessary under section 10.08 to satisfy the conditions precedent to filing a lawsuit.

The other brief point I'd make on this, your Honor, in regard to the rights of Walnut Place is it is curious that the trustee says there are no rights of Walnut Place and other investors that are to be extinguished by the Article 77 proceeding, because in the proposed final order and judgment that the trustee submitted there are two provisions, and these are provisions paragraphs O and P on pages 8 and 9 of the order, that specifically release claims of the trustee, all trust beneficiaries, the covered trust, and other purposes. Why would we be releasing claims of trust beneficiaries if there were no claims to be released?

One thing I would note in particular is one of the

sets of claims of trust beneficiaries that are being released by the proposed final order and judgment are claims by the trust beneficiaries against Bank of New York for potential breaches of its duties by entering into the settlement. So, at the very least the Article 77 proceeding would have the effect of releasing against Walnut Place as well its rights to sue The Bank of New York for its conduct in entering into the settlement agreement.

I wanted to focus today, your Honor, with the Court's permission, on the same questions that Mr. Ingber wanted to focus on, which are, first, is this appropriately removed as a mass action under CAFA and, second, is it subject to the securities exception.

I would note one disagreement with Mr. Ingber's characterization of the appropriate standard the Court is to apply. I think the law is clear and it is established by the Greenwich case. If the requirements of CAFA are satisfied and this is a mass action, then the burden of establishing that an exception applies is the burden borne by the trustee, not by the removing parties.

There are two primary reasons why Bank of New York argues that this action does not satisfy the requirements for a mass action under CAFA. First they argue that there is no monetary relief being sought in this action. Second, they argue that Walnut Place is not a defendant. I want to briefly

address both of those points, if I may.

First, the monetary relief. I would have thought this would have been an easy one. The purpose of this action is to get Bank of America and Countrywide to pay $8.5 billion to the trusts and the trustee as part of the settlement. Monetary relief means the payment of money. I think that is relatively clear. It is hard to imagine arguing that $8.5 billion is not the payment of money. To argue that this is not a settlement that seeks monetary relief borders on the absurd.

The court already noted that this is not simply an argument about the substance of or the concept of this action. It is very specific in the proposed order the trustee put before the court and incorporates by reference into the petition, it is very clear they are asking specifically for the Court to order the parties.

"The parties" has the definition that is provided by the settlement agreement. Under the proposed order the court adopts the definitions in the settlement agreement. The parties are defined as Bank of America, Countrywide, and the trustee. The court orders the parties to consummate the settlement in accordance with its terms and conditions.

The settlement agreement is already signed. It's been entered into. The only thing that consummation can mean is performance. The Bank of New York is asking a court to order the parties, including Bank of America and Countrywide, to

perform on their obligations under the terms and conditions of the settlement agreement. That means principally, although among other things, the payment of $8.5 billion. So there is no question that monetary relief is at issue here.

But Bank of New York Mellon is wrong, we think, about what monetary relief means. What they are trying to do is equate monetary relief and money damages. But there is no authority that says that monetary relief means money damages. CAFA doesn't say money damages. It could have said a mass action is an action by a hundred or more persons seeking money damages. It doesn't say that.

Many cases, two of which we have cited in our brief, Ballan v. Massachusetts and Maryland v. Health and Human Services, make the point that there is a difference between money damages and monetary relief. Monetary relief can be awarded by a court sitting in equity, money damages cannot.

If I could pause for a moment on the Supreme Court's decision in Ballan v. Massachusetts because I think it is important. The statute the Supreme Court was looking at in Ballan was the Administrative Procedures Act, 5 U.S.C. 702. That statute says, requires, money damages.

That statute says that an action must be brought in the Court of Federal Claims unless it seeks other than money damages. The statute uses the word "money damages." The Supreme Court picked up on that fact and distinguished between

money damages and monetary relief. The Supreme Court specifically made the point that just because monetary relief is being ordered doesn't mean that money damages are involved, and vice versa.

The statute in the Administrative Procedures Act uses the words "money damages." The statute in CAFA uses the words "monetary relief." "Monetary relief" means payment of money. "Money damages" means an action at law in contradistinction to an action at equity.

