

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.

On Appeal from the United States
District Court for the Northern
District of Illinois
In re No. 08-CV-04035
The Honorable John W. Darrah

**U.S.C.A. — 7th Circuit
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**CERTAIN DEFENDANTS-PETITIONERS' PETITION FOR LEAVE TO
APPEAL AN ORDER OF REMAND**

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October 6, 2008

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Pursuant to 28 U.S.C. section 1453(c) and Rule 5 of the Federal Rules of Appellate Procedure, petitioners Archstone, formerly known as Archstone-Smith Operating Trust (the “Archstone UPREIT”); Tishman Speyer Archstone-Smith Multifamily Series I Trust, successor-by-merger to Archstone-Smith Trust (the “Archstone REIT”); and Tishman Speyer Development Corporation (“Tishman”) (collectively, “Petitioners”)¹ respectfully request leave of this Court to appeal the order of the United States District Court for the Northern District of Illinois (the “District Court”), entered September 25, 2008, remanding this case to the Circuit Court of Cook County, Illinois (the “Memorandum and Order”).²

PRELIMINARY STATEMENT

This petition raises a significant question of federal statutory interpretation, one of first impression in this Circuit, and one that has generated a split among courts in different Circuits: whether an action properly removed to federal court under the Class Action Fairness Act of 2005 (“CAFA”) may nevertheless be remanded to state court pursuant to an apparently conflicting non-removal provision of a decades-old statute, Section 22(a) of the Securities Act of 1933 (the “’33 Act”).³

¹ On September 23, 2008, plaintiff Jack B. Katz (“Plaintiff”) filed a notice of voluntary dismissal (without prejudice) of defendant Lehman Brothers Holdings Inc. Pls.’ Notice of Voluntary Dismissal of Def. Lehman Brothers Holdings, Inc., dated Sept. 23, 2008.

² CAFA provides for discretionary appellate review of district court orders granting or denying motions for remand. 28 U.S.C. § 1453(c)(1).

³ Where, as here, a petition for review under CAFA raises significant or novel legal issues, an appeal should be accepted. *Bullard v. Burlington N. Santa Fe RR.*, 535 F.3d 759, 760 (7th Cir. 2008) (“We grant this petition, because the legal issue is novel.”).

The District Court erroneously held that the action could be remanded, and in doing so created an implied exception to CAFA that is inconsistent with its structure and purpose. CAFA states that “any civil action” meeting certain requirements may be removed to federal court.⁴ 28 U.S.C. § 1332(d)(1)(B) (emphasis added). As the District Court correctly held, all of CAFA’s requirements are satisfied here. Mem. and Order at 4-5 (A-1 - A-4). In granting Katz’s motion to remand (the “Remand Motion”), however, the lower court added an unwritten exception to CAFA -- in addition to the express exceptions included by Congress -- for actions subject to non-removal under Section 22(a) of the ’33 Act.⁵ But CAFA includes no savings clause -- no provision excepting from CAFA actions that fall within the ambit of previously-enacted legislation barring removal. As the United States Court of Appeals for the Second Circuit highlighted, in a case that addressed the same fundamental legal issue as is raised here, *Cal. Pub. Employees’ Ret. Sys. v. WorldCom, Inc.*, 368 F.3d 86 (2d Cir. 2004) (“*WorldCom*”), Congress knows how to draft savings clauses, and the absence of such a clause from a removal statute reflects Congress’s intention for that statute not to be subject to any previously-enacted bars to removal.

⁴ Under CAFA, a putative “class action” filed after February 18, 2005, may be removed to the appropriate federal district court if: (a) “the amount in controversy exceeds the sum or value of \$5,000,000,” and (b) “any member of the putative class is a citizen of a state different from any defendant.” 28 U.S.C. § 1332(d)(2)(A). In addition, under CAFA, “the number of members of all proposed plaintiff classes in the aggregate” must not be “less than 100.” *Id.* § 1332(d)(5)(B).

⁵ Section 22(a) states: “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).

Indeed, in a case decided just two weeks ago, on September 24, 2008, the United States District Court for the Southern District of New York held that Section 22(a) does not bar removal of class actions properly removed pursuant to CAFA. *N.J. Carpenters Vacation Fund v. Harborview Mortgage Loan Trust 2006-4*, 2008 U.S. Dist. LEXIS 72039 (S.D.N.Y. Sept. 24, 2008) (“*Harborview*”). In reaching this conclusion, the court adopted the Second Circuit’s reasoning in *WorldCom* and correctly noted Congress’s express intent that large interstate class actions, including securities class action, be litigated in federal court.

Equally significant, CAFA includes several express exceptions to its coverage, including one for class actions arising under the ’33 Act brought on behalf of holders of *covered* securities. If Congress had wanted to extend that exception to actions brought on behalf of holders of *noncovered* securities -- the kind at issue here -- it would have said so expressly. That it did not do so demonstrates its intent that actions of this nature not be barred from removal by Section 22(a).

