Appeal No. 08-8031

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Jack P. Katz, on behalf of himself and all others similarly situated,

Plaintiff-Respondent,

v.

Ernest A. Gerardi, Jr., Ruth Ann M. Gillis, Ned S. Holmes, Robert P. Kogod, James H. Polk III, John C. Schweitzer, R. Scot Sellers, Robert H. Smith, Stephen R. Demeritt, Charles Mueller, Jr., Caroline Brower, Mark Schumacher, Alfred G. Neely, Archstone-Smith Operating Trust, Archstone-Smith Trust, Lehman Brothers Holdings, Inc., and Tishman Speyer Development Corporation,

Defendants-Petitioners.

Petition to Appeal an Order of the United States District Court for the Northern District of Illinois

Case No. 08-cv-04035

The Honorable John W. Darrah

PLAINTIFF-RESPONDENT'S ANSWER IN OPPOSITION TO CERTAIN DEFENDANTS-PETITIONERS' PETITION FOR LEAVE TO APPEAL AN ORDER OF REMAND

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Appellate Court No: 08-8031

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PRELIMINARY STATEMENT

For 75 years, the Securities Act of 1933 has allowed investors to bring an action in state court with an express prohibition in §22(a) *against* removal of that action to federal court.[1] 15 U.S.C. §77v(a). Congress comprehensively amended the Securities Act in 1995, with the Private Securities Litigation Reform Act ("PSLRA"), and again in 1998, with the Securities Litigation Uniform Standards Act ("SLUSA"). Congress made extensive changes to the securities laws each time, even amending §22(a) with SLUSA, but each time it left intact the Act's grant of concurrent subject matter jurisdiction and, with exceptions that do not apply here, §22(a)'s prohibition on removal of Securities Act claims. *Id.*

In 2005, Congress passed the Class Action Fairness Act ("CAFA") (28 U.S.C. §1332(d)(2)), at which time it declined to amend §22(a) further, and again left unchanged an investor's right to bring Securities Act class actions in state court. Because CAFA did not supersede the Securities Act, there was no need for a "savings clause", and the absence of one does not warrant removal of this action.

Congress did not, as Petitioners claim, implicitly repeal the Act's absolute choice of forum. Indeed, the only court of appeals ruling on point *rejected* this very claim, holding that CAFA's *general* provision for removal of class actions does not supersede §22(a)'s *specific* bar against removal of cases arising under the Securities

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[1] Section 22(a)'s prohibition is strict and unequivocal:

> Except as provided in section 77p(c) of this title, no case arising under this subchapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States.

15 U.S.C. §77v(a).

Act. *Luther v. Countrywide Home Loans Servicing LP*, 533 F.3d 1031, 1034 (9th Cir. 2008) ("'It is a basic principle of statutory construction that a statute dealing with a narrow, precise and specific subject is not submerged by a later enacted statute covering a more generalized spectrum.'"), *quoting Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976). *See* Point I.B, *infra.*

The District Court was correct to follow *Luther* (Mem. and Order at 8-9 (A-8 – A-9))[2]; both rulings follow Congress' intent and long-standing principles of statutory construction. As such, neither the District Court nor *Luther* addressed a "novel issue" of law; nor did they create an implied exception to CAFA, as Petitioners claim. Exactly the opposite is true: both upheld a statute that has been relied upon for 75 years, one that Congress has had three opportunities to amend or, as Petitioners seek here, revoke altogether with respect to class actions, *but chose not to do so.* Plaintiff respectfully submits that this Court should refrain from doing what Congress has not. *See* Point I.A and B, *infra.*

Petitioners maintain that the Ninth Circuit wrongly decided *Luther*, and ask this Court to instead follow the Second Circuit's inapposite and erroneous holding in *Cal. Pub. Emples. Ret. Sys. v. WorldCom, Inc.*, 368 F.3d 86, 90 (2d Cir. 2004) ("*WorldCom*"), that a single district court felt "constrained to follow". Pets.' Mem. at 2-3, *citing, New Jersey Carpenters Vacation Fund v. Harborview Mortgage Loan Trust 2006-4*, No. 08cv5093(HB), 2008 U.S. Dist. LEXIS 72039 [at *4] (S.D.N.Y.

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[2] "Mem. and Order" refers to the September 25, 2008 Order of the District Court (Dkt. #46), attached to Certain Defendants-Petitioners' Petition for Leave to Appeal an Order of Remand ("Pets.' Mem."). As did Petitioners, Plaintiff will include both page citations for the Memorandum and Order.