This is a case for monetary relief because it asks for the ultimate payment of $8.5 billion. It doesn't matter for the Court's consideration of the mass action provision of CAFA whether this is a purely equitable claim or in part a legal claim. That is not what CAFA is focusing on. CAFA focuses on a monetary relief component to the case, and it seems clear that that is satisfied here.

Second, is Walnut Place a defendant? It seems also strange for us to be arguing about whether Walnut Place is a defendant in this action. As the court noted, the trustee filed an Article 77 proceeding. It noted in its petition that there were no adverse parties when it filed it but there may be adverse parties added as the case went on.

Walnut Place filed a petition to intervene as an adverse party. It made that very clear. It sought to intervene as a respondent, not a petitioner. Uncontroverted

case law specifically says that the respondent in a New York State special proceeding or any special proceeding is a defendant for removal purposes.

THE COURT: How would this case proceed in federal court if Bank of New York Mellon's motion to remand were denied?

MR. CYRULNIK: I think there are several different ways in which the case could proceed. I think that Bank of New York Mellon made a fair point in its brief that there are hard questions this Court and the parties would have to consider to determine how this case would proceed in federal court.

It is conceivable, I don't see any reason why it is impossible for, a case to proceed under the equivalent of Article 77. There are analogs that I'm aware of in the federal courts to the kind of proceeding that Bank of New York Mellon has done here. For example, an interpleader: A trustee seeks instructions from a court to determine how to proceed in an action where beneficiaries of the trust may differ as to how they would prefer to proceed. This case could be conceived of as an interpleader.

It could be conceived of and I don't think there is anything under the federal rules or constitution that would prevent this case from proceeding as essentially an Article 77 proceeding in federal court. There is precedent for the removal of special proceedings to federal court. There is

precedent for continuing to hear the case in a similar fashion.

THE COURT: Aren't all actions in federal court governed by the Federal Rules of Civil Procedure?

MR. CYRULNIK: They are.

THE COURT: Which rules would you shoehorn this Article 77 proceeding into?

MR. CYRULNIK: I think there are probably several answers to this question. If I had to choose, I would conceive of this essentially as either the equivalent of an interpleader or a class action. I think that this case has characteristics of both. I think that the relief the trustee is seeking and the kinds of orders it's asking for from the Court and the kind of consideration the Court could give to the orders that it is seeking could be conceived of in either of those two ways without losing any of the otherwise available relief they get in an Article 77.

THE COURT: Assume for the moment that the case was treated as a class action settlement approval. Would your clients even be members of the class?

MR. CYRULNIK: The trusts would be members of the class. Our clients, if they could gather together, and many of them have, the requisite percentages to instruct the trustee, would be able to participate in the settlement by virtue of their standing in the trust. But the answer to the direct question is no, individual certificate holders I do not believe

would be parties to a class action settlement.

If I may note one thing. The Bank of New York says in its papers that we ignore the Ackert case, which we don't. We specifically pointed out in our papers that had Bank of New York Mellon filed this case as a class action in state court seeking approval of a settlement, which we think it should have, then probably we would have been objectors, some of our clients would have been opt-outs.

But I would agree that our clients would not have removed this case to federal court, because we would not have been defendants as we are in this case in the Article 77 proceeding. Sure, Bank of New York Mellon could, for example, withdraw the Article 77 proceeding, refile this as a class action if it prefers to state court, and probably it would stay there. It would be a case against Bank of America and Countrywide.

THE COURT: Would you turn to the securities exception.

MR. CYRULNIK: Certainly, your Honor. There are a few points I want to make about the securities exception. The first was the burden point which I made earlier. The second is the focus of all of the three exceptions to CAFA on the word "solely." CAFA specifically says these exceptions apply only if the claim the plaintiff is making solely relates to the three categories of exceptions that are provided, the third

exception of which Bank of New York is focusing on today.

I think the "solely" is important for some of the reasons that your Honor articulated earlier. It seems inarguable to me that there components of this case, important components of the relief the trustee is seeking, that cannot possibly relate solely to a security even if the PSA somehow were a claim that was created by or pursuant to a security, which we strongly believe it is not.