Here, the District Court’s Order not only ignored the above-stated considerations and the *WorldCom* decision, but also contradicted Congress’s stated intent that large interstate class actions be removed to federal court. Hence the lower court’s September 25 Order was erroneous and should be reviewed and reversed. *See* Point I.A. *infra*. Rather than engage in the type of substantive analysis referenced above, the District Court placed sole and undue reliance on an erroneous decision of the United States Court of Appeals for the Ninth Circuit, *Luther v. Countywide Home Loans Servicing LP*, 533 F.3d 1031 (9th Cir. 2008) (“*Luther*”), which also ignored the analysis discussed above, *WorldCom*, and congressional intent. *Luther* based its flawed

conclusion, that Section 22(a) trumps CAFA, on a canon of statutory construction holding that a specific statute takes precedence over a general one, regardless of priority of enactment. That canon does not apply here, but even if it did, it would not support the lower court's decision, since CAFA is at least as specific as Section 22(a). For this reason, as well, the District Court's Order was erroneous and should be reviewed and reversed. *See infra* Point I.B.

In any event, this Court need not resolve the issue of any asserted conflict between Section 22(a) and CAFA, for even if Section 22(a) does trump CAFA -- which it does not -- the District Court erred for an independent reason: Section 22(a) does not apply to this action. The '33 Act provides a remedy to *purchasers* of securities only. Here, Katz concedes that his '33 Act claims, and specifically his allegation that he is a purchaser of securities, are based solely on the "fundamental change" doctrine of securities law. That doctrine has been soundly rejected by this Court. Absent that doctrine, Katz has no '33 Act claims because, as his complaint itself alleges, he *sold*, not purchased or acquired, securities, and, therefore, he does not have a claim under that Act. Accordingly, regardless of how "artfully" Katz pled his claims, they do not arise under the '33 Act and do not operate to bar removal of this action. *See infra* Point II.

In any event, even if the "fundamental change" doctrine were recognized in this Circuit -- which it is not -- it still cannot be extended to fit the alleged facts of this case. Katz claims that the "fundamental change" doctrine applies because his securities, known as "A-1 Units," were converted into economically inferior "New A-1 Units." But no "New A-1 Units" were ever issued; moreover, no prospectus or registration statement for the non-existent "New A-1 Units" was ever issued or filed with the Securities and

Exchange Commission (the “SEC”). Without a registration statement and prospectus, there can be no Section 11 or 12(a) claims, as Katz alleged here. *See id.*

For the foregoing reasons, and those set out below, the District Court’s Order should be reviewed and reversed.

STATEMENT OF FACTS

A. Katz’s Allegations⁶

Katz and the other putative class members are former holders of A-1 Units of the Archstone UPREIT. Compl. ¶¶ 2, 12, 32. Several years ago, they contributed real property (or ownership interests in companies owning real property) to the Archstone UPREIT. *Id.* In exchange, they received beneficial interests, the A-1 Units, in the Archstone UPREIT. *Id.* As A-1 Unit holders, they were parties to tax (and other) agreements with or assumed by the Archstone UPREIT and the Archstone REIT (collectively, the “Archstone Entities”). *Id.* ¶¶ 3, 48-49. Under those agreements, A-1 Unit holders were entitled to certain tax and other benefits. *Id.*

In 2007, the Archstone Entities participated in a \$22.2 billion merger transaction (the “Acquisition”). *Id.* ¶¶ 65-70. In connection with that transaction, for their A-1 Units, Unit holders received their choice of premium cash consideration, Series O Preferred Units, or a combination of cash and Series O Preferred Units. *Id.* ¶¶ 5, 7-8, 12. *Katz elected to sell his Units for cash only*; hence, he received no Series O Preferred Units or other securities. *Id.* ¶ 12 (emphasis added).

In this action, Katz alleges that as a result of the Acquisition, A-1 Unit holders were deprived of tax and other benefits. *Id.* ¶ 9. Specifically, Katz claims that

⁶ For purposes of this Petition only, Katz’s factual allegations are assumed to be true.

the Archstone Entities disclosed that, following the merger transactions, they will no longer indemnify A-1 Unit holders for any tax liabilities. *Id.* ¶¶ 74-75. He purports to allege claims under Sections 11, 12(2), and 15 of the '33 Act. *Id.* ¶ 1. Katz asserts that he was injured because “Defendants failed to include information in the Prospectus and Registration Statement [for the Acquisition and Series O Preferred Units], information without which Plaintiff and members of the Class were unable to make a reasonable and informed decision as to their [mentioned] ‘election,’ thereby rendering both the Prospectus and Registration Statement false and misleading.” *Id.* ¶ 9.

Apparently recognizing that, as a seller of securities, he does not have a '33 Act claim, in his reply memorandum of law in support of his Remand Motion (the “Reply Memorandum”), Katz asserted a new theory of liability, Reply Mem. at 4-7, that as a result of the Acquisition, his A-1 Units were somehow converted into so-called “New A-1 Units”. *Id.* In particular, he claimed that because the Acquisition required A-1 Unit holders to tender their Units for cash or Series O Preferred Units (or a combination thereof), the economic attributes of the A-1 Units fundamentally changed, so that those Units became, in effect, new securities “New A-1 Units”. *Id.*

Well before Katz brought this action, on November 30, 2007, two members of the same putative class as is alleged here filed suit in the United States District Court for the District of Colorado. Those plaintiffs are represented by the same lawyers who represent Katz here. Like this action, that one, *Stender, et al. v. Cardwell, et al.* (No. 07-cv-2503 (D. Colo. 2007) (the “Stender Action”)), challenges the Acquisition. In addition, it alleges the same facts and names the same defendants as the instant action, and is brought by two plaintiffs that purport to represent the same class as does Plaintiff.