Sept. 24, 2008) ("*Harborview*"). Petitioners also argued the applicability of *WorldCom* to the District Court (Certain Defendants' Memorandum of Law in Opposition to Plaintiff's Motion to Remand (Dkt. #33) ("Remand Opp.") at 11-12), which did not "ignore" *WorldCom* (Pets.' Mem. at 3), but rather declined to adopt a ruling that was both inapposite and wrongly decided. In fact, the District Court's decision is consistent with those of other courts that have expressly rejected the Second Circuit's reasoning in *WorldCom*. *See* Point I.C and D, *infra*.

Even if CAFA had revoked §22(a) or rendered it inapplicable here, Petitioners cannot argue that remand to state court is not mandated by CAFA's bar of removal of actions that are "relate[d] to the rights, duties...and obligations relating to or created by or pursuant to any security." 28 U.S.C. §1332(d)(9)(C). Plaintiff's claims are embraced by this exception; the claims relate to rights and obligations relating to real estate limited partnership units, the terms of which are governed by a Declaration of Trust. These rights, duties and obligations fell under the jurisdiction of the Securities Act when Petitioners sold limited partnership units under that Act. CAFA, therefore, does not apply to this action. *See* Point I.E, *infra*.

Petitioners are also wrong that Plaintiff' has failed to allege claims under the Securities Act. Plaintiff alleges that, through a false and misleading registration statement, Petitioners revoked the dividend, liquidity and tax protections guaranteed to Plaintiff's A-1 Units through a Declaration of Trust, and thereby fundamentally changed Plaintiff's original limited partnership units, which are securities under the Securities Act. Under the fundamental change doctrine, after

Plaintiff's A-1 Units were stripped of economically valuable features they became in essence new securities "purchased" by Plaintiff and necessarily traceable directly back to a registration statement, and Plaintiff therefore has cognizable claims under Sections 11, 12(a)(2) and 15 of the Securities Act.

Petitioners argue that this Court has rejected the fundamental change doctrine in situations where the plaintiff did not make a new "investment decision". Pets.' Mem. at 4. Despite comments by the Court questioning the doctrine, district courts in this Circuit continue to apply it in securities cases. More importantly, in the context of a motion for remand, questions of controlling substantive law must be resolved in a plaintiff's favor. The District Court did so, recognizing that the proper place to consider the issue for the first time is in a lower court with subject matter jurisdiction. Mem. and Order at 7 (A-7). *See* Point II.B, *infra*.

Petitioners' final contention – that the fundamental change doctrine does not "fit the alleged facts of this case" (Pets.' Mem. at 4.) – goes to the *merits* of this action, which are irrelevant to a motion to remand. The District Court did not address the merits, recognizing that the proper place to do so is in a lower court with subject matter jurisdiction. Mem. and Order at 7 (A-7). *See* Point II.B, *infra*.

For the foregoing reasons, as discussed in greater detail below, Petitioners' Petition for Leave to Appeal the District Court's ruling should be denied.

STATEMENT OF FACTS

A. *Supplement to Petitioners' Summary of Allegations*

Plaintiff Jack P. Katz filed this action on behalf of himself and all former holders of A-1 Units in the Archstone-Smith Operating Trust that were damaged

when Petitioners orchestrated a merger through which they fundamentally changed the A-1 Units. Complaint ("Compl."), ¶¶ 1, 6. 75.[3] Through the merger, Petitioners stripped Plaintiff's A-1 Units of the liquidity, dividend and tax-protection rights guaranteed under the terms of the Declaration of Trust. *Id.; see also* Compl., ¶¶ 31, 47, 48, 52, 54, 56, 74-81. The merger transformed the A-1 units, forcing Plaintiff to acquire New A-1 Units that "had materially different and inferior economic rights than the original A-1 units." Compl., ¶¶ 6, 75. Plaintiff thereby *acquired* New A-1 Units when Petitioners fundamentally changed the attributes of the originals; the New A-1 Units are traceable directly back to a registration statement. Compl., ¶ 75. The New A-1 Units Plaintiff acquired not only altered the basic characteristics of the securities, but they also further obligated Plaintiff to exercise one of two alternatives, either: (1) sell the New A-1 Units by a time certain; or (2) exchange these units for Series-O units in the merged entity. *Id.* Petitioners characterized these alternatives as a "choice", but these were brand new requirements and thus no choice at all. Compl., ¶¶ 7-8, 12. Having acquired the New A-1 Units, Plaintiff "chose" the lesser of two imposed evils and sold them, suffering severe damages in the form of undesirable tax consequences. Compl., ¶¶ 7, 12.

