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)

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

DECHERT LLP
Hector Gonzalez
James M. McGuire
1095 Avenue of the Americas
New York, New York 10036
(212) 698-3500

MAYER BROWN LLP
Jason H. P. Kravitt
Matthew D. Ingber
1675 Broadway
New York, New York 10019
(212) 506-2500

Attorneys for Petitioner
The Bank of New York Mellon

TABLE OF CONTENTS

Page

PRELIMINARY STATEMENT 1

ARGUMENT 1

I. This Article 77 Proceeding Is Well Established Under New York Law As A Proper Mechanism For Settlement Approval. 1

II. The Article 77 Petition Does Not Seek Monetary Relief. 3

III. Walnut Is Not a Defendant. 4

IV. The Securities Exception Unequivocally Bars Removal. 7

V. There Are Not 100 Plaintiffs.....10

CONCLUSION.....10

TABLE OF AUTHORITIES

Page(s)

CASES

Ackert v. Ausman,
217 F. Supp. 934 (S.D.N.Y. 1963) 6

Anwar v. Fairfield Greenwich Ltd.,
676 F. Supp. 2d 285 (S.D.N.Y. 2009).....3

Brook v. UnitedHealth Group Inc.,
No. 06 CV 12954(GBD), 2007 WL 2827808 (S.D.N.Y. Sept. 27, 2007) 3

Estate of Pew v. Cardarelli,
527 F.3d 25 (2d Cir. 2008).....7, 8

Federal Ins. Co. v. Tyco Int'l Ltd.,
422 F. Supp. 2d 357 (S.D.N.Y. 2006).....5

First Nat'l Bank of Pulaski v. Curry,
301 F.3d 456 (6th Cir. 2002) 5

Garcia v. Boyar & Miller, P.C.,
Nos. 3:06-cv-1936-D *et al.*, 2007 WL 1556961 (N.D. Tex. May 30, 2007) 5

Greenwich Fin. Servs. Distressed Mtge. Fund 3, LLC v. Countrywide Fin. Corp.,
No. 650474/08, 2010 BL 316853 (N.Y. Sup. Ct. Oct. 07, 2010) 3

Greenwich Fin. Servs. Distressed Mtge. Fund 3, LLC v. Countrywide Fin. Corp.,
603 F.3d 23 (2d Cir. 2010).....7, 8, 9

In re Application of IBJ Schroder Bank & Trust Co.,
No. 101530/98 (N.Y. Sup. Ct. Aug. 16, 2000) 2

In re Marriage of Dean Dyche & Theresa Beat v. United States, No. Civ.A. 05-1116-
WEB, 2005 WL 1993457 (D. Kan. Aug. 16, 2005) 6

In re Tanenblatt,
N.Y.L.J., Oct. 5, 1993 (N.Y. Sur. Ct. 1993) 2

In re Webster's Estate,
271 N.Y.S. 922 (N.Y. Sur. Ct. 1934).....10

Kitazato v. Black Diamond Hospitality Invs., LLC,
CV. No. 09-00271 DAE-LEK, 2009 WL 3824851 (D. Haw. 2009) 4

TABLE OF AUTHORITIES

(continued)

Page(s)

CASES (CONT'D)

Machat v. Sklar,
No. 96 Civ. 3796 SS, 1997 WL 599384 (S.D.N.Y. Sept. 29, 1997).....6

Matsushita Elec. Indus. Co. v. Epstein,
516 U.S. 367 (1996).....6, 7

Matter of Scarborough Properties Corp.,
255 N.E.2d 761 (N.Y. 1969).....2, 7

Md. v. Dep't of Health & Human Servs.,
763 F.2d 1441 (D.C. Cir. 1985).....4

Mullane v. Cent. Hanover Bank & Trust Co.,
339 U.S. 306 (1950).....1

Oppenheimer & Co. v. Neuhardt,
No. 93 Civ. 3854, 1993 WL 546673 (S.D.N.Y. Dec. 30, 1993).....6

Palisades Collections LLC v. Shorts,
552 F.3d 327 (4th Cir. 2008).....5

Passa v. Derderian,
308 F. Supp. 2d 43 (D.R.I. 2004).....6

Sears Roebuck & Co. v. Glenwal Co.,
325 F. Supp. 86 (S.D.N.Y. 1970).....6

Shamrock Oil & Gas Corp. v. Sheets,
313 U.S. 100 (1941).....5

Shappell v. PPL Corp.,
No. 06-2078(AET), 2007 WL 893910 (D.N.J. Mar. 21, 2007).....3