The plaintiffs in the Stender Action assert only state law claims; no federal claims are pled.

In the Stender Action, Petitioners moved to dismiss the plaintiffs' complaint (or stay the action pending arbitration of the plaintiffs' breach of contract claim). Pending resolution of that motion, the federal district court in Colorado stayed discovery in that action. In a transparent attempt to avoid that discovery stay, and the potential for a dismissal of that action for failure to state a claim upon which relief can be granted, or for a stay of that action pending arbitration, Katz and his counsel brought the present case in state court in Illinois, asserting only federal securities claims, under the '33 Act, which they believe bars removal and prevents transfer of this case to the federal district court in Colorado.

On September 30, 2008, the Colorado federal court ruled on the motion to dismiss or stay, holding that to the extent plaintiffs' breach of contract claim asserted an arbitrable claim, that claim should proceed in arbitration, but otherwise dismissing all counts of the complaint for failure to state a claim upon which relief can be granted.

B. Procedural Background

On July 16, 2008, under CAFA, Petitioners filed a joint notice of removal (the "Notice of Removal") of this action from Circuit Court of Cook County, Illinois to the United States District Court for the Northern District of Illinois. Notice of Removal, dated July 16, 2008. On July 23, 2008, citing Section 22(a), Katz filed the Remand Motion. Remand Mot. at 5-7. On August 25, 2008, Petitioners filed their opposition to Katz's Remand Motion. Pet'r's' Opp. Mem. at 6-14. On September 25, 2008, the District Court entered an Order granting the Remand Motion. Mem. and Order, dated

Sept. 25, 2008 (A-1 - A-9). Citing *Luther*, the lower court held that Section 22(a) was more specific than, and accordingly superseded, CAFA. *Id.* at 9 (A-9). Effectively repudiating the “artful pleading” doctrine, the District Court also rejected Petitioners’ argument that Section 22(a) does not apply to this case. *Id.* at 8 (A-8) (“Even if the Court agreed with Defendants that Katz’s claims under the ’33 Act lacked merit and that Katz alleged them to avoid removal under Section 22(a), a plaintiff is the master of his complaint. . . . Katz has chosen to allege only claims arising under the ’33 Act. Such claims cannot be removed under Section 22(a).”).

QUESTIONS PRESENTED

1. Did the District Court err by holding that Section 22(a) supersedes CAFA, where CAFA contains no savings clause and includes multiple express exceptions, including one for actions under the ’33 Act on behalf of holders of *covered* securities, which concededly do not apply to this action concerning *noncovered* securities?

2. Did the District Court err by effectively repudiating the well-established “artful pleading” doctrine, thus allowing a plaintiff to strip a federal court of jurisdiction merely by pleading a facially insufficient claim under a statute that, by its terms, bars removal of the action in question?

ARGUMENT⁷

I. The District Court Erroneously Held that Section 22(a) Supersedes CAFA

A. CAFA's Structure and Purpose Dictate that Section 22(a) Does Not Supersede CAFA

The District Court's holding, that Section 22(a) trumps CAFA, creates an additional but unwritten exception to CAFA that disregards that (as *WorldCom* emphasized and *Harborview* reiterated), CAFA contains no savings clause, such as the one in the general removal statute, and already includes a number of express exceptions, none of which, concededly, applies to this case. Hence, the District Court's Order vitiates Congress's stated intent, in enacting CAFA, to authorize removal of large interstate class actions, including securities class actions.

In *WorldCom*, the question was "whether a federal district court may exercise bankruptcy jurisdiction over generally nonremovable claims brought under the Securities Act of 1933." 368 F.3d at 90. Emphasizing that "unlike the general removal statute, 28 U.S.C. § 1441(a), Section 1452(a) [the bankruptcy removal statute] contains no exception for federal claims that are expressly nonremovable under an Act of Congress," the Second Circuit held that it could exercise such jurisdiction. *Id.* at 105.⁸

⁷ The "standard of review for issues of subject matter jurisdiction, including cases arising under CAFA, is plenary." *Frederico v. Home Depot*, 507 F.3d 188, 193 (3d Cir. 2007). As the proponent of remand, Katz has the burden of proving the existence of an exception to federal jurisdiction under CAFA. *Hart v. FedEx Ground Package Sys. Inc.*, 457 F.3d 675, 676 (7th Cir. 2006) (holding that "the structure of the statute [CAFA] logically shifts the burden of persuasion to the plaintiff to show that the general rule does not apply").

⁸ Section 1441(a) states: "*Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants . . .*" 28 U.S.C. § 1441(a) (emphasis added).

The court reasoned that this “crucial distinction *within* the federal jurisdiction scheme of Title 28,” suggests that “Congress did not intend for Section 22(a) and its analogues to bar removal of . . . claims” related to a bankruptcy case. *WorldCom*, 368 F.3d at 105-06 (emphasis in original).