B. *Supplement to Petitioners' Procedural History*

Petitioners' procedural history omits key points. First, Petitioners moved for, were granted, and did file a *Surreply Memorandum of Law in Further Support of Their Opposition to Plaintiff's Motion to Remand.* Dkt. #49. Petitioners officially

[3] These allegations alone show that Petitioners' claim that Plaintiff did not allege the "fundamental change" doctrine in his Complaint (Pets.' Mem. at 17) is incorrect.

filed their surreply on September 29, 2008, but attached a copy of the surreply to their motion for leave to file it on September 15, 2008. Dkt. #39. The District Court stated in the Memorandum and Order that it "considered" the surreply prior to ruling on the Motion to Remand. Mem. and Order at 1 n. 1 (A-1 n. 1). Second, Petitioners requested, and again were granted, leave to file a motion to reconsider. Dkt. #45. However, they elected not to file such a motion. Finally, Plaintiff filed a Notice of Dismissal pursuant to Fed. R. Civ. P. 41(a) for defendant Lehman Brothers Holdings, Inc. as a result of the Lehman Brothers bankruptcy. Dkt. #44.

ARGUMENT[4]

I. The District Court Correctly Held That Section 22(a) Required the Remand of Plaintiff's Complaint.

A. *Concurrent Jurisdiction Provided by the Securities Act was Kept Intact by All Subsequent Amendments to the Federal Securities Laws.*

The Securities Act expressly authorizes investors to bring claims in *either* state or federal court. 15 USCS §77v(a) ("The district courts of the United States and United States courts of any Territory shall have jurisdiction of offenses and violations under this title ... concurrent with State and Territorial courts ... of all suits in equity and actions at law brought to enforce any liability or duty created by

[4] Petitioner attempts to shift the burden of persuasion to Plaintiff. Pets.' Mem. at 9, n. 7. However, the issue before this Court is not whether CAFA's diversity jurisdiction provisions have been met; the issue before this Court is whether the subject matter jurisdiction and removal provisions of the Securities Act should take precedence. CAFA does not shift the burden of proving either to Plaintiff. *See Blockbuster, Inc. v. Galeno*, 472 F.3d 53, 58 (2d Cir. 2006) ("CAFA did not change the traditional rule and that defendant bears the burden of establishing federal subject matter jurisdiction."); *Abrego v. Dow Chem. Co.*, 443 F.3d 676, 678 (9th Cir. 2006) ("CAFA did not shift to the plaintiff the burden of establishing that there is no removal jurisdiction in federal court.")

this title.") Congress even included an anti-removal provision in the Act expressly forbidding defendants from removing cases properly filed in state court. *Id.* ("no case arising under this title ... and brought in any State court of competent jurisdiction shall be removed to any court of the United States"). Had Congress wished to alter or repeal this absolute choice of forum guaranteed by § 22(a), it could have done so. It has not. *See Breuer v. Jim's Concrete of Brevard, Inc.*, 538 U.S. 691, 697 (2003) ("[w]hen Congress has 'wished to give plaintiffs an absolute choice of forum, it has shown itself capable of doing so in unmistakable terms.'") (citation omitted).

Although it expressly amended the Securities Act when passing SLUSA and the PSLRA, Congress did not amend further the concurrent jurisdiction and non-removability of claims brought under the Securities Act. CAFA thereby reaffirmed what Congress had done twice before with the PSLRA and SLUSA: it kept the concurrent jurisdiction and anti-removal provisions of the Securities Act intact. Petitioners can argue only that §22(a) was *implicitly* repealed by Congress. Pets.' Mem. at 10-13. However, "[i]t is, of course, a cardinal principle of statutory construction that repeals by implication are not favored," *United States v. United Continental Tuna Corp.*, 425 U.S. 164, 168 (1976), and the "intention of the legislature to repeal must be clear and manifest." *Posadas v. National City Bank*, 296 U.S. 497, 503 (1936).

B. *Luther Correctly Decided That CAFA Did Not Disturb the Anti-Removal Provision in §22(a).*

The weakness of Petitioners' argument is emphasized by the fact that the *only* appeals court case to consider the very issue that is before this Court – whether CAFA repealed §22(a) for purposes of "large interstate class actions" – *rejected* Petitioners' claim, holding that CAFA's *general* provision for removal of class actions to federal court "does not supersede §22(a)'s *specific* bar against removal of cases arising under the '33 Act." *Luther, supra*, 533 F.3d at 1031.

