UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In the matter of the application of THE BANK OF NEW YORK MELLON (as Trustee under various Pooling and Servicing Agreements and Indenture Trustee under various Indentures) *et al.*, Petitioners, -against- WALNUT PLACE LLC *et al.*, Intervenor-Respondents.	**2011-cv-5988(WHP)**

MEMORANDUM OF LAW IN SUPPORT OF THE BANK OF NEW YORK MELLON'S MOTION TO REMAND

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PRELIMINARY STATEMENT

Frivolous is not a word to be used lightly, but it applies with full force to Walnut's removal of this matter to federal court under the Class Action Fairness Act ("CAFA"). The state court judge, the Honorable Barbara Kapnick, has made clear that "[t]his is not a class action." Nor is it a "mass action" that involves a claim by more than one hundred plaintiffs. This case is a New York special proceeding brought under Article 77 of the C.P.L.R. in which a single petitioner, The Bank of New York Mellon ("BNYM" or "Trustee"), seeks a ruling that its decision to enter into a settlement was reasonable and in good faith. There is no claim for "monetary damages"; it is a purely equitable proceeding. The parties who have removed the case (collectively, "Walnut")—all intervenor-respondents in state court—also are not defendants, because no one seeks to recover money damages from them. Finally, while Walnut states affirmatively that "this action falls within no exception to the exercise of federal jurisdiction under CAFA," it ignores directly applicable Second Circuit law—***in a case that Walnut's own counsel argued***—that holds to the contrary. *See Greenwich Fin. Servs. Distressed Mortg. Fund 3 LLC v. Countrywide Fin. Corp.*, 603 F.3d 23, 25–26 (2d Cir. 2010). This action should be remanded to state court.

STATEMENT OF FACTS

This case is a trust administration proceeding brought by BNYM under Article 77 of the New York C.P.L.R. BNYM is the trustee of 530 mortgage securitization trusts. All involve either Pooling and Servicing Agreements or Sale and Servicing Agreements (collectively, "PSAs" (model attached as Ex. A to the Ingber Declaration)). The counterparties on these contracts are Countrywide Home Loans, Inc. and various affiliates, now owned by Bank of America Corporation (collectively, "Countrywide"). After several months of pre-litigation

negotiations, the Trustee exercised its good faith judgment that a settlement was in the best interests of the Trusts. The Settlement Agreement requires a payment of $8.5 billion to Trust beneficiaries and mandates industry-leading improvements to Countrywide's mortgage servicing process, among other valuable reforms that would have been difficult, if not impossible, to attain through litigation.

New York law allows the Trustee to file this Article 77 proceeding seeking equitable relief limited to a determination of whether its decision to enter into the Settlement Agreement was made in good faith and is reasonable. In the Article 77 proceeding, the Trustee acts only in its capacity as trustee. It seeks to settle claims that the Trustee—and not the Trusts, which are not legal entities under New York law—has the power to bring. The Article 77 Proceeding, therefore, does not involve a claim either by more than 100 plaintiffs or a claim for money damages. Instead, it is one in which a single plaintiff seeks only equitable relief.

A number of Trust beneficiaries have intervened in the Article 77 proceeding, some as intervenor-petitioners in support of the settlement and others, including Walnut, as intervenor-respondents. Article 77 proceedings, like all special proceedings in New York, are intended to be expedited.[1] At the very outset of the proceeding, Justice Barbara Kapnick, before whom the Article 77 proceeding has been pending since it was commenced by the Trustee more than two months ago, approved a scheduling order that set an August 30 deadline for any parties to object to the Settlement and a November 17 final hearing date. In accordance with that scheduling

[1] "The purpose of [Article 77] is to provide for a special proceeding, as an alternative to the procedure by action, in trust accountings in the interests of expedition and economy. In other words, the purpose is to simplify the practice in relation to express trusts and eliminate cumbersome and expensive procedures." Vincent C. Alexander, Practice Commentaries C401:1 (2010) (footnote omitted).

order, the Trustee executed a massive and costly program to provide notice of the Settlement (including notice of these dates) to Trust beneficiaries.

Walnut is evidently unhappy with the Article 77 proceeding, and the timing of its removal petition is telling. Leading up to an August 5 hearing, Walnut's counsel complained that the Settlement Agreement has no "opt-out" provision. Justice Kapnick explained at the August 5 hearing that there would be no opt-outs because an Article 77 proceeding is "not a class action." Walnut's counsel then asked that the August 30 objection deadline be extended. Justice Kapnick denied that request.

