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 and Intervenor-Petitioners, -against- WALNUT PLACE LLC, *et al.*, Intervenor-Respondents.	Docket No. 11-CV-5988 (WHP)

WALNUT PLACE'S MEMORANDUM OF LAW IN OPPOSITION TO THE BANK OF NEW YORK MELLON'S MOTION TO REMAND

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This Court has subject-matter jurisdiction of this action because it is a "mass action" under the Class Action Fairness Act. The Bank of New York Mellon raises two primary challenges to this Court's jurisdiction, but it is mistaken about both of them.

First, BNYM argues that this is not a "mass action" because there is no claim for monetary relief, there are fewer than 100 plaintiffs, and there are no claims to be tried jointly. None of those arguments is plausible. BNYM simply ignores the part of its own proposed final order that asks the Court to direct Bank of America and Countrywide to pay $8.5 billion — surely "monetary relief" — to the trustee and the trusts. BNYM also ignores its own petition, in which it makes clear that it is suing solely in its capacity as trustee of each of 530 separate and unique trusts, each of which is a plaintiff in this action. And if all of those trusts are plaintiffs in this action, then certainly they are seeking to have their claims adjudicated together based on common questions of law and fact. (*See* Point I.A.) BNYM also argues that Walnut Place is not a defendant and so cannot properly remove this action to federal court. That too is implausible because Walnut Place intervened as an adverse respondent in the state court proceeding, and BNYM did not oppose the petition to intervene or disagree with its characterization of Walnut Place as an adverse party. (*See* Point I.B.)

Second, BNYM argues that this action falls under the "securities exception" to federal jurisdiction under CAFA. BNYM is wrong for several reasons. Most important, BNYM misunderstands the holding of the Second Circuit in *Greenwich Financial Services v. Countrywide.* The Second Circuit held that the securities exception applies only if the source of the right that is being enforced is rooted in the plaintiff's ownership of a security. Because it is undisputed that BNYM and the trusts own no securities issued by any of the 530 trusts, the

claims in this action are not rooted in their ownership of any security, so the securities exception does not apply. (*See* Point II.)

*

CAFA was enacted for the express purpose of preventing the abuse of state courts and state procedures to obtain judicial approval of class action settlements without adequate protection for the members of the class. The Senate recognized that "in too many cases, state court judges are readily approving class action settlements that offer little — if any — meaningful recovery to the class members." S. COMM. ON THE JUDICIARY, 109TH CONG., REPORT ON THE CLASS ACTION FAIRNESS ACT OF 2005 at 4 (2005). In this action, BNYM is trying to use an expedited special proceeding designed to address the internal administration of express trusts to obtain court approval of one of the largest class action settlements in history. And BNYM is trying to do so without providing adequate protection to the members of the class that do not believe the proposed settlement is in their best interests. Despite BNYM's fevered protestations that this removal was frivolous, this is precisely the type of case that CAFA was designed to bring within the ambit of federal jurisdiction. Walnut Place respectfully asks the Court to conclude that it has subject-matter jurisdiction and to deny BNYM's motion to remand.

STATEMENT OF FACTS

To continually raise new money with which to make its now-notorious mortgage loans to borrowers across the United States, Countrywide Home Loans, Inc. sold millions of its loans to securitization trusts that Countrywide sponsored. To raise the money to pay Countrywide for the mortgage loans, those trusts in turn sold securities called certificates, which were backed by those mortgage loans, to investors all over the world. Countrywide made numerous representations and warranties about those loans, and it agreed to repurchase from the trusts loans that did not comply with those representations and warranties. The Bank of New York Mellon is the trustee for 530 of the trusts that Countrywide created, which are the subject of this action. BNYM is a bank organized under the laws of New York and has its principal

place of business in New York City. For the purpose of diversity jurisdiction, BNYM is a citizen of New York.

The Walnut Place entities are Delaware limited liability companies, whose members are limited partnerships organized under Delaware law. Based on the citizenship of their members and partners, Walnut Place VIII LLC and Walnut Place X LLC are each citizens of Massachusetts, Connecticut, New Hampshire, and Maryland, and Walnut Place IX LLC is a citizen of Massachusetts, New Jersey, Connecticut, New Hampshire, and Maryland.[1] The Walnut Place entities own securities issued by three of Countrywide's trusts. Concerned by widespread reports about the poor quality of Countrywide's loans, Walnut Place spent many months and hundreds of thousands of dollars to investigate the true quality of the loans in its trusts. It found that hundreds of loans in each trust were actually not of good quality and breached several of the representations and warranties that Countrywide had made about them. Walnut Place demanded that Countrywide repurchase those loans as it had agreed, and, when it did not, Walnut Place filed two lawsuits in New York State Court.

Months after Walnut Place filed its first action, BNYM announced on June 29, 2011, that it had entered into an agreement with Countrywide and its corporate parent and successor by *de facto* merger, Bank of America Corporation, to settle all "potential claims belonging to the [530] trusts" for which BNYM serves as trustee. On the same day, BNYM filed an Article 77 proceeding and sought an order that (i) declared that BNYM had behaved reasonably by entering into the settlement, (ii) ordered BNYM, Countrywide, and Bank of America to consummate the settlement, and (iii) released the claims of investors, including the claims being litigated by Walnut Place. BNYM has a conflict of interest because, among other things, it negotiated for itself as part of the settlement an additional "side letter" of indemnity from Bank of America, which is over and above the indemnity to which it is entitled under the pooling and servicing agreements that govern the trusts.

[1] Many other intervenor-respondents also are not citizens of New York.