One example of that is New York law, either fiduciary law or other common law of New York, that dictates the requirements of a reasonable trustee in acting on behalf of its beneficiaries. Bank of New York today said it doesn't believe it has fiduciary duties. But it would be amazing for a trustee who is simply a functionary as an administrator of a trust pursuant to provisions of a contract to have the kind of discretion that Bank of New York Mellon claims it has to determine the fairness of and settle claims on behalf of the trust.

Bank of New York Mellon could have solicited the input of all investors before it settled this action. It didn't have to sign the settlement agreement. It could have issued notice through DTC to its certificate holders and said we have a proposed deal from Countrywide and Bank of America, many institutional investors support this deal, please tell us, do you like it, do you not like it. Trustees do this all the

time, solicit input from investors.

They didn't do that. They took it upon themselves to decide the fairness of it, signed the settlement agreement, and then filed an Article 77 proceeding with their thumb on the scale, saying here is a deal, we think you should take it. If they are a fiduciary, then I don't know how they could possibly have the discretion to make those kind of judgments.

THE COURT: What about the Second Circuit's construction of "solely" in Greenwich.

MR. CYRULNIK: The argument in Greenwich, which was the focus of Judge Lynch's opinion in the Greenwich case, was that because there were potential defenses that would come up in the case, therefore it can't be solely involving the security. It's a completely different point.

That was what the Second Circuit was considering. Because Countrywide may mount a defense under a federal statute that gives a servicer a safe harbor for entering into certain modifications of loans, is that an issue that turns the case into something other than solely arising out of a security? The court find it doesn't.

It is different here because this claim, the claim that arises under New York common law, the claim for a judgment that under New York law the trustee acted properly, is a claim affirmatively asserted by the plaintiff in the case. It's an integral part of the action that it filed, completely different

from the point that the Second Circuit was considering when it interpreted the word "solely" in the Greenwich case.

The Second Circuit held in Greenwich that it would be absurd to say that any issue that could potentially come up in a case would go to the "solely" requirement of CAFA, because that would essentially swallow the exception and turn it into a nonexistent provision. It can't be the case, though, that affirmative claims made as part and parcel at the original proceeding by the trustee don't qualify as issues with regard to "solely."

THE COURT: Are there any authorities for the proposition that indentured trustees like Bank of New York Mellon have nonwaivable duties under New York law?

MR. CYRULNIK: I don't know the answer to that off the top of my head, your Honor. I believe that there are authorities that support that and probably authorities that would suggest otherwise. I'd be happy to submit something to your Honor on that question.

THE COURT: I think I'm going to ask both parties to submit a short memorandum on that subject to me following this argument.

MR. CYRULNIK: Absolutely, your Honor, we will be happy to.

To move on to the actual substance of the securities exception for a moment, your Honor, even if it weren't the case

that there are essential components of this action that are not related in any way to the PSA or contract, we think it is very clear that the securities exception does not apply. Let me tell the Court briefly why, if I may.

The securities exception has been limited by two Second Circuit decisions, first in Cardarelli and then in Greenwich. Both decisions, and it is most clear in Cardarelli, read out the "relating to" language in the provision. To make it clear, Cardarelli says at page 32, "Our interpretation arguably renders the words 'relating to' superfluous. But forced as we are to construe CAFA's cryptic text, we prefer an interpretation that preserves the meaning of the entire subsection. In any event, the words 'relating to' are repetitive and lack any predictable or precise effect."

I think both Second Circuit decisions clearly read 'securities exception' that to fall within it, a claim must be created by or pursuant to a security. That is what is left of the securities exception if you read out the words "relating to," which both Second Circuit decisions agreed would be unnecessarily broad and impossible to apply.

The claim must be created by or pursuant to a security. Before we even get to Greenwich, I don't see how it is possible that the claim of the trustee in this action, where the trustee owns no securities and the trusts own no securities and their claims are not rooted in their holding of a security

or in the terms of a security, could possibly be created by or pursuant to a security.

This is a classic contract claim. The trustee and the trusts bought loans from Countrywide. They now allege that those loans were sold to them in breach of representations and warranties, and the underlying suit here is to recover for breaches of those representations and warranties. Or the trustee is seeking an order from the New York State court that it acted reasonably, not that it acted reasonably because it owned securities, but because it acted reasonably as a trustee pursuant to a contract. Again, if we focus on CAFA as claims created by or pursuant to a security, this case simply does not fit.