Victorias Milling Co. v. Hugo Neu Corp.,
196 F. Supp. 64 (S.D.N.Y. 1961).....6

STATUTES

28 U.S.C. § 1332(d)(9)(C).....8, 10

28 U.S.C. § 1441(a).....5

28 U.S.C. § 1446(a).....4

28 U.S.C. § 1453(d)(3).....8

TABLE OF AUTHORITIES

(continued)

Page(s)

STATUTES (CONT'D)

N.Y. Civil Practice Act 1

N.Y. C.P.L.R. 7701 1

Cal. Prob. Code § 17200 1

Tex. Prop. Code § 115.001 1

OTHER AUTHORITIES

151 Cong. Rec. S1236 (daily ed. Feb. 10, 2005) 3

H.R. 1115, 108th Cong. (2003) 7

RESTATEMENT (SECOND) OF TRUSTS (1959) 2

WRIGHT & MILLER FED. PRACTICE & PROCEDURE (4th ed. 2009) 3

PRELIMINARY STATEMENT

Walnut ties itself in knots trying to fit the Article 77 proceeding into CAFA. It suggests that it is both a member of a class asserting "plaintiffs' claims" and a "defendant." It contends that "BNYM is asserting claims" against it, but under Walnut's own theory those claims are ones on which Walnut would receive payment—hardly the type of claim that would make Walnut a "defendant," much less one against whom "monetary relief" is sought. It argues that CAFA was designed to ensure "adequate protection for the members of the class" (Opp. 2), yet when it comes to counting class members, Walnut argues that the "class" consists entirely of BNYM, in multiple capacities. Walnut would rewrite both CAFA and Article 77 wholesale in contravention of binding Second Circuit authority. Decades of precedent hold that removal and jurisdictional statutes, including CAFA, are construed narrowly. Walnut's efforts to force the square peg of this Article 77 proceeding into the round hole of CAFA must be rejected.

ARGUMENT

I. This Article 77 Proceeding Is Well Established Under New York Law As A Proper Mechanism For Settlement Approval.

At least since the 1920 Civil Practice Act (C.P.A. §§ 1307, 1308), New York has provided for a special proceeding "to determine a matter relating to any express trust" (C.P.L.R. 7701). This is not a procedure unique to New York. *See, e.g.*, Cal. Prob. Code § 17200; Tex. Prop. Code § 115.001 *et seq.* As the Supreme Court put it, "the interest of each state in providing means to close trusts that exist by the grace of its laws and are administered under the supervision of its courts is so insistent and rooted in custom as to establish beyond doubt the right of its courts to determine the interests of all claimants, resident or nonresident, provided its procedure accords full opportunity to appear and be heard." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950).

This proceeding falls squarely within Article 77. The Trusts are "express trust[s]," and the Trustee seeks determinations of "a matter relating to" those Trusts. The use of Article 77 to approve the settlement of litigation claims by a trust is neither unprecedented nor untoward. *See In re Application of IBJ Schroder Bank & Trust Co.*, No. 101530/98 (Sup. Ct. N.Y. Cnty. Aug. 16, 2000); *In re Tanenblatt*, N.Y.L.J., Oct. 5, 1993 (Sur. Ct. Nassau Cnty. 1993). It is the most sensible way to proceed: "If a trustee is in doubt whether he should compromise or submit to arbitration a claim, he may ask the instruction of the court or he may agree thereto conditionally upon the subsequent approval of the court." RESTATEMENT (SECOND) OF TRUSTS § 192, cmt. d (1959). In *Matter of Scarborough Properties Corp.*, the New York Court of Appeals even held that "the rule against [trustee] self-dealing has not been applied and does not apply . . . where the court . . . approves and authorizes the sale." 255 N.E.2d 761, 764 (N.Y. 1969).