Although BNYM concedes (BNYM Petition ¶ 13, attached as Ex. A to Declaration of Owen L. Cyrulnik in Support of Walnut Place's Opposition to BNYM's Motion to Remand) that it knew that Walnut Place and other certificateholders were likely to object to the proposed settlement, BNYM nevertheless made no effort to inform Walnut Place or the hundreds of investors in Countrywide trusts (other than the 22 self-appointed investors) that BNYM was secretly negotiating a deal with Countrywide and Bank of America, much less to solicit the views of those investors about what terms of settlement would be fair or whether they wished to be "represented" in those negotiations by the 22 self-appointed investors. Moreover, BNYM appeared *ex parte* in New York State Court, without notice to even those potentially adverse parties that it was well aware of, and proffered an order to show cause that unilaterally set an expedited deadline so that it could have its proposed settlement ratified by the court as quickly as possible. BNYM chose to file an Article 77 proceeding because it thought it could use the special proceeding to cherry-pick the aspects of class action settlements that it finds useful (court approval, global releases of the rights of all class members, "objections" rather than interventions as of right, etc.) but to cast aside the aspects that it finds inconvenient (mainly the right to opt out).

On August 26, 2011, Walnut Place removed the Article 77 proceeding to this Court because it is a "mass action" under the Class Action Fairness Act. On August 31, 2011, BNYM moved to remand the case to state court.

ARGUMENT

I. THIS COURT HAS SUBJECT MATTER JURISDICTION OF THIS ACTION AS A MASS ACTION UNDER THE CLASS ACTION FAIRNESS ACT.

BNYM does not dispute that this action satisfies the minimal diversity and amount-in-controversy requirements of CAFA. (Notice of Removal ¶¶ 12-13, Cyrulnik Decl. Ex. B). 28 U.S.C. § 1332(d)(2), (11).[2] BNYM argues only that this is not a "mass action" under CAFA and

[2] *See, e.g., Anwar v. Fairfield Greenwich Ltd.*, 676 F. Supp. 2d 285, 292 (S.D.N.Y. 2009) (subject matter exists under CAFA for mass actions that "satisfy minimum diversity and an amount in controversy requirement of $5,000,000").

that Walnut Place is not a "defendant" and therefore was not authorized to remove this action. Neither argument has any merit.

A. The Article 77 Proceeding Is A Mass Action.

A mass action is "any civil action . . . in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact." 28 U.S.C. § 1332(d)(11)(B)(i). BNYM argues that the Article 77 proceeding is not a mass action for three reasons: (i) it does not involve monetary relief claims, (ii) it does not involve 100 or more persons, and (iii) the claims will not be tried jointly. (Br. 6-11.) BNYM is mistaken on all three points.

1. The Payment Of $8.5 Billion Is A Form Of Monetary Relief.

BNYM argues that "the Trustee's petition seeks entry of a Proposed Final Order and Judgment, which provides no monetary relief at all." (BNYM Br. 7.) That statement is not correct. "Monetary relief" means the payment of money. The Proposed Final Order and Judgment provides monetary relief because it expressly directs Bank of America and Countrywide to "consummate the Settlement" (BNYM Proposed Order 5, Cyrulnik Decl. Ex. C) by paying $8.5 billion to the Trustee and the Trusts. The proposed order provides that

> The Parties are directed to consummate the Settlement in accordance with its terms and conditions, and the Settlement is hereby approved by the Court in all respects.

(BNYM Proposed Order 5, Cyrulnik Decl. Ex. C.) One of the "terms and conditions" of the Settlement is that Bank of America and Countrywide pay $8.5 billion to the Trusts. (Settlement Agreement § 3(a) at 9, Cyrulnik Decl. Ex. D.) It defies logic that an action that seeks an order directing the payment of $8.5 billion does not include a claim for monetary relief.

BNYM relies on two decisions that "actions seeking solely equitable relief" are not removable as "mass actions" under CAFA. *See Lowrey v. Alabama Power Co,.* 483 F.3d 1184, 1202 n.45 (11th Cir. 2007); *Kitazato v. Black Diamond Hospitality Investments, LLC,* No. 09-00271, DAE-LEK, 2009 WL 3824851, at *5 (D. Haw. 2009). In neither case, however, did the plaintiff seek any relief that could have been characterized as "monetary." Had the plaintiffs in

those cases asked the court to order the payment of billions of dollars, then certainly those cases (like this one) would have been removable under CAFA.

BNYM also argues that "it is well established that matters of trust administration are generally equitable in nature." (Br. 7.) Even if that were true, however, it is irrelevant. CAFA requires only that a mass action include a claim for "monetary relief," that is, the payment of money. Although courts sitting in equity by definition cannot order the payment of *money damages*, such courts routinely award "monetary relief." *See, e.g., Bowen v. Massachusetts*, 487 U.S. 879, 893 (1988) ("The fact that a judicial remedy may require one party to pay money to another is not a sufficient reason to characterize the relief as 'money damages.'"); *Maryland v. Department of Health & Human Services,* 763 F.2d 1441, 1447-48 (D.C. Cir. 1985) ("[C]laims for specific relief, albeit monetary, are for 'relief other than money damages' . . . ."). Thus, even if BNYM's claims were purely equitable, still this would be a "mass action" and subject to federal jurisdiction under CAFA.