CAFA's driving purpose was to "make [ ] it harder for plaintiffs' counsel to 'game the system' by trying to defeat diversity jurisdiction," *see* S. Rep. 109-14, by "adding named plaintiffs or defendants solely based on their State of citizenship in order to defeat the diversity requirement" or alleging "an amount in controversy that does not trigger the $75,000 threshold for removing cases to federal court."[5] 151 Cong. Rec. S1079 (daily ed. Feb. 8, 2005) (statement of Sen. Dodd). None of these concerns resonate in Securities Act cases. Indeed, the practices targeted by CAFA were largely irrelevant to determinations of (1) federal jurisdiction, and (2) removal jurisdiction in Securities Act cases, since the Securities Act expressly

[5] Petitioners refer to CAFA's legislative history to support their claim that CAFA's sole purpose was to remove all interstate class actions to federal court. Pets. Mem. at 11-12. However, the plain language of the statute contains no such limitation. As this Court has recognized, CAFA's legislative history "has no more force [as a source of legislative intent] than an opinion poll of legislators -- less really, as it speaks for fewer. Thirteen Senators signed this report and five voted not to send the proposal to the floor. Another 82 Senators did not express themselves on the question; likewise 435 Members of the House and one President kept their silence." *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446, 448 (7th Cir. 2005). This Court is not alone here. *See Blockbuster, supra,* 472 F. 3d at 58 (court skeptical of the "probative value" of a Senate Report issued ten days *after* CAFA's enactment).

provides for the former and prohibits the latter. *See* 15 U.S.C. §77v(a). Regardless of the "diversity" of the parties or the amount sought, concurrent jurisdiction was always present and removal was never proper so long as the case was brought under 15 U.S.C. §77a, *et seq*. The prohibition on removal in the Securities Act "trumps" the general removal provision in 28 U.S.C. §1441(a), which authorizes removal for any case that could have been brought originally in federal court. *See* 28 U.S.C. §1441(a) ("Except as otherwise expressly provided... any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed...").

Against this backdrop, Petitioners urge the Court to apply the broad, diversity-based removal provision of CAFA over the specific and express prohibition of removal contained in the Securities Act. On this issue these two statutes cannot "mutually coexist," *Radzanower*, 426 U.S. 148, because to permit removal based on CAFA would violate the 1933 Act's prohibition on removal of any case "arising under" that Act, *see* 15 U.S.C. §77v(a).

"It is a basic principle of statutory construction that a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum." *Radzanower*, 426 U.S. at 153 (1976). "Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." *Id.* Petitioners do not show any such "clear intention" and point only to Congress's lack of an express exclusion of 1933 Act claims from CAFA. *See* Pets.' Mem. at 11. This

argument is unavailing because CAFA is directed towards efforts to circumvent diversity requirements, whereas the Securities Act specifically forbids removal of cases brought under its subject-matter jurisdiction. Federal courts are courts of "limited jurisdiction", *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994), and the case should be remanded if there is doubt as to the right of removal in the first instance. *Jones v. General Tire & Rubber Co.*, 541 F.2d 660, 664 (7th Cir. 1976); *see also Countrywide Home Loans, Inc. v. Stewart Title Guar. Co.*, No. 06-C-1254, 2007 U.S. Dist. LEXIS 21544, *3 (E.D. Wis. Mar. 23, 2007) (same).

C. *WorldCom is Both Inapposite and Wrongly Decided.*

Petitioners' argument ultimately depends on the Second Circuit's holding in *Cal. Pub. Emples. Ret. Sys. v. WorldCom, Inc.*, 368 F.3d 86 (2d Cir. 2004) ("*WorldCom*"), a case both inapposite to this one and wrongly decided in the first place. *WorldCom* dealt with bankruptcy cases, and the Second Circuit was guided by its conclusion that the jurisdictional section of the Bankruptcy Code was designed to further Congress' purpose of centralizing bankruptcy litigation in a federal forum. *Id.* at 103. Because the court believed bankruptcy assets might be jeopardized by related actions in different forums, it held it necessary to give preference to the Bankruptcy Code's removal provision in order to centralize all cases "related to" a bankruptcy in a single forum. *WorldCom*, 368 F.3d at 104, (*citing* 28 U.S.C. §1452(a)).