Adopting the *WorldCom* reasoning, and comparing the bankruptcy removal statute to CAFA, *Harborview* held:

Similarly, here, one could argue that CAFA, which targets only diversity cases that are class actions, also has sweeping removal power and like the bankruptcy removal provisions, CAFA’s sole limitations are those exclusively listed in the defined exceptions such as Home State, Local Controversies, and the three securities and corporate governance exceptions. Had Congress wanted to treat CAFA like the general removal statute of § 1441(a) and leave intact other statutory regimes, it could easily have done so.

2008 U.S. Dist. LEXIS 72039, at *18. Accordingly, like the bankruptcy removal statute, CAFA contains no savings clause; hence, the same “crucial distinction” relied on in *WorldCom* is present here, and, as *Harborview* held, demonstrates that Congress did not intend for CAFA to be subject to a previously-enacted bar to removal applicable to claims brought by holders of noncovered securities.

Moreover, as *Harborview* also noted, CAFA already contains several express exceptions, including one for actions that “solely involve” claims that “*concern[] a covered security as defined under . . . the Securities Act of 1933.*” *Id.* (quoting 28 U.S.C. § 1332(d)(9)(A)) (emphasis added).⁹ There is no dispute, however, that this case

⁹ Congress left it to another statute, the Securities Litigation Uniform Standards Act of 1998 (“SLUSA”), to determine whether federal court jurisdiction exists over claims concerning covered securities. S. Rpt. 109-2, *reprinted in* 2005 U.S.C.C.A.N. 3, at 45 (“The purpose of this provision [§1332(d)] is to avoid disturbing in any way the federal vs. state court jurisdictional

involves claims concerning a *noncovered* security, the A-1 Units. Hence, the absence of an express exception for securities class actions concerning *noncovered* securities further illustrates Congress's intent that CAFA be subject to no previously-enacted bar to removal of class actions brought on behalf of holders of such securities. As the United States Supreme Court has explained, "[w]hen Congress provides exceptions in a statute, it does not follow that courts have authority to create others. The proper inference . . . is that Congress considered the issue of exceptions and, in the end, limited the statute to the ones set forth." *United States v. Johnson*, 529 U.S. 53, 58 (2000); *Detweiler v. Pena*, 38 F.3d 591, 594 (D.C. Cir. 1994) ("Where a statute contains explicit exceptions, the courts are reluctant to find other implicit exceptions."). Thus, this case presents an even stronger case for removal than does *WorldCom*.¹⁰

Crucially, the lower court's holding is also plainly inconsistent with Congress's stated intent that CAFA authorize removal of large interstate class actions. In

lines already drawn in the securities litigation class action context by the enactment of [SLUSA].").

CAFA also contains an exception for actions that "solely involve" a claim "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 the first time, in his Reply Memorandum, Katz cited this exception as a basis for remand. Reply Mem. at 15, n. 6. But this exception does not apply to claims, such as those here, challenging disclosures in connection with purchases of securities. *Estate of Pew v. Cardarelli*, 527 F.3d 25, 31-32 (2d Cir. 2008) ("Claims 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. . . .") (citation omitted).

¹⁰ The lower court's holding that CAFA is subject to an unwritten exception for cases falling within the ambit of Section 22(a) also impermissibly renders superfluous CAFA's express exceptions to removal, *United States v. Miscellaneous Firearms*, 376 F.3d 709, 712-13 (7th Cir. 2004) (holding that a court should "not construe a statute in a way that makes words or phrases meaningless, redundant, or superfluous"), and is inconsistent with the bedrock canon of statutory construction that *inclusio unius est exclusio alterius*: "Mention of one thing implies exclusion of another." *Black's Law Dictionary* 581 (6th ed. 1990).

enacting CAFA, Congress's express purpose was to "restore the intent of the framers of the United States Constitution by providing for *Federal* court consideration of interstate cases of national importance under diversity jurisdiction." 28 U.S.C. § 1711(b)(2) (emphasis added). "Because interstate class actions typically involve more people, more money, and more interstate commerce ramifications than any other type of lawsuit," Congress "firmly believe[d] that such cases properly belong in *federal* court." S. Rpt. 109-14, at 5 (emphasis added). "Overall, new section 1332(d) is intended to expand substantially federal court jurisdiction over class actions," *id.*, and hence "[i]ts provisions should be read broadly, with a strong preference that interstate class actions should be heard in a federal court if properly removed by any defendant." *Id.*

Consistent with congressional intent that CAFA's "provisions be read broadly," S. Rpt. 109-14, at 5, CAFA states that it applies to "*any* civil action," 28 U.S.C. § 1332(d)(1)(B) (emphasis added). This is precisely the sort of large interstate class action that, in enacting CAFA, Congress intended to be litigated in federal court. *Estate of Pew*, 527 F.3d at 32 (holding that under CAFA, but subject to its exceptions, "diversity jurisdiction is created under CAFA for *all large, non-local securities class actions.*") (emphasis added). To give due respect to the text and purpose of CAFA, as *Harborview* held, CAFA must "override[] the Securities Act's anti-removal provision because this case involves exactly the type of case CAFA was concerned about -- a large, non-local securities class action dealing with a matter of national importance" 2008 U.S. Dist. LEXIS 72039, at *21.