But just two business days before the objection deadline, Walnut filed a removal petition that threatens to confuse and disrupt the state-court proceedings and to significantly delay them. This despite the Trustee's (and the intervenor-petitioners') request that Walnut at least wait to file its removal notice until August 31, so that other interested parties' efforts to appear in accordance with the court-ordered deadlines would not be disrupted. The request for a mere two business days of delay would have caused no prejudice to Walnut: they would not have made the petition untimely, if it was not untimely already. K. Patrick letter to O. Cyrulnik (Ingber Decl., Ex. B). Walnut removed precipitously anyway, risking disruption of the Article 77 proceeding. The case has been removed improperly and should be remanded.

ARGUMENT

Walnut's effort to remove this case rests on the fiction that the Article 77 proceeding is "a civil action that seeks to try jointly the claims for monetary relief of 530 separate trusts"—the definition of a "mass action" under CAFA. This is the classic "square peg in a round hole." To make its theory fit, Walnut is forced to pretend that there are hundreds of plaintiffs when there is only one petitioner. It is forced to pretend that there are separate claims of over 100 plaintiffs,

when in fact there is only a single issue to be decided—whether the Trustee's entry into the Settlement was within the bounds of reasonableness. It is forced to pretend that the Trustee is seeking monetary relief when it is actually seeking equitable relief and is not pursuing any claim against anyone at all. It is forced to pretend that it is a defendant, when there is no claim asserted against it. And it is forced to pretend that no exclusions to CAFA's removal and jurisdictional provisions apply when it knows perfectly well that a ***controlling*** opinion by the Second Circuit holds to the contrary. The case for remand is irrefutable.

The Legal Standard

It is well established that "plaintiffs in any action . . . are the 'masters of the complaint,' free to preclude removal by electing to" bring a case that is not removable. *Anwar v. Fairfield Greenwich Ltd.*, 676 F. Supp. 2d 285, 296 (S.D.N.Y. 2009). *Anwar* is particularly instructive, as the court there rejected the removing defendants' attempt to treat as a "mass action" a case that asserted a derivative claim. Adopting Magistrate Judge Katz's recommendation, the court found that "Plaintiffs have not crafted an evasive complaint or concealed the true nature of their claims. Derivative Plaintiffs have simply opted to file derivative claims, as they are free to do." *Id.* The court declined to "disregard Plaintiffs' election to file [a] derivative" suit, which is, like an Article 77 proceeding, "a separate and distinct type of suit long established under New York law." *Id.* at 296–97. *Anwar* broke no new ground: "the longstanding well-pleaded complaint rule" depends on "the plaintiff's statement of his own cause of action," not the later acts of the removing parties. *Vaden v. Discover Bank*, 129 S. Ct. 1262, 1272 (2009) (quoting *Louisville & Nashville R. Co. v. Mottley*, 211 U.S. 149, 152 (1908)); *see also id.* ("The well-pleaded complaint rule applies to the original jurisdiction of the district courts as well as to their removal

jurisdiction.") (quoting *Franchise Tax Bd. of Cal. v. Construction Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 10 n.9 (1983)).

Walnut, without any support, says that "[t]his proceeding is a civil action that seeks to try jointly the claims for monetary relief of 530 separate trusts." Petition ¶ 11 (footnote omitted). In other words, according to Walnut, it is a lawsuit involving 530 separate claims of 530 separate trusts against unspecified defendants. That is completely made up. The Trustee's Article 77 petition says nothing about trying claims. That petition cites "the extraordinary burden and cost of a litigation that could last many years" as one important reason ***not*** to try any claims and instead to settle them. Article 77 Petition ¶ 1. Justice Kapnick herself firmly rejected Walnut's attempt to transform this proceeding into a class action by insisting on "opt-out" rights:

> It's important to remember that this petition was brought as an Article 77 petition . . . . That's what they did. That's the proceeding they brought. It's not, it's not a Class Action. There aren't provisions in there to opt out that you are talking about. That's not what this is. If you started it, maybe that's what you would have done, but they started it and that's what they did.

August 5, 2011 Hrg. Tr. 18:21-19:6 (Ingber Decl., Ex. C). But even if the state court proceeding were not an Article 77 proceeding commenced by one petitioner seeking equitable relief, and instead involved some sort of aggregated action, Walnut's removal would still be frivolous.

It is well settled that the removal statutes are narrowly construed and do not permit the wholesale rewriting that Walnut advocates. "In light of the congressional intent to restrict federal court jurisdiction, as well as the importance of preserving the independence of state governments, federal courts construe the removal statute narrowly, resolving any doubts against removability." *Lupo v. Human Affairs Int'l, Inc.*, 28 F.3d 269, 274 (2d Cir. 1994); *see also FDIC v. Tyco Int'l Ltd.*, 422 F. Supp. 2d 357, 367–68 (S.D.N.Y. 2006) ("[O]ut of respect for the independence of state courts, and in order to control the federal docket, 'federal courts construe the removal statute narrowly, resolving any doubts against removability.'") (quoting *Stan*

Winston Creatures, Inc. v. Toys "R" Us, Inc., 314 F. Supp. 2d 177, 179 (S.D.N.Y. 2003)). The rationale that motivates this rule of construction is particularly applicable here, where the special proceeding at issue is a creature of New York state law, intended to allow New York state courts to provide instructions to New York trustees by way of a summary proceeding.