Unlike the bankruptcy laws, even after three wholesale revisions of the securities laws, Congress left alone the Securities Act's provision for concurrent jurisdiction in *both* federal and state court. *See* 15 U.S.C. §77v(a). In doing so,

Congress demonstrated its belief that, unlike bankruptcy, there is no overriding need to centralize securities cases in a single forum. Even the Second Circuit acknowledged that "'[w]here there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.'" *WorldCom*, 368 F.3d at 101 (*quoting Radzanower*, 426 U.S. at 153). The same is true here: CAFA does not express a "clear intention" to repeal the long-standing removal bar in §22(a). Unlike *WorldCom*, where the Second Circuit concluded that "the class of claims covered by Section 22(a) is no more specific than the class of claims covered by Section 1452(a)," §22(a) covers a small "subset" of the claims covered by CAFA. *WorldCom*, 368 F.3d at 102. Whereas "CAFA's removal provision applies to '*any* civil action' meeting its requirements" (Pets.' Mem. at 10), §22(a) applies a small subset of class action claims brought *solely* under the Securities Act. Since §22(a) is the "statute dealing with a narrow, precise, and specific subject," it was "not submerged by a later enacted statute covering a more generalized spectrum," namely CAFA. *Radzanower*, 426 U.S. at 153.

Numerous courts considering the very issue addressed in *WorldCom* have actually held that §22(a) trumps the Bankruptcy Code, and that actions filed in state court under the Securities Act *may not* be removed using the Bankruptcy Code's removal statute. In *Tenn. Consol. Ret. Sys. v. Citigroup, Inc.*, No. 3:03-0128, 2004 U.S. Dist. LEXIS 24043 (M.D. Tenn. Oct. 8, 2004) ("*Citigroup*"), the court *rejected* the Second Circuit's holding in *WorldCom*, stating that "the Second Circuit decision misapplies Supreme Court precedent; erroneously utilizes a rule of

statutory construction to set aside a clear statutory mandate and misconstrues [the] Court's earlier opinion." *Id.* at *5-6. Specifically, the court disagreed with the Second Circuit's holding that §1452(a) created an exception to §22(a):

> Congress' 1998 amendments to the Securities Act of 1933 added several provisions allowing for the removability of class actions, and also featured provisions, such as Section 77p(d)(2)(A) above, which 'protected' state actions such as those dealing with state pension. ... Congress clearly modified Section 77v(a) by excepting from the removal exception only the state class actions described in Section 77p(c): 'Except as provided in section 77p(c) of this title ...' Congress did this in 1998 with full knowledge of the Bankruptcy removal statute, yet did nothing to textually provide for the removability of cases under 77p (except those under subsection (c)) 'related to' bankruptcy claims.

Id. at *15-16. This reasoning is equally applicable here. *See also Ill. Mun. Ret. Fund v. Citigroup, Inc.*, No. 03-465-GPM, 2003 U.S. Dist. LEXIS 16255 at *6 (S.D. Ill. Sept. 9, 2003) ("the rules of statutory construction require Section 22(a) to control over the more general provisions of 28 U.S.C. §§1334(b) and 1452...The only way to give effect to the legislative intent behind its enactment is to construe it as a bar to removal even under these circumstances.") (*affirmed on other grounds, Ill. Mun. Ret. Fund v. Citigroup, Inc.*, 391 F.3d 844 (7th Cir. 2004)); *City of Birmingham Ret, & Relief Fund v. Citigroup, Inc., et al.*, No. CV-03-BE-0994-S, 2003 U.S. Dist. LEXIS 14066 at *8-9 (N.D. Ala. Aug. 12, 2003) (removal of Securities Act class action to bankruptcy court barred by §22(a)).

D. *Application of Section 22(a) Would Not Unduly Interfere With CAFA.*

Application of §22(a) here would not "unduly interfere" with the operation" of CAFA. (Pets.' Mem. at 13, 15-16.) Since CAFA admittedly covers a much greater

spectrum of cases, namely "*any* civil action" (Pets.' Mem. at 10) (emphasis in original), and §22(a) only applies to cases brought exclusively under the Securities Act, the application of §22(a) "will have no impact whatever upon the vast majority of lawsuits brought under" CAFA. *Radzanower*, 426 U.S. at 155. Indeed, CAFA will still allow for removal of numerous types of class actions in the tort, consumer and antitrust areas. The cases brought under the Securities Act, in particular those involving securities that are not traded on a national exchange such as the A-1 Units here, are limited and would not unduly interfere with CAFA's operation.