2. There Are Claims Of 530 Separate Trusts Because BNYM Brought The Article 77 Proceeding In 530 Separate Capacities.

BNYM argues that the petitioners in this action are not "100 or more persons." According to BNYM, "there is one petitioner making one request for approval of a settlement" and "there [is] only one plaintiff, the Trustee." (Br. 7, 10.) But the very first line in BNYM's petition proves the opposite. BNYM alleges that it brought this action "*solely in its capacity* as trustee of the five hundred and thirty . . . residential mortgage-securitization trusts." (BNYM Petition 1, Cyrulnik Decl. Ex. A.) There is a reason why BNYM is careful to allege that it sues "solely in its capacity" as trustee of 530 Trusts. Courts in New York have held for more than a century that "a judgment against the same person in one capacity is not a judgment against him in another." *In re Webster's Estate,* 271 N.Y.S. 922, 926 (N.Y. Sur. 1934); *see also Collins v. Hydorn*, 135 N.Y. 320, 324 (1892) ("The same person may in law be considered another person, and consequently another party, by suing in another capacity."); *Purvin v. Grey,* 64 N.Y.S.2d 266, 267 (N.Y. Sup. 1946) (holding that a previous suit by a trustee did not bar a second suit

brought by the trustee in his individual capacity). This rule was recently underscored by the Appellate Division for the Fourth Department in *Tuper v. Tuper*: "[P]ersons suing or being sued in their official or representative capacity are, in contemplation of law, distinct persons, and strangers to any right or liability as an individual." 34 A.D.3d 1280, 1281 (N.Y. App. Div. 2006) (quoting *Leonard v. Pierce*, 182 N.Y. 431, 432 (1905)). This unbroken line of cases establishes that a trustee suing solely in its capacity as trustee is a unique legal entity.

BNYM could have filed an action solely in its own corporate capacity seeking a declaration that it did not breach its fiduciary duties. Had it done so, then perhaps it would have been the sole petitioner. But that is not the action that is now before this Court. BNYM instead brought this action solely in its capacity as trustee of each of the 530 trusts and seeks approval of a settlement for each trust. In each such capacity, BNYM acting on behalf of each trust is a "distinct person." CAFA jurisdiction "look[s] to the substance of the action and not only at the labels that the parties may attach." *Louisiana ex rel. Caldwell v. Allstate Ins. Co.*, 536 F.3d 418, 424 (5th Cir. 2008). This Court thus need not — and, given that BNYM accepted 530 separate trusteeships, should not — accept BNYM's formalistic argument that it is a "single petitioner."

For at least two reasons, BNYM cannot credibly argue that all 530 trusts may be lumped together into a single legal entity. First, although it is well established that a trustee acting for a single trust is a unique legal entity, there is no such thing as a single legal entity that lumps together 530 trusts. The fact that all 530 trusts happen to have the same trustee is mere happenstance. Each of the trusts was created under a unique pooling and servicing agreement or indenture. Each trust has its own legal rights against Bank of America and Countrywide. The law does not permit BNYM to treat the trusts collectively as one person. It must treat the trusts as separate legal entities. For example, in *In re Steen*, 506 N.Y.S. 2d 640 (N.Y. Sur. 1986), the court held that two trusts created by the same settlor and administered by the same trustee could not be treated as one trust for the purpose of calculating commission. Each of the trusts was created by a separate indenture, and so "[e]ach was separately created and the one is distinct from the other in point of time and purpose of creation." *Id.* at 642. The court stated that the fact

that the same trustee administered both trusts was a "coincidence." *Id.* Precisely the same is true here. Each of the 530 trusts in this action was created with a unique instrument and each one "is distinct from the other[s]." The fact that BNYM is the trustee of all 530 trusts is, for these purposes, a "coincidence." *See also In re Culver's Will*, 62 N.E. 2d 213, 215 (N.Y. 1945).

Second, in attempting to lump all 530 trusts together to avoid federal jurisdiction, BNYM simply ignores that the fairness of the proposed settlement must be evaluated separately for each trust. Not all of the trusts are identically situated. For example, Walnut Place conducted an extensive investigation of three trusts, and was involved in active litigation on two of them, before the proposed settlement was even announced. A non-conflicted trustee and certainly a court would at least consider the value of that active litigation in determining the relative benefits of the proposed settlement for those three trusts. Moreover, the Settlement Agreement itself expressly provides that certain trusts may be excluded from the settlement. (Settlement Agreement § 4 at 13-14, Cyrulnik Decl. Ex. D.) That too belies BNYM's argument that the Article 77 proceeding presents a single "indivisible" claim on behalf of an undifferentiated mass of 530 trusts. The mere fact that the parties included a provision that the settlement may apply only to certain trusts further demonstrates that the trusts are divisible. For this reason, as well as all of the others discussed above, the Court should treat each unique trust as a separate legal entity. This action thus has 530 plaintiffs and easily satisfies the numerosity requirement of a mass action under CAFA.

3. The Claims Will Be Tried Jointly On The Ground That They Involve Common Questions Of Law Or Fact.

BNYM also argues that the claims of the trusts will not be "tried" and that they do not involve common questions of law or fact. (Br. 8-9.) First, BNYM appears to be arguing that there are no claims to be "tried" in this action because the purpose of the action is to approve a settlement for the express purpose of avoiding a trial. "As with any settlement, a key goal is to avoid the cost, uncertainty, and delay associated with a full-blown litigation." (Br. 8.) That argument makes no sense. A trial is "a formal judicial examination of evidence and

determination of legal claims in an adversary proceeding." BLACK'S LAW DICTIONARY (9th ed. 2009). That is precisely what BNYM is asking the Court to do here, that is, to examine evidence in an adversarial proceeding, make a determination of legal claims, and extinguish claims of the adverse parties who oppose the relief being sought. Nor does it matter that BNYM seeks an order approving a settlement rather than litigation of the underlying claims. *See Bullard v. Burlington North Santa Fe Railway. Co.*, 535 F.3d 759, 761 (7th Cir. 2008) (rejecting argument that, because "Complaints do not propose trials [and that plaintiffs would like] to win by summary judgment or settlement," the claims would not be "tried jointly"); *Aburto v. Midland Credit Management, Inc.*, No. 08-CV-1473-K, 2009 WL 2252518, at *3 (N.D. Tex. July 27, 2009).