That admonition applies equally to CAFA jurisdiction. *See Palisades Collections LLC v. Shorts*, 552 F.3d 327, 336 (4th Cir. 2008) ("although we are cognizant of the fact that Congress clearly wished to expand federal jurisdiction through CAFA, we also recognize that it is our duty, as a court of law, to interpret the statute as it was written, not to rewrite it as [the counterclaim defendant] believes Congress *could have* intended to write it"). Further, because "[t]he question of subject-matter jurisdiction can, after all, be raised by the parties or even by the court at any stage of the proceedings[,] [i]t would therefore ill behoove [the Court] to retain the action if there is the ***slightest doubt*** as to [its] power to entertain it, and then face the possibility of jurisdictional dismissal by a higher court after the litigation had been fully concluded." *Tyco Int'l*, 422 F. Supp. 2d at 368 (emphasis added) (quoting *Am. Mut. Liab. Ins. Co. v. Flintkote Co.*, 565 F. Supp. 843, 850 (S.D.N.Y. 1983)). But Walnut's removal theory, which requires the court to entertain so many fictions that the Article 77 proceeding becomes all but unrecognizable, does more than raise serious doubts as to this Court's jurisdiction over this state-created special proceeding. Rather, as we demonstrate, it is completely untenable.

I. The Article 77 Proceeding Is Not Removable.

The Article 77 proceeding is not a "mass action" under Section 1332(d)(11)(B)(i). A "mass action" is a civil action in which (1) "monetary relief claims" (2) "of 100 or more persons" (3) "are proposed to be tried jointly" (4) "on the ground that the plaintiffs' claims involve common questions of law or fact." Not one of these requirements is met here.

There are no monetary relief claims. Even assuming that a request for judicial approval of a settlement is a "claim," it plainly is not a claim for "monetary relief." The Trustee's petition seeks entry of a Proposed Final Order and Judgment (Ingber Decl., Ex. D), which provides no monetary relief at all. It is well established that matters of trust administration generally are equitable in nature. *See, e.g.*, *In re Salkin*, 170 N.Y.S.2d 191, 194 (N.Y. Sup. Ct. N.Y. Cnty. 1957), *aff'd*, 178 N.Y.S.2d 613 (N.Y. App. Div. 1st Dep't 1958) (enactment of Article 79, the predecessor to Article 77, allowing "a trustee to voluntarily petition the Chancellor to review his record and approve or disapprove his actions in furtherance of his trust . . . did not, however, change the inherent nature of the action, which is in equity."). Such claims are not removable. *See Lowery v. Ala. Power Co.*, 483 F.3d 1184, 1202 n.45 (11th Cir. 2007) (CAFA "does not extend to actions seeking solely equitable relief"); *Kitzato v. Black Diamond Hospitality Invs., LLC*, 2009 WL 3824851, at *5 (D. Haw. 2009) (same as to "actions seeking solely equitable or declaratory relief"). It is undeniable that there is no claim for monetary relief in the Article 77 proceeding.

The proceeding does not involve "claims of 100 or more persons." 28 U.S.C. § 1332(d)(11)(B)(i). In this case, there is one petitioner making one request for approval of a settlement. There is no "mass" in this action. In describing the action as trying the claims of "530 separate trusts," the removal petition quotes the Trustee's Article 77 petition, which only confirms that there is but a single petitioner: "***Petitioner***, The Bank of New York Mellon ("BNY Mellon" or "Trustee"), solely in ***its*** capacity as ***trustee*** of the [530 trusts] . . . alleges as follows." Art. 77 Petition, preamble (emphasis added). Nothing in that language suggests that "100 or

more persons" are involved.[2] There is no conceivable way that the Article 77 proceeding meets the numerosity requirement.