Ironically, in attempting to invalidate *Luther*, Petitioners claim that no "irreconcilable conflict" exists between §22(a) and CAFA, that the two provisions "can be easily harmonized." (Remand Opp. at 14-15.) This cannot be farther from the truth. As the district court noted in *Luther*, "these two statutes cannot 'mutually coexist,' because to permit removal based on CAFA would violate the 1933 Act's prohibition on removal of any case 'arising under' that Act, see 15 U.S.C. §77v(a)." *Luther v. Countrywide Home Loans Servicing*, No. 2:07-CV-08165-MRP(MANx), 2008 U.S. Dist. LEXIS 26534 at *8-9 (C.D. Cal. Feb. 28, 2008) (*citing Radzanower*, 426 U.S. at 155).

E. *Petitioners are Incorrect to Claim That Plaintiff's Action is Excepted From Removal Under Section 1332(d)(9)(C) of CAFA.*

Petitioners erroneously argue that CAFA's exception for actions that relate to "the rights, duties (including fiduciary duties) and obligations relating to or created by or pursuant to any security" does not apply to Plaintiff's claims here. Pets.'

Mem. at 11, n.9, *citing* 28 U.S.C. §1332(d)(9)(C).[6] However, Petitioners misunderstand the underlying basis for Plaintiff's claims, arguing that the exception "does not apply to claims, such as those here, challenging disclosures in connection with purchases of securities." Pets.' Mem. at 11, n.9, *citing Estate of Pew v. Cardarelli*, 527 F.3d 25, 31-32 (2nd Cir. 2008).

However, the very case relied on by Petitioners, *Estate of Pew*, shows that §1332(d)(9)(C) applies to securities actions such as the one now before this Court, where the "[c]laims that 'relate[ ] to the rights . . . and obligations' 'created by or pursuant to' a security must be claims grounded in the terms of the security itself, *the kind of claims that might arise where the interest rate was pegged to a rate set by a bank that later merges into another bank, or where a bond series is discontinued, or where a failure to negotiate replacement credit results in a default on principal.*") *Estate of Pew*, 527 F.3d at 31-32 (emphasis added). Petitioners failed to note that the Second Circuit held that the obligations referred to in §1332(d)(9)(C) were obligations created by those corporate instruments that set forth the duties owed by persons such as Petitioners:

> "Obligations" can be owed by persons *or* by instruments, but the natural reading of this statutory language is to differentiate obligations from duties by reading obligations to be those created in instruments, *such as a certificate of incorporation, an indenture, a note, or some other corporate document.* And certain duties and

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[6] Petitioner attempts to dismiss this argument by claiming that Plaintiff raised the issue for the first time in its reply. Even if true, the District Court gave Petitioner ample opportunity to respond by granting it not only leave to file a surreply, but also a motion to reconsider the District Court's ruling. Mem. and Order at 1 fn. 1 (A-1 fn. 1); Dkt. #45.

> obligations of course "relate to" securities even though they are not rooted in a corporate document but are instead superimposed by a state's corporation law or common law on the relationships underlying that document. Finally, the "rights" are those of the security-holders (or their trustees or agents) to whom these duties and obligations run. Thus, an instrument that creates an obligation generates a corresponding right in the holder.

Id. at 31 (emphasis added.)[7]

This is precisely the case here, where Plaintiff's action solely involves a claim related to Petitioners' abrogation of obligations created by the Declaration of Trust that governed the terms of Plaintiff's A-1 Units, terms that guaranteed Plaintiff's dividends, tax protection and liquidity. *See* Compl., ¶ 52 ("The foregoing tax protections and liquidity provisions were all contained in binding contribution agreements assumed by the Archstone UPREIT and Archstone REIT as well the Declaration of Trust governing the Archstone UPREIT and Archstone REIT"); ¶ 54

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[7] Despite the clear intent of the statutory language itself, *Pew* found further support in CAFA's legislative history:

> [T]he Act excepts from . . . [its grant to the district courts of original] jurisdiction those class actions that solely involve claims that relate to matters of corporate governance arising out of state law. . . . By corporate governance litigation, the Committee means only litigation based solely on . . . the rights arising out of the *terms of the securities* issued by business enterprises.
>
> . . .
>
> The subsection 1332(d)(9) exemption to new *section 1332(d)* jurisdiction is also intended to cover *disputes over the meaning of the terms of a security*, which is generally spelled out in some formative document of the business enterprise, such as a certificate of incorporation or a certificate of designations.

Id. at *33 (*citing* S. Rep. 109-14 at 45) (emphasis in original).