Second, BNYM argues that the Article 77 proceeding "does not involve trying multiple claims of multiple plaintiffs because they present 'common questions.'" (Br. 9.) This argument is based on two fundamental errors. First, it presupposes that BNYM is correct that there is "only one claim by one plaintiff" and, therefore, no "common questions." If the Court were to agree with Walnut Place, however, that there are actually 530 separate plaintiffs, each of which is seeking relief, then certainly those separate requests for relief present common questions of law and fact that are to be tried together in this one proceeding. Thus, this argument essentially collapses into the question whether there is only one plaintiff or 530 of them. Second, BNYM appears to believe that this action cannot be subject to federal jurisdiction under CAFA because "the New York C.P.L.R. has an entire article devoted to class actions: Article 9, not Article 77." (Br. 9.) But the "mass action" prong of CAFA would be meaningless if every mass action removed under CAFA must have been brought under a state rule that permits class actions. Those actions are already removable as ordinary "class actions" under CAFA. *See* 28 U.S.C. § 1332(d)(1)(B) (defining "Class Action" as "any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar state statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action.") The purpose of the "mass action" option is to permit the removal of actions that are not formally filed as class actions but nevertheless meet the criteria set forth in section 1332(d).

B. Walnut Place Is A Defendant And May Remove Under CAFA.

Under 28 U.S.C. section 1446(a), only a defendant may remove an action to federal court. BNYM argues that Walnut Place is not a defendant in this action and therefore was not authorized to remove it. (Br. 11.) BNYM is mistaken for at least three reasons.

First, Walnut Place filed a petition to intervene as an adverse party, that is, a respondent, in the Article 77 proceeding. Walnut Place and other investors are adverse parties in this action because BNYM is seeking an order that would extinguish the investors' legal rights against their will and over their strong objection. BNYM did not oppose Walnut Place's petition to intervene in the state court proceeding, nor did it disagree with the petition's characterization of Walnut Place as an adverse party and a respondent. Indeed, BNYM itself expressly stated in its petition that, although there were no adverse parties when BNYM first initiated the Article 77 proceeding, "to the extent that certain Certificateholders or other interested parties may wish to be heard on the subject of the Settlement or the judicial instructions sought through this Petition, those parties may become adverse." (BNYM Petition 7, Cyrulnik Decl. Ex. A.) That is precisely what Walnut Place did. Thus, BNYM has already conceded that Walnut Place is properly an adverse party to this action.

It is also settled law that "intervenors may file notices of removal if they are properly aligned as defendants," 14C WRIGHT, MILLER, ET AL., FEDERAL PRACTICE & PROCEDURE, JURIS. § 3730 (4th ed.), and that respondents in special proceedings under New York law are deemed "defendants" for purposes of removal. *See, e.g., Sears Roebuck & Co. v. Glenwal Co.*, 325 F. Supp. 86, 88-89 (S.D.N.Y. 1970) ("[I]t is clear that Sears [by filing a special proceeding to stay an arbitration] . . . was the petitioner or plaintiff in the New York proceeding, and that Glenwal, as the respondent or 'defendant,' properly filed its petition for removal."); *cf. Passa v. Derderian*, 308 F. Supp. 2d 43, 64 (D.R.I. 2004) (concluding that respondent in miscellaneous proceeding was a "defendant" for purposes of removal).[3] Thus, there is no credible reason why

[3] There is likewise no dispute that special proceedings may be removed as "civil actions" if there is a basis of federal subject-matter jurisdiction. *See, e.g., Heifetz v. Tugendrajch*, 542 F. Supp. 1207, 1208-09 (E.D.N.Y. 1982) (concluding that special proceedings under Article 75 of

Walnut Place should be treated as anything other than a defendant for purposes of removing this action to federal court.

Second, it appears that BNYM does not even dispute that Walnut Place is a defendant in the actual Article 77 proceeding. Indeed, BNYM cannot credibly argue otherwise, because it consented to Walnut Place's intervention as an adverse party. Instead, BNYM seems to be arguing that if one were to "reimagine" this action as a claim by BNYM against Countrywide and Bank of America for the repurchase of defective loans, then Countrywide and Bank of America would be the defendants and Walnut Place and other investors would essentially be objectors to a class action settlement.[4] (Br. 11-12.) BNYM may be correct that, if it had styled this proceeding as a class action settlement between the trusts and Countrywide and Bank of America, and then sought court approval of that settlement in New York State Supreme Court, then investors like Walnut Place would not have been defendants and would not have had standing to remove such an action under CAFA.[5] But that is not the action that BNYM filed. BNYM instead chose to use the mechanism of Article 77 — which was designed to assist trustees in the administration of express trusts, *not* to evaluate and approve multi-billion dollar settlements — to pit the trusts and the trustee *against* all of the other investors in the trusts. Thus, in the actual Article 77 proceeding that BNYM filed, there is no question that Walnut Place is a defendant that is entitled to remove under section 1446.

Third, BNYM argues that Walnut Place cannot be a defendant because it is not the "party against whom the plaintiff asserts claims." (Br. 12.) That is wrong for two reasons. First, as

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the CPLR are "civil actions" which may be removed to federal court where original federal jurisdiction otherwise exists).

[4] BNYM appears to be arguing that Walnut Place somehow proposed this "re-imagined" form of the Article 77 proceeding. But Walnut Place has not made any such argument — neither in its notice of removal nor in this opposition to BNYM's motion to remand.