The only argument that Bank of New York makes as to why this satisfies the CAFA exception is really based on the Greenwich case. The first thing to note about Greenwich I think is that it is not dispositive. It can't be dispositive. The Second Circuit was not considering the question before this Court.

In both Cardarelli and Greenwich, the Second Circuit was considering the difference between a claim by a certificate holder as a purchaser of securities, a classic federal securities claim, and a claim by a certificate holder as a holder of securities where the claim is rooted in its ownership of the securities. Those are the issues that the Second

Circuit was deciding. Its holding is limited to that.

THE COURT: Didn't Judge Lynch say that the rights created by PSA's like the PSA's in this case are related to securities?

MR. CYRULNIK: He did. But there is an important clarification to that which I think gets to the heart of the disconnect between our argument on this and the trustee's argument on this. Judge Lynch in Greenwich made two very important distinctions, two very important points.

The first was to distinguish between claims brought by holders as holders, which means claims that are rooted in the ownership of a security, claims where the reason why the plaintiff gets to sue is because it owns a security, and on the other hand claims that are based on some other right that has nothing to do with the ownership of a surety, has to do with some wrong that was done to the plaintiff in some other context. That is the first distinction.

The second point that Judge Lynch made, it is important to understand why he made the second point. The argument in the Greenwich case that was made by the defendants in support of removal was even if this is a case that involves the "relates to, was created by or pursuant to a security," because the put-back right, because the right that the Greenwich plaintiff was pursuing was not printed on the face of the certificate, because it was printed in the PSA, therefore

the exception doesn't apply.

That was the argument that Judge Lynch was responding to when he made this point, which is if you're a certificate holder, if you're suing as a holder; if your right to sue is rooted in your ownership of a security, you don't have to have the claim you are pursuing written on the face of the certificate. If the PSA is incorporated by reference into the certificate and the claim is in the PSA, that's enough.

You can't read that second point without the first point. There is no statement anywhere in Greenwich that can credibly be read to say that any suit based on a contract that happens to be a PSA automatically, no matter who the plaintiff is, no matter what the source of its right to sue is, no matter whether its suit has anything to do with the ownership of securities, is subject to the securities exception.

That would be a very unfair reading of a very small piece of a snippet of the Greenwich case that has to be taken in context. You never get to the second part until you stop off at the first part and establish that you are suing as a holder and that the rights that you are pursuing are rooted in the ownership of a security.

The way that makes sense is to go back to the statute. The statute says the claim has to be created by or pursuant to a security. That is what the statute says, and that makes perfect sense with what Judge Lynch was writing. You first

figure out if the claim is created by or pursuant to a security. Not a contract that happens to also create securities, but a security. That is the point in Greenwich.

In Greenwich the plaintiff owned securities. The plaintiff couldn't have sued. It wouldn't have been in court at all if it didn't own a security. Its only right to be there was because it owned a security. The PSA was expressly incorporated by reference into the security on the face of the certificate, and therefore the terms of the PSA were also part of the securities exception in that case. I don't think Judge Lynch would have gotten there if the securities part of it hadn't been there first.

THE COURT: Anything further?

MR. CYRULNIK: I think that's all we have for your Honor today. Thank you.

THE COURT: Mr. Ingber, do you want to be heard further in response?

MR. INGBER: Sure, although I think counsel for the institutional investor --

THE COURT: I'm going to hear from Mr. Warner in a minute. I just want to tie this off.

MR. INGBER: Sure. Let me make a few points, your Honor, just a few.

First, with respect to the question of whether Walnut has any claims that are being extinguished, Mr. Cyrulnik

referred to the no-action clause, section 10.08, and he went through a number of different conditions that have to be checked off before certificate holders would have a right to sue.

One of those conditions is that an instruction has been given to the trustee by holders representing 25 percent or more of the voting rights, that they have given an adequate indemnity, and that the trustee has refused to act after a period of 60 days. The trustee has not refused to act here. The trustee has acted we think in a very significant way by trying to resolve these claims without litigation in the form of this settlement.