No claims are being "tried jointly." The Trustee seeks judicial instructions and approval of a single, indivisible ruling that it acted in good faith and within the bounds of reasonableness in entering into the Settlement. The standard of review applicable to the Trustee's decision in this context is whether the decision to settle "is within the scope of the trustee's powers, is reasonable and prudent, and is entitled to judicial deference." *In re Application of IBJ Schroder Bank & Trust Co.*, 101530/1998 (N.Y. Sup. Ct. N.Y. Cnty. Aug. 16, 2000), at 6; *see also In re Stillman*, 433 N.Y.S.2d 701, 707–08 (N. Y. Sur. Ct. N.Y. Cnty. 1980) ("If discretion is conferred upon the trustee in the exercise of a power, the court will not interfere unless the trustee in exercising or failing to exercise the power acts dishonestly, or with an improper even though not a dishonest motive, or fails to use his judgment, or acts beyond the bounds of a reasonable judgment."). That standard emphatically does not require trying the claims against Countrywide—indeed, as with any settlement, a key goal is to ***avoid*** the cost, uncertainty, and delay associated with a full-blown litigation. Nothing in the petition asks for or in any sense contemplates trying or adjudicating any claims for relief. Rather, the New York court is asked to adjudicate and resolve a question about the Trustee's decision-making in entering into the Settlement. That distinction is elementary, not novel. *Cf. In re Metro. Life Derivative Litig.*, 935 F. Supp. 286, 292 (S.D.N.Y. 1996) (settlement hearing must not become a "trial or a rehearsal of the trial"); *Robertson v. Nat'l Basketball Assoc.*, 72 F.R.D. 64, 68-69 (S.D.N.Y. 1976)

[2] We note that 22 Trust beneficiaries have intervened as petitioners, but 22 intervenors plus the Trustee is still far short of 100. More importantly, those intervenor-petitioners do not have their own "claims," but merely support the single indivisible request made by the Trustee.

("settlement hearing is not a trial or a rehearsal of the trial. . . . it does not attempt to decide the merits of the controversy").

No claims are being tried jointly "on the ground that the plaintiffs' claims involve common questions of law or fact." 28 U.S.C. § 1332(d)(11)(B)(i). If the Article 77 proceeding involves a Settlement covering 530 trusts, it does not involve trying multiple claims of multiple plaintiffs because they present "common questions"—to the contrary, the Article 77 proceeding presents only one claim by one plaintiff: whether the aggregate Settlement, which covers 530 trusts in a single, particular Settlement Agreement, is a reasonable exercise of the Trustee's discretion. The Senate report on CAFA explained that the "mass action" provision was not intended to sweep in any case that might affect a lot of people; instead, it was aimed at cases that "are simply class actions in disguise . . . [and that] often result in the same abuses." S. REP. NO. 109-14, at 41, *as reprinted in* 2005 U.S.C.C.A.N. at 44. The "mass action" language was directed particularly at the handful of states that have no formal class action rules and use judicial claim-aggregation principles instead. *See* 151 CONG. REC. S1235-36 (daily ed. Feb. 10, 2005) (statement of Sen. Durbin); *Anwar*, 676 F. Supp. 2d at 297 ("CAFA's legislative history makes clear that Congress envisioned 'mass actions' as claims by multiple plaintiffs 'consolidated by State court rules,' but not otherwise pled as class actions.") (citing 151 CONG. REC. S1151 (daily ed. Feb. 9, 2010) (statement of Sen. Reid)). The New York C.P.L.R. has an entire article devoted to class actions: Article 9, not Article 77. In sum, this Article 77 proceeding bears no resemblance to a class action or CAFA "mass action," and Walnut's attempt to recast it as such should be rejected.

II. The Article 77 Proceeding Would Not Be Removable Even If It Had The Scope That Walnut Erroneously Ascribes To It.

A. The Suit As Walnut Imagines It Is Not a Mass Action.

Even if this Article 77 proceeding did seek to try the claims against Countrywide, as Walnut imagines, it still would not be a mass action.

There are not "100 or more persons" bringing claims. Even in a suit on the underlying claims, there still would be only one plaintiff, the Trustee. The 513 New York common-law Trusts are not parties to any PSA—only the Trustee is. The PSAs explicitly provide that rights against Countrywide under the PSAs belong to the Trustee.[3] That contractual term is consistent with the more fundamental principle that New York common-law trusts are not juridical "persons" that can sue or be sued. *See In re Straut's Estate*, 27 N.E. 259, 262 (N.Y. 1891) ("It is the duty of a trustee to defend and protect the title to the trust-estate, and, as the legal title is in him, he alone can sue and be sued in a court of law.") (citing Perry on Trusts § 328) (quoted in *New Century Mortg. Corp. v. McDonald*, 2011 WL 781466, at *5 (N.Y. Sup. Ct. Bronx Cnty. 2011). The 17 Delaware Trusts granted their rights in those contracts to the Trustee and provided that any suit to enforce them must be brought in the Trustee's name. Therefore, claims against Countrywide are not "claims of 100 or more" trusts; they are claims of one person, BNYM as Trustee.