Walnut is fundamentally mistaken when it speculates that BNYM initiated an Article 77 proceeding to avoid Certificateholder intervention (Opp. 4), or to settle "without providing adequate protection to the members of the class" (*id.* at 2).[1] To the contrary, in this, as in any Article 77 proceeding, any interested beneficiary can be heard in support of or in opposition to the Settlement, exactly the "solicit[ation of] the views of those investors" that Walnut claims to want. *Id.* at 4. Nor did the Trustee use Article 77 "to cast aside the aspects [of a class action] that it finds convenient (mainly the right to opt out)." Opp. 4. Any notion that Certificateholders are being deprived of an opt-out right that they otherwise would enjoy is indefensible. An individual Certificateholder cannot opt out of a Trust settlement, any more than a shareholder can opt out of a suit by a corporation. Opt-out was eliminated the moment the investors knowingly purchased Certificates that gave them no rights to sue directly under the PSAs. *See*

[1] But Walnut later asserts that the class members are BNYM in various capacities. Opp. 7.

Greenwich Fin. Servs. Distressed Mtge. Fund 3, LLC v. Countrywide Fin. Corp., No. 650474/08, 2010 BL 316853, at *6–*7 (N.Y. Sup. Ct. Oct. 07, 2010). CAFA's mass action provisions apply to "actions brought in states whose court systems do not provide for class actions."[2] 14B CHARLES ALAN WRIGHT, *et al.*, WRIGHT & MILLER FED. PRACTICE & PROCEDURE § 3724 (4th ed. 2009). The Trustee's use of a decades-old procedure designed to address trust administration is hardly an "abuse of state courts and state procedures" (Opp. 2) or the kind of "gerrymandering" that is necessary to disregard the pleadings.[3]

Walnut also fires a scattershot of accusations that go only to the merits of the Settlement approval (such as the false statement that BNYM received an indemnity "over and above" that in the PSAs (Opp. 3)), or to the negotiation process (such as that BNYM "made no effort to inform Walnut Place" of the "secret[]" negotiations (*id.* at 4)).[4] Of course, these charges do not convert the case into a mass action, and therefore do not establish jurisdiction.

II. The Article 77 Petition Does Not Seek Monetary Relief.

Walnut argues that the Article 77 petition seeks monetary relief because it would direct, among many other things, the payment of money. Opp. 5. That conclusion is wrong, for at least two reasons. First, because Countrywide and Bank of America are not even parties, the Court cannot order any "relief" against them, let alone "direct Bank of America and Countrywide to

---

[2] *See also* 151 Cong. Rec. S1236 (daily ed. Feb. 10, 2005) (statement of Sen. Durbin) ("these so called mass actions are currently filed only in Mississippi and West Virginia. In other words, this provision . . . will have no impact on mass torts cases filed in the other 48 States.").

[3] *Compare Shappell v. PPL Corp.*, No. 06-2078(AET), 2007 WL 893910 (D.N.J. Mar. 21, 2007) (plaintiffs sought voluntary dismissal to bring claims of fewer than 100 plaintiffs); *Brook v. UnitedHealth Group Inc.*, No. 06 CV 12954(GBD), 2007 WL 2827808, at *4 (S.D.N.Y. Sept. 27, 2007) (plaintiffs' counsel brought identical state-by-state class actions to fit within local controversy and home state exceptions) *with Anwar v. Fairfield Greenwich Ltd.*, 676 F. Supp. 2d 285, 296–97 (S.D.N.Y. 2009) (derivative claim not "evasive" and not a removable class action).

[4] In fact, Walnut was invited to participate in the negotiations, which were also covered widely in the media and in press releases. Notice of Removal, Ex. 57 at 3–4.

pay $8.5 billion."[5] *Id.* at 1. Second, Walnut does not dispute that ***CAFA*** uses "monetary relief" in contradistinction to "equitable relief." *See* BNYM Br. 7 (citing *Kitazato v. Black Diamond Hospitality Invs., LLC*, CV. No. 09-00271 DAE-LEK, 2009 WL 3824851, at *5 (D. Haw. 2009) ("CAFA limits mass actions to suits seeking monetary relief and does not extend to actions seeking solely equitable or declaratory relief")). And Walnut concedes that courts of equity "routinely" award the payment of money. Opp. 6 (citing *Md. v. Dep't of Health & Human Servs.*, 763 F.2d 1441, 1447–48 (D.C. Cir. 1985) ("claims for specific relief, albeit monetary," are "equitable actions")). Because "monetary relief" excludes "equitable relief," and Walnut agrees that orders directing the payment of money are equitable (unless they involve "money ***damages***"), it follows that even if the Trustee did seek an order directing payment, that would be equitable, not monetary, relief. In short, even though the ***effect*** of an order could be that money is paid from one party to another, that does not transform equitable relief into monetary relief.