Mr. Cyrulnik also argued that the claim that we are asserting against the investors is a claim that any rights that they have to sue the trustee are to be extinguished by the final order and judgment. I make two points. One, your Honor, that is a perfectly logical provision of the final order and judgment. If the Court makes a determination that the trustee acted within the bounds of reasonableness in entering into the settlement and acted in good faith, then there really can be no claims that the trustee did not act in good faith or did not act within the bounds of reasonableness.

Also, the way he articulates the claim, that is, our effort to extinguish rights that they might have, that again does not sound anything like a claim for monetary relief. Mr.

Cyrulnik didn't address the question of whether the claim for monetary relief has to be made against the defendant. I don't think he can make that argument here. There is no claim for monetary relief being asserted against Walnut. The more that Walnut describes what the claim is, the less it sounds like anything relating to monetary relief.

With respect to the securities exception, your Honor, the Second Circuit addressed the statute. The statute reads that claims relating to rights, duties, including fiduciary duties and obligations created by, relating to, or pursuant to a security, would be subject to the securities exception.

The focus of Judge Lynch's decision was on the source of the right, what is the source of the right. He distinguished between claims that arise out of laws that are superimposed or rights that are superimposed by state common law or state corporate law. He distinguished those type of claims from claims that arise out of instruments that create securities. That is the distinction that he was drawing.

And when he referred to holders as "holders" and holders as "purchasers," that was to reinforce the point that holders as purchasers are pursuing claims to enforce rights that arise solely out of state common law or state corporate law, distinguishing that from holders as holders who are pursuing claims under instruments that create or define securities. He ruled very clearly, we think, that in this case

the PSA's are instruments that create or define securities.

Your Honor, this case is really all about the PSA's, in our view. The claims that are being settled are claims that arise out of the PSA's. The trustee isn't releasing any securities law claims, claims that would arise out of state law.

The trustee has a right to bring these claims because the PSA's give the trustee the right to bring these claims. When I say bring these claims, we haven't filed claims against Bank of America or Countrywide, but we are settling claims that we have the right and we have the ability to commence as a result of the PSA's.

In settling the claims, the trustee is acting in its capacity as trustee, which is a role that was created solely by this instrument, solely by this PSA, and its duties are defined by the duties that are set forth in the PSA's. That is why this case is not removable. It is not a case that is relating to rights that arise out of state corporate law or state common law. It relates to rights that arise out of the PSA, claims that exist in the PSA, claims that the trustee has the right to bring and settle as a result of its role and the specific terms of the PSA's.

On the question of whether ownership is required, first of all, the statute itself says nothing about ownership. Cardarelli says that the exception applies to trustees and

agents and persons who administer securities. Cardarelli seemed to recognize that ownership wasn't essential.

The draft bill actually considered using the language "brought by shareholders." Claims brought by shareholders was in the draft bill for CAFA, and that was excluded. That undercuts any notion that ownership of securities is actually required for the securities exception to apply.

Again, your Honor, Greenwich focused on the source of the right. It may be that typically owners of securities are the ones bringing these claims, but it is not essential and it is not a requirement.

That is all, your Honor, that I have on the securities exception. If you don't have any other questions, then I thank you for your time.

THE COURT: Thank you, Mr. Ingber.

MR. CYRULNIK: Your Honor, I apologize. I skipped over the point about the defendants because the Court asked me to move on to the securities exception. If I could trouble the Court to respond briefly, I would. Otherwise, I will sit down.

THE COURT: I really don't think it is necessary.

MR. CYRULNIK: Certainly, your Honor.

THE COURT: Mr. Warner.

MR. WARNER: Thank you, your Honor. If I may ask, your Honor, Mr. Madden's familiarity and involvement with this matter is much further back and deeper than mine, and his pro

hac vice application is before the Court.

THE COURT: I'll grant his application and I'll hear from him for a couple of moments.

MR. WARNER: Thank you very much.

MR. MADDEN: Thank you, your Honor. I appreciate the opportunity to address the Court, and I'll keep my comments brief.

THE COURT: Do me a favor. Start by telling me who you are, what law firm or organization you're affiliated with. All right?