The claims are not tried jointly on the ground that they implicate common issues of law or fact. Even if the claims against Countrywide were proposed to be tried in this proceeding, the claims would not have been "joined" under some New York rule because they have common

[3] *See* PSA § 2.01(b) ("the Depositor sells, transfers, assigns, sets over and otherwise conveys to the Trustee . . . all the right, title and interest of the Depositor in and to the Trust Fund together with the Depositor's right to require each Seller to cure any breach of a representation or warranty . . . or to repurchase or substitute for an affected Mortgage Loan").

issues, for the same reasons as explained above. The claims are all in one proceeding because the Trustee seeks an indivisible ruling regarding its entry into a single Settlement Agreement.

B. Only a Defendant Can Remove Under CAFA, and Walnut Would At Most Be a Plaintiff in the Suit As It Imagines It, Not a Defendant.

Section 1453 allows removal "in accordance with section 1446," and Section 1446 allows removal only by "[a] defendant or defendants." 28 U.S.C. § 1446(a). "Federal law, not the applicable state statute or even the pleadings in state court, determines who is a plaintiff and who is a defendant." *See Yakama Indian Nation v. State of Wash. Dep't of Revenue*, 176 F.3d 1241, 1248–49 (9th Cir. 1999) (citing *Chicago, R.I. & P.R. Co. v. Stude*, 346 U.S. 574, 580 (1954)). The Supreme Court's decision in *Shamrock Oil & Gas Corp. v. Sheets* "dictate[s] that the phrase 'the defendant or the defendants,' as used in § 1441(a) [the general removal statute], be interpreted narrowly, to refer to defendants in the traditional sense of parties against whom the plaintiff asserts claims." *First Nat'l Bank of Pulaski v. Curry*, 301 F.3d 456, 462–63 (6th Cir. 2002). Section 1332(d)(11)(B)(i) makes clear that the "claims of 100 or more persons" must be "the plaintiffs' claims" (consistent with the way that real class or mass actions work).

In a case strikingly similar to this one, a Southern District court held that shareholders who objected to the settlement of a derivative suit were not defendants for removal purposes. The court wrote:

> There is neither logic or merit in the contention that because Willheim and Phillips did not choose to accept the settlement offered to the corporation and its stockholders, the parties should be realigned so as to make the defendants, who offered the settlement, plaintiffs and Willheim and Phillips to whom, among others, it was in essence offered, defendants, in order to permit them to remove the action to this Court. Moreover, if the settlement should not be approved the action will continue in the same adversary posture with Willheim and Philips united in interest with the plaintiff, who is asserting claims against the named and actual defendants.

Ackert v. Ausman, 217 F. Supp. 934, 936 (S.D.N.Y. 1963). Just like the *Ackert* objectors, Walnut has appeared to object to the settlement of claims in which it would be aligned with the plaintiff, making it a plaintiff for removal purposes.

The removal petition says nothing about whether Walnut is a defendant, and it is not hard to see why. If the Trusts are supposed to be the plaintiffs, then the defendant—the "part[y] against whom the plaintiff asserts claims" (*Pulaski*, 301 F.3d at 463)—must be Countrywide. It is no answer to say that Walnut is a defendant because ***the Trustee*** seeks relief that could affect it. That would concede that the relevant "claims" are not those of the "100 or more" Trusts but that of the one Trustee, making the removal subject to the other defects discussed in Point I above.[4]

Courts have repeatedly rejected the efforts of parties to play fast and loose with the definition of a "defendant" for purposes of determining who may remove under CAFA. As the Seventh Circuit has explained in holding that CAFA does not authorize counterclaim defendants to remove cases to federal court:

> [T]he word 'defendant' has an established meaning in legal practice, and it is vital to maintain consistent usage in order to ensure that Members of Congress (and those who advise them) know what proposed language will do, and people can understand the meaning of statutes.
>
> It does not follow from the fact that the 2005 Act expands the set of removable cases that it must use "defendant" in a novel way. The statute employs time-tested legal language. . . . [T]he drafters of the 2005 Act . . . chose the unadorned word "defendant," a word with a settled meaning.

[4] Walnut's admission that it owns certificates in only three trusts (Petition ¶ 5) raises the further question of how it can be a "defendant" as to the claims of all 530 trusts. If it is a defendant only as to the "claims of 3 persons," can it invoke the "mass action" provision? This, along with other questions of first impression concerning the Court's subject matter jurisdiction, need not be resolved if the case is remanded.