B. Luther Was Wrongly Decided

Luther, on which the District Court relied without analysis, requires no contrary result. *Luther*'s reasoning is flawed and, by extension, so is the lower court's Order. *First*, *Luther* erroneously failed to address both the analysis in *WorldCom* and the significance of CAFA's multiple express exceptions, none of which apply to class actions brought on behalf of holders of noncovered securities. *Second*, *Luther* improperly followed the canon of statutory construction that a specific statute trumps a general one, and, without providing any principled explanation, held that Section 22(a) is more specific than CAFA.

The specificity canon does not apply here, where Section 22(a) and CAFA can be harmonized. *Chevron U.S.A., Inc. v. Hammond*, 726 F.2d 483, 490 n.8 (“Principles of construction requiring the more . . . specific statute to prevail over the . . . more general only apply when there is an *irreconcilable conflict* between statutes.”) (emphasis added) (citation omitted).¹¹ As the Supreme Court has held, “[w]e must read [apparently conflicting] statutes to give effect to each if we can do so while preserving their sense and purpose.” *Watt v. Alaska*, 451 U.S. 259, 267 (1981). Here, the only reading of CAFA and Section 22(a) that gives effect to each law, yet preserves the sense and purpose of each statute, is that, with respect to those necessarily few class actions subject to both Section 22(a) and CAFA, CAFA supersedes Section 22(a). The opposite reading, that Section 22(a) trumps CAFA, would interfere with the critical sense and purpose of CAFA, to enable large interstate class actions to be litigated in federal court,

¹¹ See *Detweiler*, 38 F.3d 591, 594 (D.C. Cir. 1994) (“These canons, whatever their combative power against a statute’s plain meaning, are not appropriately invoked in this case; they apply only in the face of ‘irreconcilably conflicting statutes.’”) (citation omitted).

see supra pp. 11-12, yet preserve no critical sense or purpose of the '33 Act, "to protect [securities] investors." *Pinter v. Dahl*, 486 U.S. 622, 637-38 (1988).

But even if the specificity canon of statutory construction did apply here -- which it does not -- it and another canon of statutory construction actually militate against remand of this action. *First*, the District Court held that Section 22(a) is more specific than CAFA because Section 22(a) applies to "securities actions," whereas CAFA "generally governs large class actions." Mem. and Order at 9 (A-9). But, in fact, both statutes apply to a narrow category of actions, and neither category is a subset of the other; rather, just as CAFA applies to many claims that are not brought under the '33 Act, Section 22(a) applies to many claims that are not covered by CAFA. Hence, with respect to the claims covered by each statute, Section 22(a) is no more specific than CAFA.¹²

As this Court has observed, "[w]hich of two statutes is the 'more specific' is in most cases . . . a matter of perspective." *United States v. Lov-It Creamery, Inc.*, 895 F.2d 410, 412 (7th Cir. 1990). As the party seeking remand, Katz has the burden of demonstrating that the canon favoring specific statutes over general ones supports remand of this case. *See supra* p.9, n. 4. Here, he cannot meet that burden.

Indeed, if anything, CAFA is more specific than Section 22(a), for it applies to fewer types of actions than Section 22(a). Whereas Section 22(a) applies to both individual and class actions, *see supra* p.2, n. 4, CAFA applies to only one type of

¹² *See WorldCom*, 368 F.3d at 102 ("Additionally, the class of claims covered by Section 22(a) is no more specific than the class of claims covered by Section 1452(a). Section 22(a) does not cover only a subset of the claims covered by Section 1452(a). By the same token, Section 1452(a) does not cover only a subset of the claims covered by Section 22(a). Rather, just as Section 1452(a) applies to many claims that are not brought under the 1933 Act, Section 22(a) applies to many claims that are not 'related to' a bankruptcy.") (citation omitted).

action, class actions. *See supra* p.2, n. 4. Moreover, with respect to the question here, whether federal subject matter jurisdiction exists over Katz's putative class claims, CAFA's purpose is more specific than that of the '33 Act, of which Section 22(a) is but one ancillary component. CAFA's purpose is to create federal court jurisdiction over, and authorize the removal of, large interstate class actions. *See supra* pp. 11-12. In contrast, the '33 Act is a far-ranging statute that aims to promote disclosure in connection with the offering of securities in interstate commerce. *See supra* p. 14. It is therefore CAFA's purpose, not that of the '33 Act, that specifically relates to the question in this case.

Second, there can be no dispute that CAFA was enacted decades after Section 22(a), and hence better and more specifically reflects congressional intent with respect to the question of whether federal subject matter jurisdiction lies here than does Section 22(a). *E.g., In re Ionosphere Clubs*, 922 F.2d 984, 991 (2d Cir. 1990) (“[W]hen two statutes are in irreconcilable conflict, we must give effect to the most recently enacted statute since it is the most recent indication of congressional intent.”).

But even if there were an irreconcilable conflict between CAFA and the '33 Act, and even if Section 22(a) were more specific than CAFA, remand would still have been improper here because the District Court failed to address the issue whether application of Section 22(a) would “unduly interfere” with the operation of CAFA. *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 156 (1976) (“Where the application of a specific statute would ‘unduly interfere’ with the “operation” of a general statute that was enacted subsequent to the specific statute, the more general statute controls.”)