III. Walnut Is Not a Defendant.

Walnut's claim that it is a "defendant" entitled to remove under Section 1446(a) is flatly inconsistent with its assertion that the "monetary relief claims" "direct Bank of America and Countrywide to pay $8.5 billion." Opp. 1. If this is a proceeding that seeks to compel Bank of America and Countrywide to pay money, then Walnut is not a defendant. And because no one seeks money from Walnut, if Walnut is a defendant, then the claims are not for monetary relief.

The Removal Petition asserted that this proceeding "seeks to try jointly the claims for monetary relief of 530 separate trusts." Removal Petition ¶ 11 (footnote omitted). Walnut seems to have abandoned that idea, because if the proceeding would try the ***Trusts'*** claims for monetary relief against Countrywide, then Walnut is a beneficiary, not a defendant. Instead, Walnut first

[5] What the Proposed Final Order actually orders is the "consummat[ion]"—that is, the entry into—the Settlement Agreement, not performance on the agreement.

argues that it is a defendant merely because it opposes the relief that the ***Trustee*** seeks and it is a respondent in the Article 77 proceeding. Opp. 10. But it is undisputed that federal law, not "the pleadings in state court," determines who is a defendant for removal purposes. *See* BNYM Br. 11. For the same reason, Walnut's point that "a defendant is a party to a proceeding that would be adversely affected by a judgment in favor of the plaintiff" (Opp. 12) is meritless. An "adversely affected" standard is inappropriate here, in part because whether the Settlement is beneficial or adverse to investors cannot be determined without an examination of the merits. *See Garcia v. Boyar & Miller, P.C.*, Nos. 3:06-cv-1936-D *et al.*, 2007 WL 1556961, at *6 (N.D. Tex. May 30, 2007) ("It is a settled principle that a federal court's jurisdiction does not normally depend on the merits of a civil action"; CAFA removal does not depend on class certification).

Walnut cites no authority for its argument that an allegedly "adversely affected" party is a "defendant" for removal purposes, and that definition is at odds with longstanding principles governing removal. Specifically, the Supreme Court's decision in *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941), "dictate[s] that the phrase 'the defendant or the defendants,' as used in § 1441(a), be interpreted narrowly, to refer to defendants in the traditional sense of parties against whom the plaintiff ***asserts claims***." *Federal Ins. Co. v. Tyco Int'l Ltd.*, 422 F. Supp. 2d 357, 373 (S.D.N.Y. 2006) (emphasis added) (quoting *First Nat'l Bank of Pulaski v. Curry*, 301 F.3d 456, 462–63 (6th Cir. 2002) (citing in turn *Shamrock Oil*)).[6] Walnut asserts that "there is simply no requirement that the removing defendant must be a party against whom the plaintiff asserts claims." Opp. 12. But as just shown, that definition comes straight from the case law, unlike "adversely affected," which comes straight out of thin air. The cases that Walnut cites do

[6] Contrary to what Walnut implies (Opp. 12–13), *Shamrock* does not give removal rights to any party who did not select the forum. In fact, most courts have applied *Shamrock* to preclude removal by third-party defendants. *See, e.g.*, *Palisades Collections LLC v. Shorts*, 552 F.3d 327, 332–33 (4th Cir. 2008) (collecting cases); *Tyco*, 422 F. Supp. 2d at 372 (also collecting cases).

not support its definition. *Machat v. Sklar* discussed a proceeding in which "[b]oth [defendant] and [plaintiff] lay claim to [the same] pension funds." No. 96 Civ. 3796 SS, 1997 WL 599384, at *1 (S.D.N.Y. Sept. 29, 1997). *In re Marriage of Dean Dyche & Theresa Beat v. United States*, involved a claim for money benefits ***from*** the removing party. No. Civ.A. 05-1116-WEB, 2005 WL 1993457, at *2 (D. Kan. Aug. 16, 2005). And *Victorias Milling Co. v. Hugo Neu Corp.*, involved an order to vacate an arbitral award in the removing party's favor. 196 F. Supp. 64, 65 (S.D.N.Y. 1961). In all, the removers would either pay or lose money to the plaintiff. Similarly, the claims in *Sears Roebuck & Co. v. Glenwal Co.*, *Oppenheimer & Co. v. Neuhardt*, and *Passa v. Derderian* would have imposed restraints on the named respondents to directly benefit the petitioners—an injunction in *Sears* (325 F. Supp. 86, 88 (S.D.N.Y. 1970)) and *Oppenheimer* (No. 93 Civ. 3854, 1993 WL 546673, at *1 (S.D.N.Y. Dec. 30, 1993)), and a duty to preserve evidence in *Passa* (308 F. Supp. 2d 43, 64 (D.R.I. 2004)). Here, the judgment would have the effect of approving a Settlement Agreement. And that Agreement, when performed, would require, among other things, money to be paid ***to*** Walnut, not by it.