First Bank v. DJL Properties, LLC, 598 F.3d 915, 917 (7th Cir. 2010). And the Ninth Circuit recently observed that "Appellants ask us to do what Congress did not, by rewriting the meaning of an accepted and understood term. To do so and change the meaning of 'defendant' in [28 U.S.C.] § 1453(b) would, as Judge Easterbrook phrased it, 'make hash of Chapter 89 [governing removal], because § 1453(b) refers to § 1446; unless the word 'defendant' means the same thing in both sections, the removal provisions are incoherent.'" *Westwood Apex v. Contreras*, 644 F.3d 799, 807 (9th Cir. 2011) (quoting *First Bank*, 598 F.3d at 917); *see also Ball v. Alfortish*, 2009 WL 901773, at *2 (E.D. La. Mar. 31, 2009) ("The text of CAFA does not indicate Congressional intent to permit an intervenor to make a case removable by independently asserting a class action. There is no evidence that Congress intended the courts to look beyond the text of CAFA to discover an independent basis for removal, permitting non-defendants to remove, or permitting a third party's claims to serve as the basis for removal.") (footnote omitted).[5]

Under any of Walnut's tortured theories, Walnut is not a defendant and cannot remove.

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[5] The legislative history confirms that parties in Walnut's position have no right of removal. Although the enacted version of Section 1453 permits removal only by a "defendant," an earlier iteration of CAFA that initially passed the House, H.R. 1115, would have granted absent plaintiff-class members a right to remove. *See* H.R. 1115, 108th Cong. § 5 (2003), at 15:14–23, *available at* http://www.gpo.gov/fdsys/pkg/BILLS-108hr1115eh/pdf/BILLS-108 hr11 15eh.pdf ("class action may be removed . . . by any plaintiff class member who is not a named or representative class member without the consent of all members of such class."). The House Report states that this provision was intended, in part, to allow class members who objected to a class settlement to move the matter to federal court for review. *See* H.R. REP. NO. 108-144, 108th Cong. (2003), 1st Sess., 2003 WL 21321526, at *36 (2003) ("This revision will combat collusiveness between a corporate defendant and a plaintiffs' attorney who may attempt to settle on the cheap in a State court at the expense of the plaintiff class members."). But this absent class-member removal right was deleted from the version of CAFA that passed the Senate, and the House approved the Senate version without change. Thus, under any theory, what Walnut is seeking to do here—remove a settlement that affects it for review by a federal court—is something Congress considered but decided ***not*** to authorize.

III. Removal Is Also Barred by the Securities Exception.

Regardless of how the proceeding is characterized, it cannot be removed because it falls within the "securities exception" to CAFA. Walnut asserts that the Article 77 proceeding seeks to try claims arising out of the PSAs. Petition ¶ 11. In this much, Walnut is correct: the actual Article 77 proceeding seeks approval of the exercise of the Trustee's decision to settle claims arising under the PSAs. Under controlling precedent from the Second Circuit, claims seeking to enforce terms of the PSAs, and specifically the repurchase obligations that would be settled and that would be at issue in any suit against Countrywide, are not removable.

The removal provisions of Section 1453(d) "shall not apply to any class action that solely involves—":

> (3) a claim that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security (as defined under section 2(a)(1) of the Securities Act of 1933 (15 U.S.C. 77b(a)(1)) and the regulations issued thereunder).

28 U.S.C. § 1453(d). Section 1332(d), which creates subject matter jurisdiction over the types of cases that are removable under CAFA, contains in subsection (d)(9)(C) an exception for securities-related claims that is identical to the exception in Section 1453(d)(3). These are referred to collectively as the "securities exception."

Greenwich Financial v. Countrywide was a class action by Certificateholders against three Countrywide entities for breaching PSAs. The defendants removed under CAFA, and the District Court remanded based on the securities exception. 603 F.3d 23, 25–26 (2d Cir. 2010). In an opinion by Judge Lynch, the Second Circuit dismissed the appeal from the remand, finding that it lacked appellate jurisdiction because the case fell within an "exception to appellate jurisdiction over remand orders of class actions [that] is identical to the third of three exceptions to CAFA's grant of original federal diversity jurisdiction." *Id.* at 27. The finding that the case

fell within the exception to appellate jurisdiction amounted to a finding that the case was not removable under Section 1453(d)(3) and also that the District Court lacked subject matter jurisdiction under Section 1332(d)(9)(C).

Walnut's counsel should be familiar with this case, because they represented the plaintiffs in opposing removal. In their brief to the Second Circuit (2d Cir. No. 09-3660-cv, filed Jan. 15, 2010 (Ingber Decl., Ex. E)), referring to mortgage-securitization trust certificates, they wrote:

> [T]he sole objective of this action is to enforce Countrywide's obligation under the PSAs to repurchase loans that it modifies. The district court thus held correctly that plaintiffs' claim comes under the exception to jurisdiction in 28 U.S.C. § 1332(d)(9)(C) because it "relates to the rights, duties . . . and obligations relating to or created by or pursuant to any security."