(emphasis added). Here, as noted above, *see supra* pp. 13-14, application of Section 22(a) over CAFA would unduly interfere with the operation of CAFA.¹³

**II. The District Court Erroneously Held
That Section 22(a) Applies to This Case**

But this Court need not address the asserted conflict between CAFA and Section 22(a), nor even consider *WorldCom*, *Harborview*, or *Luther*, for even if Section 22(a) did trump CAFA -- which it does not -- the District Court's holding would still be erroneous for the independent reason that Section 22(a) does not apply to this action, and hence the District Court effectively (and improperly) repudiated the well-established "artful pleading" doctrine.

Although a plaintiff may be the "master of his complaint," a federal court should determine the existence of federal subject-matter jurisdiction based upon the substance of a plaintiff's claims, not the labels that it attaches to them. *Burda v. M. Ecker Co.*, 954 F.2d 434, 438 (7th Cir. 1992) ("Although the plaintiff is generally considered the 'master of his complaint,' this principle is not without limitation. An independent corollary to the 'well-pleaded complaint rule' is the 'artful pleading doctrine.' A plaintiff may not frame his action under state law and omit federal questions that are essential to recovery.") (citation omitted).

"Therefore, a federal court may, in some situations, look beyond the face of the complaint to determine whether a plaintiff has *artfully pleaded* his suit so as to couch a federal claim in terms of state law. In these cases, [courts] will conclude that a

¹³ In contrast, regardless of CAFA, a plaintiff can still file and litigate a '33 Act case in state court as an individual action.

plaintiff's claim actually arose under federal law and is therefore removable." *Id.* (emphasis added).¹⁴

Here, Katz alleges claims purporting to arise under Sections 11, 12(a)(2), and 15 of the '33 Act. To bring a claim under Section 11, a plaintiff must have "acquir[ed]" a security. 15 U.S.C. § 77k (emphasis added). Likewise, to bring a claim under Section 12(a)(2), a plaintiff must have "purchased" a security. 15 U.S.C. § 77l(2) (emphasis added). Katz admitted, however, that, in connection with the Acquisition, for his A-1 Units, he acquired or purchased no security, but, rather, elected to receive only cash. Compl. ¶¶ 5, 7-8, 12. Thus, Katz is a seller, not a purchaser, of securities. Accordingly, Katz does not have standing to bring a '33 Act claim and Section 22(a) does not bar removal of this action. Under the "artful pleading" doctrine, that Katz self-servingly chose to refer to his claims as claims arising under the '33 Act, Compl. ¶ 1, does not deprive the federal district court of jurisdiction over this case.

Apparently recognizing that his complaint failed properly to assert claims under the '33 Act, Katz asserted a new theory of liability. In his Reply Memorandum, he relied on a dubious doctrine -- the "fundamental change" doctrine -- that he tried to contort to fit the facts of this case. Reply Mem. at 4-7. Katz asserted that because the Acquisition required him to tender his A-1 Units for cash or Series O Preferred Units,

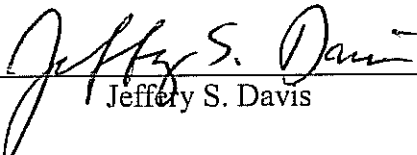
¹⁴ Although the "artful pleading" doctrine is usually invoked in cases in which the issue is whether a given claim arises under a particular federal statute, and hence whether federal subject-matter jurisdiction exists, its reasoning is no less applicable here, where the issue is whether Katz's claims actually arise under the '33 Act, and hence whether the Act's non-removal provision, Section 22(a), is applicable. *Bennett v. Bally Mfg. Corp.*, 785 F. Supp. 559, 560 (D.S.C. 1992) (holding that Section 22(a) did not bar removal of a claim under Section 12 of the '33 Act that was so "unsupported by . . . legal authority" as to prevent it from arising under the '33 Act).

CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that he caused hard and electronic copies of the Petition for Leave to Appeal an Order of Remand, to be served on the persons listed below by inserting the same in the U.S. Mail on this 6th day of October, 2008:

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No.

**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.
DEMERRITT, 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.

On Appeal from the United States
District Court for the Northern
District of Illinois
In re No. 08-CV-04035
The Honorable John W. Darrah

ORDERS SUBMITTED PURSUANT TO FED. R. APP. P. 5(b)(1)(E)

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October 6, 2008

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MHN

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JACK P. KATZ, on behalf of himself)
and all others similarly situated,)

Plaintiff,)

v.)

Case No. 08 cv 04035

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.)
DEMERRITT; 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,)

Judge John W. Darrah

Defendants.)

MEMORANDUM OPINION AND ORDER

This putative class-action lawsuit was originally filed in the Circuit Court of Cook County, Illinois, on May 9, 2008, and was removed to this Court on July 16, 2008.

Before the Court is the motion of Defendants to transfer venue to the United States District Court for the District of Colorado pursuant to 28 U.S.C. § 1404(a) [12] and Plaintiff's motion to remand to the Circuit Court of Cook County [18].¹

¹ Certain Defendants (Archstone-Smith Operating Trust, Archstone-Smith Trust, and Tishman Speyer Development Corporation) filed a motion for leave to file a sur-reply in opposition to the motion to remand [39]. The motion for leave is granted, and the sur-reply has been considered.