Further, the notion that any party that might be bound "against its will" (Opp. 12) is a defendant is vastly overbroad. In *Ackert v. Ausman*, shareholders objecting to settlement of a derivative claim "contend[ed] that since they are the only persons who oppose the settlement, they are the real as well as the only defendants left in the action." 217 F. Supp. 934, 935 (S.D.N.Y. 1963). The court remanded. *Id.* at 936. Although the Trustee stressed *Ackert* (BNYM Br. 11–12), Walnut ignores it completely. Moreover, by Walnut's definition, any plaintiff class member who objects to a settlement or to litigation strategy would be a defendant. Objecting class members are bound by class judgments (*see, e.g.*, *Matsushita Elec. Indus. Co. v.*

Epstein, 516 U.S. 367, 379 (1996)), but there is no precedent for removal by such parties. As we explained (BNYM Br. 13 n.5), Congress rejected just such a proposal before enacting CAFA.

Walnut also contends that it is a defendant because an Article 77 proceeding "pit[s] the trusts and the trustee *against* all of the other investors in the trusts." Opp. 11. That would mean that even investors who intervened as petitioners are defendants under CAFA. It is also fundamentally wrong. In *Matter of Scarborough*, the New York Court of Appeals held that a trustee could recover fees incurred in an Article 77 proceeding because, by bringing the proceeding, the trustee, "***far from acting against the interests of his beneficiaries***, petitioned the court, laid the entire matter before it and refused to act without its approval." 255 N.E.2d 761, 764–65 (N.Y. 1969) (emphasis added). So too here. As in *Scarborough*, the Trustee has done nothing to bind the Trusts unless and until the Court approves.

IV. The Securities Exception Unequivocally Bars Removal.

Walnut's primary argument against the securities exception is that "this Court must focus on the *status of the plaintiff*." Opp. 15. Neither the statute nor the caselaw makes that distinction relevant. First, the statute says nothing about the plaintiff's status. In fact, a draft bill did limit the exception to actions "brought by shareholders," and that language was removed. *See* H.R. 1115, 108th Cong. § 4 at 13:1-3, § 5 at 16:22-23 (2003) (CAFA jurisdiction "shall not apply to any class action brought by shareholders that solely involves" enumerated claims).

Second, while *Greenwich* was a "suit[] *by securities holders*" (Opp. 15), that was irrelevant to the holding. The court explicated the difference between removable and non-removable cases, and securities ownership had nothing to do with it. *Greenwich* explained that the exception "was intended to differentiate [two types of] claims." *Greenwich*, 603 F.3d 23, 28 (2d Cir. 2010). The first is claims "based either on the 'terms of instruments that create and define securities . . . [or on the duties] imposed on persons who administer securities.'" *Id.* at 28-29 (quoting *Estate of*

Pew v. Cardarelli, 527 F.3d 25, 33 (2d Cir. 2008)) (ellipsis and alteration in *Greenwich*). The second is "claims based on rights arising from independent sources of state law." *Id.* at 29 (citing *Cardarelli*, 527 F.3d 25, 33 (2d Cir. 2008)). The court then set a bright-line test: "the securities exception . . . applies to suits that enforce the 'terms of instruments that create and define securities,' and . . . does not apply to suits to enforce rights that are 'superimposed by a state's corporation law or common law.'" *Id.* at 29 (quoting *Cardarelli*, 527 F.3d at 31, 33).