Grais *Greenwich* Br. 6 (ellipsis in original). That brief was signed by David Grais and Owen Cyrulnik, two of the same lawyers who signed the removal petition in this case.

The Second Circuit agreed. It held that:

> The focus of the inquiry is on the source of the right that the plaintiff's claim seeks to enforce. As long as a plaintiff's claim seeks enforcement of a right that arises from an appropriate instrument, it falls within the exception of §§ 1332(d)(9)(C) and 1453(d)(3), regardless of whether the plaintiff is a party to the instrument.

Greenwich, 603 F.3d at 29. The court reiterated that the securities exception "examines the *source* of the right that the suit seeks to enforce" and applies to all "suits that seek to enforce the terms of *instruments* that create and define securities." *Id.* at 30 (quoting *Estate of Pew v. Cardarelli*, 527 F.3d 25, 33 (2d Cir. 2008)).

Like the claims in *Greenwich*, the "source" of any claim against Countrywide would be the PSAs, and those claims would include claims for alleged breaches of representations and warranties that were set forth in the PSAs. The Article 77 proceeding turns on the reasonableness of the Trustee's decision to settle precisely the type of PSA-based claims that

were at issue in *Greenwich*, and its legal authority to do so under the terms of the PSAs. *See* Walnut Petition to Intervene (Ingber Decl., Ex. F) at 6 n.3 (questioning whether BNYM "has the legal authority ***under the PSAs***" to settle these claims) (emphasis added). The Second Circuit held unambiguously that such claims are not removable because the Countrywide PSAs are "instruments that create and define securities":

> Securities are created and defined not simply by their own text, but also by any number of deal instruments executed between various parties. Indeed, we made clear in *Cardarelli* that the 'instruments that create and define securities' include documents such as certificates of incorporation and bond indentures. For this reason, the fact that plaintiffs seek enforcement of a term of the PSAs—trust agreements similar to bond indentures in many respects—rather than of the certificates does not affect our conclusion that this suit is not removable under CAFA.

603 F.3d at 29 (citation omitted).

The Second Circuit's decision in *Greenwich* is controlling: this action, like *Greenwich*, is not removable because it "relates to the rights, duties . . . and obligations relating to or created by or pursuant to" the Countrywide securities. 28 U.S.C. § 1332(d)(9)(c).

IV. Remand Is Required Because Walnut Waived Its Right to Remove.

Walnut's removal should be rejected and this matter remanded for the further reason that Walnut "manifested an intent to litigate in state court, and thereby waived its right to remove." *Heafitz v. Interfirst Bank of Dallas*, 711 F. Supp. 92, 96 (S.D.N.Y. 1989); *see also Interior Glass Servs., Inc. v. FDIC*, 691 F. Supp. 1255, 1257 (D. Alaska 1988) ("The policy of prompt removal avoids tactical removal after a defendant sees the case going sour in state court."). "Waiver is generally found where the removing defendant has previously taken substantial action indicating an intent to submit the issue to adjudication in the state court." *Home Indem. Co. v. Greyhound Corp.*, 1989 U.S. Dist. LEXIS 8687, at *3–4 (S.D.N.Y. July 26, 1989); *see also Touche Ross & Co. v. Mfrs. Hanover Trust Co.*, 503 F. Supp. 222, 223 (S.D.N.Y. 1980) (remanding case to State

court because of "the extensive proceedings and litigation that [defendant] indulged in in the state courts with full knowledge of" the arguments that served as the basis for its notice of removal). While defensive, "preliminary[,] or insubstantial steps" may not be sufficient, where a defendant shows an "intent to litigate the case in state court" it cannot change course and remove. *Home Indem.*, 1989 U.S. Dist. LEXIS, at *4 (internal quotation marks and brackets omitted).

In this case, Walnut showed a clear intent to contest the proceeding in state court. On July 5, 2011, Walnut filed its unopposed petition to intervene. On August 4, almost a month later, Walnut moved by order to show cause requesting (i) discovery from the settling parties and the 22 institutional investors that negotiated the Settlement with Countrywide; (ii) a modification of the Preliminary Order setting forth the deadline and procedure for objections; and (iii) a modification of the Preliminary Order and the Settlement Agreement to give Trust beneficiaries the right to "opt-out." Ingber Decl., Ex. G. And on August 5, Walnut appeared and argued extensively before Justice Kapnick regarding these issues. It was not until after receiving adverse rulings on those requests that Walnut filed its notice of removal.