[5] In such an action, of course, Walnut Place and other investors would have been entitled to the traditional protections that are afforded to members of a putative class — including the right to opt out if it did not approve of the proposed settlement. BNYM does not purport to offer any such protection to the investors in this Article 77 proceeding.

discussed above, BNYM is asserting claims against Walnut Place and other investors, because it is seeking to settle Walnut Place's claims against its will and without its consent. More important, there simply is no requirement that the removing defendant must be a party against whom the plaintiff asserts claims. To the contrary, courts all the time permit intervenor-defendants that were not even part of the plaintiff's original action to remove cases to federal court. *See, e.g.*, *Machat v. Sklar*, No. 96 Civ. 3796 SS, 1997 WL 599384, at *5 (S.D.N.Y. Sept. 29, 1997) (Sotomayor, J.) (permitting objector in probate action to remove case to federal court); *In re Marriage of Dean Dyche & Theresa Beat v. United States*, No. 05-1116-WEB, 2005 WL 1993457, at *2 (D. Kan. Aug. 16, 2005) (where United States intervened in state court declaratory judgment action that named no respondents and sought judgment declaring that petitioners were common law spouses entitled to benefits flowing therefrom, action was properly removed because United States had an interest that would be directly impaired by judgment sought). Put simply, a defendant is a party to a proceeding that would be adversely affected by a judgment in favor of the plaintiff. That is precisely what Walnut Place is in this action.

BNYM mistakenly relies on three decisions that do not apply to this action, *First National Bank of Pulaski v. Curry*, 301 F.3d 456,462-463 (6th Cir. 2002); *First Bank v. DJL Properties, LLC*, 598 F.3d 915, 917 (7th Cir. 2010); and *Westwood Apex v. Contreras*, 644 F.3d 799, 807 (9th Cir. 2011). In all three cases, the court held that a plaintiff that files an action in state court and is then counter-sued may not remove the action to federal court as a counterclaim-defendant. That is a special rule that applies only to plaintiffs that themselves filed an action in state court and later seek to remove. The reason for this special rule prohibiting removal by counterclaim-defendants is "to restrict the removal privilege to the party who had no choice in the initial selection of its forum in the state court proceeding." *Oppenheimer & Co. v. Neuhardt*, No. 93 Civ. 3854(SS), 1993 WL 546673, at *2 (S.D.N.Y. Dec. 30, 1993) (Sotomayor, J.), *aff'd*, 56 F.3d 352 (2d Cir. 1995); *see also Victorias Milling Co. v. Hugo Neu Corp*., 196 F. Supp. 64, 68 (S.D.N.Y. 1961) (classifying "as plaintiff . . .the party who first takes the aid of Court.) That rule simply does not apply to this action. Like any other defendant, Walnut Place had no choice

in the selection of the state forum. BNYM could have filed this action in federal court, but it chose not to. To protect its rights, Walnut Place had to intervene as a respondent in the state court proceeding. It should therefore be deemed a "defendant" within the meaning of the removal statute. *See Oppenheimer,* 56 F.3d at 356 (holding that the removal statute provides "Each side the opportunity to require that a case within the original jurisdiction of the federal courts be tried there.").

II. THE SECURITIES EXCEPTION DOES NOT APPLY BECAUSE THE RIGHTS OF THE TRUSTS AND THE TRUSTEE ARE NOT BASED ON THEIR OWNERSHIP OF ANY SECURITY.

BNYM argues that "[u]nder controlling precedent from the Second Circuit, claims seeking to enforce terms of the PSAs . . . are not removable." (Br. 14.) BNYM is referring to one of three exceptions to federal jurisdiction under CAFA, commonly referred to as the "securities" exception. Section 1332(d)(9)(C) provides that:

> [This section] shall not apply to any class action that solely involves a claim —
>
> . . .
>
> (C) that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security . . . .

28 U.S.C. § 1332(d)(9)(C). For at least three reasons, section 1332(d)(9)(C) does not apply to this action. The plain text of the statute applies only to actions that solely involve rights that relate to securities. Neither BNYM nor any of the Trusts is an owner of securities, and neither it nor the Trusts are suing to enforce their rights under a security. BNYM's only argument why section 1332(d)(9)(C) should apply is based on a misunderstanding of the Second Circuit's recent decision in *Greenwich Financial Services Distressed Mortgage Fund 3 LLC v. Countrywide Financial Corporation.* 603 F.3d 23 (2d Cir. 2010). And BNYM itself has affirmatively argued that it is seeking a form of relief that was created by New York law, which is precisely the kind of action that the Second Circuit has held expressly is *not* subject to section 1332(d)(9)(C).

First, the action that BNYM filed does not "solely involve" a duty or obligation created by a security; in fact, it does not involve any securities at all. Neither BNYM nor the Trusts own securities that are the subject of this suit. The Trusts *issued* securities to fund their purchase of mortgage loans from Countrywide. But the rights and duties created by those securities are not the subject of this claim. In this respect, the Trusts are no different from a corporation that issues stock and bonds to raise capital for its business operations. Certainly BNYM would not suggest that every lawsuit that is filed by a corporation that has issued securities to raise capital somehow falls under the securities exception to CAFA simply because the plaintiff corporation happens to be an issuer of securities. Moreover, none of the claims that the Trustee has brought in this action is rooted in the terms of any security, nor is the relief that BNYM is seeking (that is, a judgment that it acted reasonably, a judgment approving the proposed settlement and ordering payment of the settlement amount, and the release of the rights of the Trusts) related to any security. The relationship between the Trusts, the Trustee, Countrywide, and Bank of America is defined purely by contract. Thus, it is clear from the plain language of section 1332(d)(9)(C) that the "securities" exception simply does not apply here.

Second, BNYM's only argument why section 1332(d)(9)(C) applies is based *not* on the text of the statute but instead on a misunderstanding of the Second Circuit's holding in *Greenwich Financial v. Countrywide*. It is undisputed that the Second Circuit held that the question whether the securities exception applies turns on the *source* of the rights that the plaintiff seeks to enforce. (Br. 15.) BNYM's error, however, is that it misunderstands what the Second Circuit meant by "source." BNYM appears to believe that under *Greenwich,* because PSAs include provisions that define the terms of securities, section 1332(d)(9)(C) must apply to any lawsuit by any party to enforce any term of any PSA. (Br. 15-16) But BNYM has missed the point of the Second Circuit's decision.