MR. MADDEN: Yes, your Honor. My name is Robert Madden. I'm here on behalf of the Gibbs & Bruns law firm. We represent the institutional investors. That's 22 investors. It includes insurance companies, investment banks, the New York Federal Reserve. It includes the Federal Home Loan Bank of Atlanta. It includes.

THE COURT: But not the Federal Reserve Bank of Minneapolis, right?

MR. MADDEN: That's correct, your Honor. The two institutions apparently have good faith differences of opinion.

I want to address two points, your Honor. The first was your Honor's point about the duty of good faith.

The duty of good faith that this trustee acts under arises under the PSA. Section 8.1 of the PSA specifically provides that the trustee has a duty to act both with

reasonable care and with good faith. Your Honor, even if it was the case, which we don't believe it is, that that is an unwaivable obligation, even if it was, we still believe that that duty would arise under the PSA because it is the PSA that creates the relationship. Therefore, even if it was unwaivable, even if it wasn't specifically set out in the PSA, it's the document that creates that duty.

We think any way you look at it, your Honor, if the Court is focusing on the duty of good faith, that arises under the PSA, the source of the right is the PSA, and for that reason the securities exception as articulated by Greenwich applies.

The second point and my final point, your Honor, is on the monetary relief claims. We agree with counsel for Walnut that monetary relief claims means an order that requires the payment of money. But we think that, your Honor, it is a fundamental concept of due process and otherwise that an order that requires a party to pay money, that party has to be a party to the suit. Neither Bank of America nor Countrywide are parties to this proceeding, so we don't understand how in any way an order from this Court, or if this case goes back to Judge Kapnick approving this settlement, orders Bank of America to pay money.

That's all I have, your Honor.

THE COURT: Before you sit down, since you represent

the institutional investors, how did they organize themselves?

MR. MADDEN: Your Honor, it started with a small group of investors that were facing a problem. That problem was that these repurchase claims were lying fallow. No one was doing anything. None of these people were doing anything. And, I'm sorry to say, the trustee wasn't doing anything. Limitations was running on those claims, and nothing was happening.

They weren't willing to sit around and allow their claims against Bank of America to expire. What they did is they formed a group. They pooled their holdings, and they went to the trustee and said you've got to sue Bank of America. This was no effort to help Bank of America, your Honor. This was an effort to bring Bank of America to justice. They went to the trustee and said you have to sue the trustee.

The trustee wouldn't act. What my clients did was they went through the hoops that have been talked about here. We started the process of going through those hoops when no one else did. We gathered together. We demonstrated to the trustee that we had 25 percent with respect to a subset of the trusts that are at issue here. We demanded that the trustee take action.

THE COURT: How big was that subset?

MR. MADDEN: At that time I believe it was less than 100 trusts, your Honor.

THE COURT: Has it changed?

MR. MADDEN: Yes, it has. What happened, your Honor, was that we served on trustee and on Bank of America what is known as a notice of nonperformance. It's one of those hoops under the agreement that started the process of triggering our ability to prosecute these claims, not for ourselves and not solely for our benefit but derivatively on behalf of the trusts.

When that happened, when we sent that notice of nonperformance, two things happened, your Honor. First, it was public. We made it public because we believed that it was important that it be known. Two things happened. One, Bank of America's share price dropped 5 percent because the market began to realize that all of a sudden these claims that were going nowhere and nobody was doing anything, somebody was actually taking some action on them.

Two, it began to attract additional investors. Investors began to contact us, saying we hear that you are doing this, we'd like to be involved also. We said fine, come join the group. Because those people joined the group, the holdings got larger. We eventually got up to a group that had -- we have holdings in all but one or two of all 530 trusts. We have 25 percent in over 200 of the trusts.

What we did is we went to Bank of New York and said we're going forward with this, either you're going to bring these claims or we're going to bring these claims derivatively.

When that happened, that is what brought Bank of America to the table, your Honor.

This was no collusive, self-selected group of people who decided to get in a room with Bank of America and cut a sweetheart deal. This was a litigation group that intended to bring litigation claims that took the steps to bring those claims. Then, when Bank of America came to the table, we negotiated a settlement that we could support that benefited all certificate holders, not simply our clients.