V. Other Problems With Proceeding in Federal Court.

Walnut's effort to force the Article 77 proceeding into CAFA raises questions by the bucketful, and those questions make an already clear case for remand even more obvious. Because jurisdictional statutes are strictly construed and doubts are resolved in favor of remand, if the Court has any question about the applicability of the "mass action" provision or its many exclusions, remand is the only option. This brief addresses only a fraction of the defects in Walnut's notice of removal, but there are many others that raise at least substantial doubt about whether this Court can or should hear the case, including:

- Whether the case falls within the "home state" provision that requires a court to decline to exercise jurisdiction where "two-thirds or more of the members of the proposed plaintiff classes in the aggregate, and the primary defendants, are citizens of the State in which the action was originally filed." 28 U.S.C. § 1332(d)(4)(B). Here, the plaintiff "class" consists of BNYM alone. The "primary defendant" in any case alleging a breach of repurchase obligations would be Countrywide Home Loans Inc., which is a New York corporation and so is a New York citizen under 28 U.S.C. § 1332(c)(1).
- Whether an Article 77 trust administration proceeding is a "civil action" under Section 1332(d)(11)(B)(i). The state-court proceeding is not a "civil action" under the C.P.L.R.[6]
- Whether the removal petition was timely even though it was filed more than 30 days after Walnut moved to intervene. *See Irving Trust Co. v. Century Export & Import, S.A.*, 464 F. Supp. 1232, 1239 (S.D.N.Y. 1979) (holding that 30-day period began when intervention motion was filed, not when it was granted); *Capoccia v. Boone*, 2007 WL 1655348, at *4 (D. Vt. June 5, 2007) ("Courts have held that the 30-day period for removing a case may begin when the intervention motion is ***filed*** in state court, thus implying that the motion need not be granted in state court prior to removal.") (emphasis added).

[6] The removal petition notes that the only form of action in ***federal*** court is a "civil action," but the Federal Rules have no analog to an Article 77 proceeding. The C.P.L.R. clearly distinguishes between "civil actions" and "special proceedings." *See* C.P.L.R. 103(b) ("All civil judicial proceedings shall be prosecuted in the form of an action, except where prosecution in the form of a special proceeding is authorized.").

Finally, absent remand, the Court would have to decide whether to fundamentally rework the case to match the fictions upon which removal was based. Among the issues that would arise are:

- If removal is allowed on the theory that the Trusts are the "plaintiffs," will they have to intervene as plaintiffs in the federal case?
- Would the Court maintain the fiction that Walnut is a "defendant"? Or would Walnut be realigned as a plaintiff (even though Walnut itself has no standing to bring claims that the Trustee has settled)? And if neither a plaintiff nor a defendant, how should Walnut be designated under CAFA?
- Finally, since Federal Rules have no analog to an Article 77 proceeding, what procedural rules would apply? Would this case move forward as an Article 77 special proceeding when the very basis for removal is that the case is a mass action? Or would it have to be recast as something entirely different?

These problems reinforce the inexorable conclusion that Walnut has no reasonable basis to remove, and that the case should be remanded.

VI. BNYM Should Be Awarded Costs and Attorney Fees Incurred as a Result of Walnut's Frivolous Removal.

Section 1447(c) expressly allows a District Court to "require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." 28 U.S.C. § 1447(c). The statute does not require a finding that the removal was frivolous (*see id.*), but an award of costs and fees is particularly appropriate where "the removing party lacked an

objectively reasonable basis for seeking removal." *Calabro v. Aniqa Halal Live Poultry Corp.*, ___ F.3d ___, 2011 WL 2279187, at *2 (2d Cir. June 10, 2011).[7]

Here, not only are there any number of obvious independent reasons that this case was not removable and the petition was not timely, but there is also ample reason to believe that Walnut timed the removal to give itself two bites at the apple on contested procedural matters. The unwarranted delay and disruption to the Article 77 proceeding caused by the removal further support an award of costs and attorney fees. *See, e.g.*, *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 140 (2005) ("Assessing costs and fees on remand reduces the attractiveness of removal as a method for delaying litigation and imposing costs," and is especially appropriate "to deter removals sought for the purpose of prolonging litigation").[8]

[7] The Court retains jurisdiction to resolve a motion for costs and fees under section 1447(c) even after a remand order has issued. *See Bryant v. Britt*, 420 F.3d 161, 165–66 (2d Cir. 2005).

[8] An award of costs and attorney fees is all the more appropriate because, under the 21-day safe harbor provision of Rule 11(c)(2), a prompt remand may preclude an award of sanctions under Rule 11, which, we respectfully submit, would be warranted here. *See Ridder v. City of Springfield*, 109 F.3d 288, 295 (6th Cir. 1997). *But see Pannonia Farms, Inc. v. USA Cable*, No. 03 Civ. 7841, 2004 WL 1276842, at *11 (S.D.N.Y. June 8, 2004).

CONCLUSION

For all of the foregoing reasons, the Court should grant the Motion and remand the proceeding to state court.

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