("Specifically, the Archstone UPREIT agreed in its Declaration of Trust, for the benefit of the hundreds, if not thousands of A-1 Unit holders with tax and liquidity provisions virtually identical to those of the Plaintiff"). Plaintiff's claims relate directly to the rights and obligations grounded in the terms of the original A-1 units, terms created and defined by the Declaration of Trust. *Estate of Pew, supra* at 33 (reserving §1332(d)(9)(C) to "'disputes over the meaning of the terms of a security' ... is entirely consistent with our interpretation of *§1332(d)(9)(C)* ... as applying only to suits that seek to enforce the terms of instruments that create and define securities, and to duties imposed on persons who administer securities", *quoting* S. Rep. 109-14 at 45.

II. The Complaint Pleads Causes of Action Under the Securities Act of 1933.

A. *There is Substantial Legal Authority to Support Plaintiff's Reliance on the "Fundamental Change" Doctrine.*

A securities transaction resulting in a "fundamental change in the nature of a shareholder's investment" can transform a plaintiff to a purchaser of that security for purposes of application of the Securities Act. *See Isquith v. Caremark Int'l*, No. 94 C 5534, 1997 U.S. Dist. LEXIS 3715, *12 (N.D. Ill. Mar. 26, 1997) (*quoting Rathborne v. Rathborne*, 683 F.2d 914, 920 (5th Cir. 1982)); *see also 7547 Corp. v. Parker & Parsley Devel. Partners*, 38 F.3d 211, 226 (5th Cir. 1994) (plaintiff is a purchaser or seller when its "interest in a company is fundamentally altered through a merger, acquisition, or liquidation").

Petitioners maintain that Plaintiff made no "investment decision" when he acquired the securities that are the subject of his claims. However, the Complaint

alleges that "when [Petitioners], through the Registration Statement and Prospectus, eliminated the liquidity, dividend and the tax-protections rights to which the A-1 Unit holders were entitled, the A-1 unit holders *effectively acquired new A-1 units* under the Registration Statement because the new A-1 units had materially different and inferior economic rights than the original A-1 units." Compl., ¶ 6 (emphasis added). As a holder of an original A-1 Unit, Plaintiff was guaranteed tax-protection on his original investment through January 1, 2022. Compl., ¶¶ 48, 52. Further, Plaintiff was entitled to redeem his units for cash or convert them to common stock which could then be sold in the open market. *Id.*, ¶ 47. Plaintiff was also guaranteed quarterly divided payments on the original A-1 Units. *Id.*, ¶ 56. All of these advantages, and more, were eliminated by Petitioners through the merger. *Id.*, ¶¶ 74-81. It is only because Plaintiff made the "investment decision" to retain the A-1 Units between the time that the registration statement and prospectus were issued and the merger that fundamentally changed the rights of the A-1 Unit security closed that Plaintiff's A-1 Units were fundamentally changed.

In *SEC v. National Securities, Inc.*, the Supreme Court held that a simple exchange of shares in a merger qualified as a purchase or sale where the shareholders became shareholders in a new company. 393 U.S. 453, 467 (1969) (holding that defendants had misled investors before their approval of a merger and thereby furthered a scheme in which plaintiffs lost their status as shareholders in [one company] and became shareholders in a new one). The Court concluded that

the plaintiffs had "purchased shares in the new company by exchanging them for their old stock." *Id.* Courts in this District have upheld the fundamental change doctrine to determine whether a securities transaction is a purchase or sale. *See Carter v. Signode Industries, Inc.*, 694 F. Supp. 493, 497 (N.D. Ill. 1988) (Aspen, J.); *FMC Corp. v. Boesky*, 727 F. Supp. 1182, 1194 (N.D. Ill. 1989) (Williams, J.) ("It is well established that the share exchange accompanying the merger of two separate and distinct corporate entities, pursuant to which shareholders in one or both of the original entities exchange their shares in [a] surviving or newly created corporation, constitutes a 'purchase or sale' of securities.").[8]

B. *Plaintiff Has Stated a Claim Under the Securities Act Sufficient to Remand This Action to State Court.*

Petitioners also attack the validity of the fundamental change doctrine, insisting that this Court has been "highly critical of, *if not outright rejected,* the 'fundamental change' doctrine." Pets.' Mem. at 18. However, in *Isquith v. Caremark Int'l*, 136 F.3d 531 (7th Cir. 1998), this Court considered but declined to apply the fundamental change doctrine to the case before it because the doctrine was "inapplicable" under the facts before it. *Id.* at 536. And while the court questioned whether the continued validity of the doctrine, it did so in *dicta,* and appeared to limit that *dicta* to securities claims brought under the Securities