The Second Circuit made it clear that to determine the "source" of the rights that are being enforced, and thus to determine whether section 1332(d)(9)(C) applies, a court must ask what *status* entitles the plaintiff to sue for the relief it is seeking. If the plaintiff has a right to sue

solely because of its status as the owner of a security, then the exception applies. If the plaintiff has a right to sue for some other reason, perhaps based on federal or state law or a private contract, then the exception does not apply.

> We focused [in *Estate of Pew v. Cardarelli*, 527 F.3d 25 (2d Cir. 2008)] on the fact that the exception only applied to suits seeking to enforce 'rights, duties, [and] obligations relating to or created by or pursuant to' securities . . . The key distinction between suits that were immune from removal under CAFA and those that were not is that suits that were immune *sought to enforce the rights of the securities 'holders as holders*.'

Greenwich, 603 F.3d at 28 (emphasis added) (quoting *Cardarelli*, 527 F.3d at 32-33). The words "holders as holders" are critical, because they underscore that this Court must focus on the *status of the plaintiff* in deciding whether section 1332(d)(9)(C) applies. *See also Cardarelli*, 527 F.3d at 32 (claims that do "not enforce the rights of the Certificate holders as holders" do not fall within the securities exception.) The Second Circuit did not hold in *Greenwich* that all claims that relate to PSAs are subject to section 1332(d)(9)(C). *Greenwich* held that an action by a certificateholder to enforce its rights *as a holder* is subject to the securities exception regardless of whether the right it sought to enforce was printed on the face of the security itself or in a document, like a PSA, that is incorporated by reference in the security.

The two snippets from the *Greenwich* opinion that BNYM relies on are taken out of context. BNYM correctly notes that the Second Circuit stated that "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. And the Second Circuit also stated that the securities exception applies to all "suits that seek to enforce the terms of *instruments* that create and define securities." *Id.* (quoting *Cardarelli*, 527 F.3d at 33). BNYM omits to state that both of those sentences are referring to suits *by securities holders* to enforce rights that they have solely by virtue of their ownership of the securities. Thus, on the very same page from which BNYM extracted the two snippets that it relies on, the Second Circuit explained that "[t]he fact that a *certificate holder's rights* may be enumerated in an instrument other than the security itself is not

material. Securities are created and defined not simply by their own text, but also by any number of deal instruments executed between various parties." *Id.* (emphasis added).

In this action, neither the Trustee nor the Trusts own any securities at all that are the subject of this litigation. It would therefore be absurd to argue that BNYM and the Trusts are seeking to enforce their rights as the holders of securities in the Trusts. Precisely the opposite was true in *Greenwich*. The plaintiffs were certificateholders, and the rights that they sought to enforce were based solely on their status as holders of securities. That is why section 1332(d)(9)(C) applied to the *Greenwich* case but does not apply here. Indeed, counsel for BNYM unwittingly made this precise point at the hearing on BNYM's Order to Show Cause in this Court on September 1. Counsel stated that:

> The Second Circuit was actually very clear on this point. The *Greenwich* case that we cited in our paper, the Second Circuit case, it's on all fours with the case that they [Walnut Place] have described, the fictional case that Mr. Grais has described in the notice of removal. The only thing that is different would be that you would need to plug in trustee instead of Greenwich, which was the plaintiff in that case . . . .

(Tr. at 31:12-31:20, Sept. 1, 2011, Cyrulnik Decl. Ex. E.) But "to plug in trustee instead of Greenwich" is fundamentally to change the "source" of the rights that are being enforced. The plaintiffs in *Greenwich* had standing to sue solely because they owned securities that incorporated by reference the terms of the PSA. The Trustee, however, has standing to sue because it is a party to contracts, which also happen to be PSAs[6], and it represents the Trusts that purchased loans from Countrywide pursuant to those contracts. The former is an action that the plaintiff brought based entirely on its rights as a holder of a security. The latter is an action that has nothing to do with the terms of any security. Under the Second Circuit's holding in *Greenwich*, that difference is dispositive. Section 1332(d)(9)(C) does not apply to this action.

Third, even if BNYM were correct (and it is not) that an action that "solely" involved a claim under a PSA is automatically subject to section 1332(d)(9)(C), BNYM has argued repeatedly that this Article 77 proceeding does not assert any claims under any PSAs. Indeed,

[6] There are 17 trusts that are governed by Sale and Servicing Agreements and Indentures.

elsewhere in its brief, BNYM described as "tortured" the "theor[y]" that the Article 77 proceeding is essentially a claim under the PSAs to require Countrywide and Bank of America to repurchase defective loans. (Br. 13.) And at the hearing before this Court on September 1, counsel for BNYM described as a "fictional case" the notion that the Trusts are asserting their rights under the PSAs in this action. (Tr. at 31:15, Sept. 1, 2011, Cyrulnik Decl. Ex. E.) By its own admission, the relief that BNYM claims to be seeking in this action "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." (Br. 6.) Moreover, the fiduciary duties that BNYM owes to the Trusts arise not out of the PSAs but out of the New York common law of trusts. Those are claims of the kind that the Second Circuit expressly held is not subject to the securities exception to CAFA jurisdiction. Judge Lynch wrote that section 1332(d)(9)(C) does not apply where "the claims [do] not seek to enforce rights, duties or obligations that were pursuant to or created by the securities, but rather rights granted to consumers by a New York statute. Plaintiffs' suit [in *Cardarelli*] was therefore removable under CAFA." *Greenwich*, 603 F.3d at 29. Thus, this action cannot possibly "solely" involve claims under the PSAs, because BNYM has affirmatively argued that at least one component of its affirmative case is based on state law rather than on a security or the instruments that create a security, and the duties that BNYM has to the Trusts are rooted in common law.