For the reasons stated below, Plaintiff's motion to remand is granted. Defendants' motion to transfer is denied as moot.

FACTS

Plaintiff, Jack P. Katz ("Katz" or "Plaintiff"), filed this putative class-action lawsuit in the Circuit Court of Cook County, Illinois. The complaint alleges that Katz and the other proposed class members are former holders of Class A-1 Units of the Archstone UPREIT, a real estate investment trust. Katz and the class members contributed certain properties to Defendant Archstone UPREIT, or to its predecessor, Charles E. Smith Residential Realty L.P. ("Smith UPREIT") in exchange for equity interests in the Archstone UPREIT or the Smith UPREIT in the form of common units (the "A-1 Units"). The purpose of the A-1 Unitholders in making such contributions was to obtain tax advantages and other benefits. The A-1 Unitholders were parties to tax and other agreements – with or assumed by the Archstone UPREIT and the Archstone REIT ("the Archstone entities") – which entitled them to tax and other benefits.

In 2007, the Archstone entities participated in a merger transaction. The Archstone REIT entered into a merger agreement in which it was to be acquired by the Tishman-Lehman Partnership.

In connection with this merger, the A-1 Unitholders were given an election of receiving cash consideration for their A-1 Units or converting their A-1 Units to new securities designated as Series O Preferred Units. Katz elected to cash out his A-1 Units.

Katz alleges in this lawsuit that the merger eliminated many of the tax, liquidity and other advantages previously associated with the A-1 Units. He alleges that the

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Prospectus and Registration Statement issued pursuant to the merger agreement contained false and misleading information about the merger, which deprived the A-1 Unitholders of information necessary to make a reasonable and informed decision as to the election offered them for their A-1 Units. Katz alleges that the transactions "resulting in the A-1 unitholders exchanging their A-1 units for cash and/or new securities were solicited through false and misleading prospectuses and the securities were issued by way of a materially false and misleading registration statement." (Compl. ¶ 10.) The Complaint alleges three causes of action under the Securities Act of 1933 (the '33 Act). Count I alleges a violation of Section 11 of the '33 Act, 15 U.S.C. § 77k; Count II alleges a violation of Section 12(a)(2), 15 U.S.C. § 77l(a)(2); Count III alleges a violation of Section 15, 15 U.S.C. § 77o.

LEGAL STANDARD

Civil actions filed in state court are removable to a federal district court only if a plaintiff could have originally brought the action in federal court. 28 U.S.C. § 1441(a); *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 808 (1986). A defendant seeking removal has the burden to establish that removal is proper and any doubt is resolved against removability. *Wirtz Corp. v. United Distillers & Vintners N. Am., Inc.*, 224 F.3d 708, 715 (7th Cir. 2000). However, a plaintiff seeking remand has the burden to prove that an express exception to removal exists. *See Breuer v. Jim's Concrete of Brevard, Inc.*, 538 U.S. 691, 698 (2003).

ANALYSIS

Defendants maintain that removal jurisdiction is proper on the basis of the Class

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Action Fairness Act of 2005 ("CAFA"), 28 U.S.C. § 1332(d)(2). The CAFA amended the requirements for diversity jurisdiction by granting district courts original jurisdiction over class actions exceeding \$5,000,000 in controversy where at least one plaintiff is diverse from at least one defendant.² The CAFA also provides that such class actions are removable to federal court. *See* 28 U.S.C. § 1453(b).

There is no dispute that this action is brought as a class action, and the CAFA's minimal diversity requirements are met. Katz contends removal of this action is not proper for two reasons: first, on the basis of an express exception to removal set forth in Section 22(a) of the '33 Act, 15 U.S.C. § 77v(a); and, second, because Defendants have not shown that the \$5,000,000 amount-in-controversy requirement is met.

In the Seventh Circuit, defendants only have to establish "a reasonable probability" that the amount in controversy exceeds the jurisdictional minimum. *Rising-Moore v. Red Roof Inns, Inc.*, 435 F.3d 813, 815 (7th Cir. 2006). Although the Complaint does not state a specific monetary figure for the damages sought, Plaintiff's action is brought on behalf of a nationwide class, including "hundreds, if not thousands of similarly situated A-1 holders" and seeks on their behalf compensatory, statutory, and rescissory damages, as well as attorney's fees. (Compl., ¶¶ 1, 11, 89, 104, 113.) The action seeks to recover, for the holders who elected to receive Series O Preferred Units,

² 28 U.S.C. § 1332(d)(2) provides, in part:

The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of \$5,000,000, exclusive of interest and costs, and is a class action in which –

(A) any member of a class of plaintiffs is a citizen of a State different from any defendant.

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rescission and rescissory damages "in the amount of the full value of the A-1 Units at the time of the merger" and, for the holders who elected to receive cash for their units, damages in the amount of the tax liability the A-1 holders incurred when they were required to cash out of the units. (Complt., ¶¶ 103, 113.) The Complaint states that the tax liabilities alone are "in the millions of dollars." (Complt., ¶ 75.) The allegations in the Complaint establish a reasonable probability that the amount in controversy exceeds \$5,000,000.