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[8] Petitioners reliance on *Bennett v. Bally Mfg. Corp.*, 785 F. Supp. 559, 560-61 (D.S.C. 1992) is inapplicable here. Pets.' Mem. at 17, n. 14. The court in *Bennett* noted that the plaintiff had "only cited cases that have been reversed or overruled and cases whose continuing validity is, at the very least, questionable." *Id.*, p. 561. This is not the case here, where Plaintiff claims arise from a longstanding doctrine for which there is competent legal authority. *See* Sections I.A. and B., *supra.*

Exchange Act of 1934.[9] The law holds that, in deciding a motion to remand, questions of controlling substantive law be resolved in Plaintiff's favor. *See Boyer v. Snap-On Tools Corp.*, 913 F.2d 108, 111 (3d Cir. 1990) (in a motion for remand "[a] district court must resolve all contested issues of substantive fact in favor of the plaintiff and must resolve any uncertainties as to the current state of controlling substantive law in favor of the plaintiff."); *see also Ontiveros v. Anderson*, 635 F. Supp. 216, 218 (N.D. Ill. 1986) ("All factual issues and questions of controlling substantive law must be evaluated in favor of the plaintiff.").

Plaintiff has demonstrated the existence of a legal theory under which he is a purchaser or acquirer of securities under the Securities Act, and thus has standing to pursue his claims. *See, e.g., Peoples Nat. Bank v. Darling*, No. 91-1052-K, 1991 U.S. Dist. LEXIS 4230 at *7, fn1 (D. Kan. Apr. 1, 1991) (motion for remand granted where plaintiff provided court with "persuasive authority" that initial distribution was not a necessary element claim under §12(2) of the Securities Act); *Pinto v. Maremont Corp.*, 326 F. Supp. 165, 167 (S.D.N.Y. 1971) (motion for remand granted where plaintiff provided court with authority that whether private right of action existed under §17 of the Securities Act was an open question). Here, Plaintiff has provided this Court with substantial legal authority to support his claim that the

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[9] Petitioner again cites to this Court's *dicta* in *SEC v. Jakubowski*, 150 F.3d 675 (7th Cir. 1998) to support its claim that this Court has rejected the fundamental change doctrine. (Pets.' Mem. at 18, n. 15.) However, even after *Jakubowski*, courts in this Circuit continue to apply the fundamental change doctrine. *See, e.g., In re Nanophase Techs. Corp. Secs. Litig.*, Case No. 98 C 3450, 2000 U.S. Dist. LEXIS 11744, *12-14 (N.D. Ill. Aug. 11, 2000) (distinguished *Isquith* and relied on tenets of fundamental change doctrine to hold that plaintiffs alleged a purchase of securities where preferred stock was converted common stock through fraudulent IPO).

fundamental changes in his original A-1 Units made him a purchaser or acquirer of securities under the Securities Act.

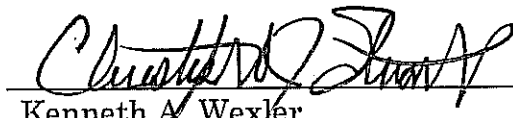
Petitioners' final effort to overturn the District Court's remand order is to argue that Plaintiffs have failed to allege facts that would plead a claim under the fundamental change doctrine. Pets.' Mem. at 19. The argument goes to the *merits* of Plaintiff's claim and, as the District Court recognized, the merits of Plaintiff's claim under the fundamental change doctrine should not be decided before a court determines jurisdiction.[10] Mem. and Order at 7 (A-7).

CONCLUSION

Plaintiff respectfully requests this Court to affirm the holding of the District Court and remand this action to the Circuit Court of Cook County, Illinois.

DATED: October 15, 2008

JACK P. KATZ, individually and on behalf of all persons similarly situated,

By: 

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[10] It is well-established that a court must not determine the merits of a case when faced with a jurisdictional question. *See Farmers Bank & Trust v. Atchison, T. & SF Ry. Co.*, 25 F. 2d 23, 27 (8th Cir. 1928); *see also Peoples Nat. Bank*, 1991 U.S. Dist. LEXIS 4230 at *6, fn1 (same); *Pinto,* 326 F. Supp. at 168 (proper issue is not ultimate merits of a claim, but whether merits warrant adjudication in state forum where Congress said cases arising under the Securities Act should remain).

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CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that he caused copies of the foregoing *Plaintiff-Respondent's Answer in Opposition to Certain Defendants-Petitioners' Petition for Leave to Appeal an Order of Remand* on the persons listed below via First Class U.S. Mail, with proper postage prepaid, on this 15th day of October 2008:

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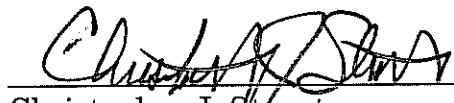

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