III. WALNUT PLACE DID NOT WAIVE ITS RIGHT TO REMOVE.

BNYM argues that Walnut Place waived its right to remove this action to federal court because it "manifested an intent to litigate in state court." (Br. 16.) BNYM is mistaken. Defendants (and intervenors) waive their right to remove only if they demonstrate a "clear and unequivocal" intent to litigate in state court. *Dri Mark Products, Inc. v. Meyercord Co.*, 194 F. Supp. 536, 537 (S.D.N.Y. 1961); *Cronin v. Family Education Co.*, 105 F. Supp. 2d 136, 137-38 (E.D.N.Y. 2000) (same). The defendant's actions "must be clearly inconsistent with a purpose to pursue the right to remove." *Dri Mark*, 194 F. Supp. at 537.

The right to remove is not lost where the actions by the removing party before removal were made only to preserve rights and not to obtain a final disposition on the merits. *See Heafitz v. InterFirst Bank of Dallas*, 711 F. Supp. 92, 96 (S.D.N.Y. 1989). Thus, courts have held that engaging in discovery or participating in scheduling conferences does not waive the right to remove. *See, e.g.*, *Dri Mark*, 194 F. Supp. at 537 (no waiver when a defendant enters an appearance, answers, serves notice to examine plaintiff, or takes a deposition prior to removal); *CognetX, Inc. v. Haughton*, No. 10-2293, 2010 WL 3370761, at *6 (E.D. Pa. Aug. 26, 2010) (no waiver where defendants attend and participate in scheduling conferences or file preliminary objections).

Here, Walnut Place acted simply to preserve its rights. BNYM argues that Walnut Place "moved by order to show cause" to seek discovery and make other modifications to the state court's preliminary schedule and order. (Br. 17.) Those are precisely the kinds of activities that do not constitute a waiver of the right to remove. "[D]efendants have not waived their right to remove if a case is still in the preliminary stages." *CognetX*, 2010 WL 3370761, at *6. The Article 77 proceeding was filed just over two months before the case was removed. Where, as here, "there has been no litigation on the merits and no prejudice to any of the parties, the general rule is that the right to remove is not lost." *Id.*

BNYM relies on two cases that do not apply here. In *Heafitz*, the removing party had filed a motion to dismiss, which was clearly a request for a determination on the merits. *See Heafitz*, 711 F. Supp. at 93-94, 96-97 (granting remand where FDIC filed motion to dismiss in state court before removing the case). Similarly, in *Home Indemnity Co. v. Greyhound Corp.*, the removing defendants had themselves filed a "nearly identical" action in the same state court from which they removed the action against them. No. 89 Civ. 0825, 1989 U.S. Dist. LEXIS 8687 (S.D.N.Y. July 26, 1989).[7]

[7] BNYM also relies on two other cases that were actually decided on the grounds of timeliness, not waiver. *See Interior Glass Services, Inc. v. FDIC*, 691 F. Supp. 1255 (D. Alaska 1988); *Touche Ross & Co. v. Manufacturers Hanover Trust Co.*, 503 F. Supp. 222, 223 (S.D.N.Y. 1980) (granting motion to remand because removal had been untimely, and inferring

IV. BNYM'S "BUCKETFUL" OF "OTHER PROBLEMS" DOES NOT PREVENT REMOVAL.

BNYM argues that Walnut Place's removal "raises questions by the bucketful," and presents some of those questions in summary form. None of these "questions" is relevant to this Court's analysis of its subject-matter jurisdiction.

A. The "Home-State" Exception Does Not Apply.

BNYM first questions "[w]hether the case falls within" the so-called "home state" exception to jurisdiction under CAFA. (Br. 18.) It does not. Under 28 U.S.C. § 1332(d)(4)(B), a district court "shall decline to exercise jurisdiction" that it would otherwise have over a class action or mass action where "two-thirds or more of the members of all proposed plaintiff classes in the aggregate, and the primary defendants, are citizens of the State in which the action was originally filed." The party invoking the home-state exception has the burden of proving that the exception applies. *See Hollinger v. Home State Mutual Insurance Co.*, No. 10-40820, 2011 WL 3890833, at *4 (5th Cir. Sept. 6, 2011); *Romano v. SLS Residential, Inc.*, No. 07 CV 0234, 2011 WL 2671526, at *3 (S.D.N.Y. June 22, 2011).

BNYM has not even attempted to carry its burden of establishing the exception here. BNYM argues that the "the plaintiff 'class' consists of BNYM alone," and that the primary defendant would be Countrywide Home Loans, Inc.[8] (Br. 18.) But Countrywide Home Loans, Inc. is not even a party to this action at all. And before the Court analyzes a potential exception, it would first have to find that this action is subject to federal jurisdiction as a "mass action" under CAFA. *See Aburto v. Midland Credit Management, Inc.*, 2009 WL 2252518, at *2 (N.D. Tex. July 27, 2009). To find federal jurisdiction, the Court necessarily would have concluded that the plaintiffs in this action are the 530 trusts of which BNYM is trustee and that the defendants are the respondents. Because BNYM has not even attempted to demonstrate that any party is a citizen of New York, let alone that any of the defendants (*i.e.*, the respondents in this

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waiver as a result of delay and extensive litigation in state court).

[8] Even in BNYM's reimagined world, Bank of America Corporation and three other Countrywide affiliates that are obligated to repurchase loans are primary defendants and they are not citizens of New York.

action) is a citizen of New York, the exception does not apply. (Indeed, the exception *cannot* apply because Walnut Place VIII, IX, and X are all not citizens of New York, and many other respondents are also not citizens of New York.)