That's how this came about. That's how the group was formed, your Honor. It was in no way collusive and in no way attended to assist either Bank of New York or Bank of America.

THE COURT: Was it that group of institutional investors that presented the settlement to Bank of New York Mellon as the trustee?

MR. MADDEN: It was not presented to The Bank of New York. Bank of New York was involved. Bank of New York was a party to those negotiations. I wouldn't agree that it was presented to them.

What we did do, though, is at the end of that process we said this settlement that is being proposed is one that we would support, we would ask that the trustee enter into this.

I think that really raises an important point. The argument is made why didn't the trustee go out and poll everyone and see what they wanted to do? Your Honor, we know

what the result of that poll would have been. My clients own over 25 percent of bonds in all of these trusts. You would have had huge numbers that would have said yes and you would have a minority, for whatever reason, that would have said no.

What then was the trustee supposed to do? Well, what are trustees supposed to do in that situation? What do the New York courts tell them to do? Go file an Article 77 proceeding. Make a judgment first. You can't just come to court. That is the one thing the New York courts have said. Don't just throw up your hands and say I don't know what to do.

You are a trustee. You have to act. You are charged with the responsibility of acting. That's why they made the decision. They made the decision. And then they came to the court to say we think this is what we should do, we understand there may be others that have a difference of opinion, let's have it all heard out.

THE COURT: Do you have any understanding concerning the trusts that are not involved in this settlement?

MR. MADDEN: Yes, your Honor. It was touched on. The reason those trusts were not involved is because, as Mr. Ingber pointed out, they are what is called fully wrapped. What that means is they had bond insurance, things like Ambac, MBIA. Those insurers have superior rights. Because they are the first to pay, they are the first to receive money in return.

What that means is you can't settle those claims

unless you've got the involvement of the insurers. So, the decision was made on the part of our clients, and frankly it was something that Bank of America wanted, that it was just not practical, there was no way you could do all that and involve those where there were already pending lawsuits.

One final point I want to make. Walnut has said our claims have been cut off, they are trying to stop our suit. They didn't begin the process of jumping through the hoops to bring claims on their trusts until after we had started. No one was doing anything when we started, until after we had publicly announced what we were doing.

Another point I want to make, your Honor, is that one of the trusts that Walnut seeks to opt out, my clients own 60 percent of notes in that trust. They don't want to opt out. They don't want to go and lose this valuable settlement and be back on the course of uncertain litigation, years of litigation where there are significant legal issues that would have to be resolved in their favor. They believe this is a very positive settlement, and they would like to see it confirmed as soon as possible.

THE COURT: Last question. Do you have any understanding as to the amount of money involved in the trusts that are not part of the settlement, that is, the fully wrapped trusts?

MR. MADDEN: I'm afraid I don't know. We could

certainly provide the Court with that information.

THE COURT: Thank you, Mr. Madden.

MR. MADDEN: Thank you, your Honor.

THE COURT: Anything further from counsel?

MR. INGBER: Not here, your Honor.

MR. CYRULNIK: No, your Honor.

THE COURT: What I would like the parties to do is to submit a short memorandum to me, try to keep it under 10 pages, specifically addressing these questions.

Does Bank of New York as trustee have any duties other than those spelled out in the PSA? If so, what is the source of those obligations?

Second, does New York law, that is, New York common law, impose nonwaivable duties on trustees like Bank of New York Mellon?

The point is I want this memorandum to focus on the securities exception and these questions. I've done some research on my own, but I'm confident that you folks have the resources to do more.

Finally, only because I posed the question to two different counsel and have not gotten an answer but I'm curious about it, I would like a very brief letter from Mr. Madden or Mr. Ingber concerning the amount at issue, the amount in the fully wrapped trusts that are not part of the 530-trust settlement.

I want to thank you for your thoughtful arguments this morning and your submissions. I'm sure you won't be surprised: Decision reserved.

MR. WARNER: Excuse me, your Honor. Is there a time frame on the submissions?

THE COURT: Yes. Thank you. Is there any reason you can't submit them by the close of business next Tuesday?

MR. INGBER: That's fine, your Honor.

MR. CYRULNIK: That's fine, your Honor.

THE COURT: That date is September 27. Thank you. Have a good afternoon.

(Adjourned)