The test is not whether the plaintiff owns securities. "The focus of the inquiry is on the source of the right." *Greenwich*, 603 F.3d at 29. Walnut interprets that passage to mean that "a court must ask what *status* entitles the plaintiff to sue." Opp. 14. But the very next sentence in *Greenwich* contradicts that reading: "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)." 603 F.3d at 29 (emphasis added). The test is not whether the ***plaintiff*** is appropriate, but whether the ***instrument*** is. Walnut's response relies exclusively on the phrase "holders as holders." *Id.* at 29 (quoting *Cardarelli*, 527 F.3d at 32). But claims brought "as holders" and "as purchasers" (*id.*) each involve owner-plaintiffs. They are treated differently because the test is not ownership but rather the "source of the right": the former arise from securities "instruments" and the latter from "a state's corporation or common law." *Cardarelli*'s observation that "the 'rights' are those of the security-holders ***(or their trustees or agents)***" puts the final nail in the coffin. 527 F.3d at 31 (emphasis added).

It is irrelevant whether the claims are "rooted in the terms of any security" or involve "rights and duties created by these securities." Opp. 14. The statute is much broader: it applies to rights, duties, and obligations "relating to ***or*** created by ***or*** pursuant to any security." 28 U.S.C. § 1332(d)(9)(C) (emphasis added). "Securities are created and defined not simply by their own

text, but also by any number of deal instruments," including PSAs.[7] *Greenwich*, 603 F.3d at 29. *Cardarelli* further held that the statute extends "to duties imposed on ***persons who administer securities***." 527 F.3d at 33 (emphasis added). The Trustee's rights and duties under the PSAs easily qualify—it administers payments into the Trusts and disbursements to Certificateholders.

Finally, the rights, duties and obligations here ***do*** arise solely out of the instruments. *Contra* Opp. 16. The "source of the right" that the Trustee "seeks to enforce" is the PSAs. *Greenwich*, 603 F.3d at 29. Pursuant to the PSAs, the claims being settled are assigned to the Trustee (§ 2.01); empower the Trustee to compromise and settle the claims (§ 8.01); and define the rights, duties, and obligations of the Trustee with respect to the claims. In fact, the Trustee has no other duties. The PSAs expressly bar implied duties (§ 8.01), and the Article 77 petition does not seek relief related to any non-contractual duties. The "claim" the Trustee has brought relates solely to rights and duties "relating to or created by or pursuant to" a security.

Although Walnut purports to discover an "admission" that "the ***relief*** that BNYM claims to be seeking" is "a creature of New York state law" (Opp. 17), the Trustee's reference actually was to the "the special proceeding," not the relief. BNYM Br. 6. What matters for CAFA is not the procedural vehicle but the "source" of the Trustee's rights and duties, and Walnut concedes that "[t]he relationship between the Trusts, the Trustee, Countrywide, and Bank of America is defined purely by contract." Opp. 14. Walnut finally argues that fiduciary duties arise out of

[7] *Greenwich* does not imply that "every lawsuit that is filed by a corporation that has issued securities" falls under the securities exception. Opp. 14. This is absurd. The exception is limited to claims brought by corporations (or anyone else) that are based on "instruments that create and define securities." *Greenwich*, 603 F.3d at 28. It is not the corporation's "status" that matters, but the "source of the right." In any event, the comparison to a corporation that "happens to be an issuer of securities" is flawed—the Trusts exist for no other purpose than to issue the Certificates.

common law (*id.* at 17), but the statutory exception expressly covers "fiduciary duties." 28 U.S.C. § 1332(d)(9)(C).

V. There Are Not 100 Plaintiffs.

Whereas the Notice of Removal suggested that the Trusts were different "persons," now Walnut says that the ***Trustee*** is. Its cases do not support that. *In re Webster's Estate* says that judgments in different capacities are against "the ***same*** person." Opp. 6 (citing 271 N.Y.S. 922, 926 (N.Y. Sur. Ct. 1934) (emphasis added). None of the other cases suggests that capacity determines personhood for ***CAFA*** purposes, and to so hold would violate the imperative to construe jurisdictional statutes narrowly.[8]

CONCLUSION

For all of the foregoing reasons, the Court should grant the Motion, remand the proceeding to state court, and award the Trustee its attorneys' fees.

Dated: New York, New York
September 16, 2011

s/Matthew D. Ingber

DECHERT LLP
Hector Gonzalez
James M. McGuire
1095 Avenue of the Americas
New York, New York 10036
(212) 698-3500

MAYER BROWN LLP
Jason H.P. Kravitt
Matthew D. Ingber
1675 Broadway
New York, New York 10019
(212) 506-2500

Attorneys for Petitioner
The Bank of New York Mellon

[8] BNYM also relies on, and does not abandon, the other arguments raised in its opening brief, which have been omitted here to remain within the page limit.