B. An Article 77 Proceeding Is A "Civil Action" For Purposes Of Removal.

BNYM next questions "[w]hether an Article 77 trust administration proceeding is a 'civil action' under section 1332(d)(11)(B)(i)." (Br. 18.) It is. Courts have held that special proceedings under the CPLR are indeed "civil actions" subject to removal. *See, e.g.*, *Casale v. Metropolitan Transportation Authority*, No. 05 CV 4232 (MBM), 2005 WL 3466405, at *5-7 & n.3 (S.D.N.Y. Dec. 19, 2005) (special proceeding under Article 78 is removable); *Heifetz v. Tugendrajch*, 542 F. Supp. 1207, 1208 (E.D.N.Y. 1982) (special proceeding under article 75 is removable). BNYM offers no reason why special proceedings should not be treated as "civil actions" for purposes of removal and cites no authority concluding that they are not.

C. Walnut Place's Removal Was Timely.

BNYM queries "[w]hether the removal petition was timely even though it was filed more than 30 days after Walnut moved to intervene." (Br. 18.) There is no question that the petition was timely. This case became removable only when Walnut Place's petition to intervene was granted. Before the petition to intervene was granted, there was no respondent or defendant in the action to satisfy the minimal diversity requirement of CAFA. *See* 28 U.S.C. § 1332(d)(2)(A) (minimal diversity required for CAFA). Section 1446(b) provides expressly that an action that is not removable may be removed within 30 days of the case becoming removable. 28 U.S.C. § 1446(b). Because it is undisputed that there were no defendants in this action before Walnut Place's petition was granted, this case could not possibly have been removed before then. Therefore, Walnut Place filed a timely notice of removal less than 30 days after the action became subject to removal. *See Engle v. R.J. Reynolds Tobacco Co.*, 122 F. Supp. 2d 1355, 1363 (S.D. Fla. 2000) ("a nonparty's mere motion to intervene cannot furnish a basis for removal pursuant to 28 U.S.C. § 1446(b)"); *Johnson Service Co. v. H.S. Kaiser Co.*, 324 F. Supp. 745,

747, 750 (N.D. Ill. 1971) (holding that the case only became removable by the U.S. government when its motion to intervene was granted).

D. Procedural Complexity Should Not Prevent Removal.

Finally, BNYM is concerned that the Court would be forced to confront several difficult questions about how an Article 77 proceeding should proceed in federal court. BNYM suggests that the Court should remand this action to avoid confronting these issues. But, should the Court conclude that that it has jurisdiction and deny the motion to remand, it would have no difficulty in resolving any procedural issues that might arise. (Br. 19.) Upon removal, actions are governed by the *Federal Rules of Civil Procedure*. FED. R. CIV. P. 81(c) ("These rules apply to a civil action after it is removed from a state court."). And, in any event, the existence of novel or difficult legal issues is not a reason to remand an action over which a federal court has subject-matter jurisdiction.

E. BNYM Should Not Be Awarded Costs Or Fees.

BNYM's request for costs and attorneys' fees should be denied. "[T]he standard for awarding fees should turn on the reasonableness of the removal. Absent unusual circumstances, courts may award attorney's fees under § 1447(c) only where the removing party lacked an objectively reasonable basis for seeking removal. Conversely, when an objectively reasonable basis exists, fees should be denied." *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 141 (2005); *Williams v. International Gun-A-Rama*, 416 Fed. Appx. 97, 99 (2d Cir. 2011) (quoting *Lott v. Pfizer, Inc.*, 492 F.3d 789, 793 (7th Cir. 2007))("[I]f clearly established law did not foreclose a defendant's basis for removal, then a district court should not award attorney's fees.").

Despite BNYM's repeated and reckless description of this removal as "frivolous," there is no doubt that Walnut Place had an objectively reasonable basis for removing this action to federal court. *Toussie v. Smithtown Bancorp, Inc.*, No. 10-CV-2179, 2011 WL 1155597, at *5 (E.D.N.Y. Feb. 7, 2011); *Rubin v. Mastercard International, LLC*, 342 F. Supp. 2d 217, 221 (S.D.N.Y. 2004); *Fischer v. Mastercard International, Inc.*, No. 03 Civ. 2111, 2003 WL

22110169, at *5 (S.D.N.Y. Sept. 11, 2003). That alone is reason to deny the request for costs and attorneys' fees. *See Anwar v. Fairfield Greenwich Ltd.*, 676 F. Supp. 2d 285, 301 (S.D.N.Y. 2009) (fees not awarded even where removal "directly contradicted by the plain language of CAFA" because defendants "raised novel issues of law").

Moreover, awards of costs and attorneys' fees are even less favored in motions to remand under CAFA. Elsewhere in its brief, BNYM relies on *Kitazato v. Black Diamond Hospitality Investments, LLC*, 2009 WL 3824851 (D. Haw. Nov. 13, 2009). In *Kitazato*, the court reversed the magistrate's decision to award attorneys' fees to plaintiff. The court held that

> CAFA is a complicated statute with unique requirements for a qualifying as a mass action. Removing Defendants relied on case law for attempting to use the value of Plaintiffs' requested relief to satisfy CAFA's amount in controversy requirement. Further, the number of persons represented by the Society was unknown at the time of removal and although Removing Defendants' use of the Kitazato Letter was speculative, Removing Defendants had no other basis on which to estimate the Society's membership. *Id.* at *6.

Walnut Place had precisely the same kind of good-faith basis to remove of this action.

CONCLUSION

For all of the reasons argued above, this action falls squarely within the subject-matter jurisdiction of this Court as a mass action under CAFA. Walnut Place respectfully requests that BNYM's motion to remand should be denied.

Dated: New York, New York
September 14, 2011

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