This leaves Katz's argument that removal is precluded by Section 22(a) of the '33 Act. Section 22(a), codified at 15 U.S.C. § 77v(a), provides for concurrent jurisdiction in state and federal courts of actions alleging violations of the '33 Act. Section 22(a) also contains language expressly prohibiting removal of actions arising under the Act that are brought in state court. Section 22(a) provides:

Except as provided in section 77p(c) of this title [providing for removal of certain class actions involving covered securities], **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) (emphasis added).

There is no dispute that the A-1 Units are not "covered securities" or that section 77p(c)'s exception to the removal bar does not apply here. (See Pltf. Mot. to Rem., at 7, n. 3.) Katz contends that Section 22(a)'s express exception to removal applies because all of the claims alleged in the Complaint arise under the '33 Act. Defendants do not dispute that actions arising solely under the '33 Act fall within Section 22(a)'s removal bar. Defendants contend that even though Katz has cast his claims as arising under the '33 Act, in fact, Katz cannot assert claims under Sections 11 and 12(a)(2) of the Act

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because he elected to receive *cash* for his A-1 Units, not new securities. Thus, Defendants argue, Katz neither "acquired" nor "purchased" a "security" as required to maintain claims under Sections 11 and 12(a)(2). *See* Def. Opp. at 8. Section 11 of the '33 Act provides: "[i]n case any part of the registration statement, when such part became effective, contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading, any person acquiring such security" may sue select categories of defendants. 15 U.S.C. §77k. Section 12(a)(2) provides that "[a]ny person who . . . offers or sells a security . . . by means of a [false or misleading] prospectus or oral communication . . . shall be liable . . . to the person purchasing such security from him." 15 U.S.C. § 771(a)(2).

Defendants urge the Court to look beyond the allegations of the Complaint and deny removal because Katz does not have a viable claim under the '33 Act.³ Therefore, Defendants contend, the case is not one that arises solely under the '33 Act and is not subject to Section 22(a)'s removal bar. Defendants rely on *Bennett v. Bally Manufacturing*, 785 F. Supp. 559 (D.S.C. 1992), in which the court denied a motion to remand an action alleging among other state-law claims, a violation of Section 12(2) of the '33 Act and where the court determined that the Section 12(2) claim was clearly unsupported by the law.

³ Defendants contend Plaintiff has cast his claims as arising under the '33 Act in an effort to avoid removal and a possible transfer of this case to the District Court for the District of Colorado, where another class-action lawsuit asserting state-law claims by the same putative class of plaintiffs against the same defendants arising out of the same transaction is pending. (Def. Mem. at 5.)

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Katz, in his reply, concedes that he must be a purchaser or acquirer of securities to maintain claims under the '33 Act. However, he argues, he is a purchaser or acquirer pursuant to the "fundamental change" doctrine. (Pltf. Rep. at 4-7). Under the fundamental change doctrine recognized by other circuits and some courts in this district, a plaintiff may be considered a purchaser or seller of a security where a corporate change "results in a fundamental change in the nature of a shareholder's investment, leaving the plaintiff with shares that represent a participation in a wholly new and different enterprise." *Isquith v. Caremark International, Inc.*, Case No. 94 CV 5534, 1997 WL 162881, at *4 (N.D. Ill. Mar. 26, 1997). Katz argues that the fundamental change doctrine applies to him because his A-1 shares were effectively changed by the merger into A-1 Units with inferior economic rights. (Pltf. Rep. at 3, 6.)

The Court does not necessarily find Katz's argument factually persuasive that he is a purchaser or acquirer of securities under the fundamental change doctrine. Nevertheless, the state court is the proper forum for the alleged claims to be determined. Unlike the complaint in *Bennett*, which alleged federal securities and state-law claims (such that claims existed to remand in the absence of the unsupported federal claim), Plaintiff's Complaint in this case purports to allege *only* claims arising under the '33 Act. Section 22(a) of the '33 Act expressly precludes removal of such actions and clearly indicates Congress's intent to have such actions heard in state court if they were initially filed there. See *Luther v. Countrywide Home Loans Servicing, LP*, No. 08-55865, 2008 U.S. App. LEXIS 15115, at *7-8 (*Luther*) ("by virtue of § 22(a) of the Securities Act of 1933, Luther's state court class action alleging only violations of the Securities

Act of 1933 was not removable."'). *See also Nauheim v. Interpublic Group of Cos.*, 2003 U.S. Dist. LEXIS 6266, at * 17 (N.D. Ill. Apr. 15, 2003) (*Nauheim*) ("In this case, Plaintiff's Complain[t] is based entirely on federal securities law. Under the clear and unambiguous language of [Section 22(a)], such an action cannot be removed from state court."). Therefore, even if the Court agreed with Defendants that Katz's claims under the '33 Act lacked merit and that Katz alleged them to avoid removal under Section 22(a), a plaintiff is the master of his complaint. For whatever reason, Katz has chosen to allege only claims arising under the '33 Act. Such claims cannot be removed under Section 22(a). Accordingly, the action must be remanded to state court. *See Luther*, 2008 U.S. App. LEXIS 15115; *Nauheim*, 2003 U.S. Dist. LEXIS 6266.

Defendants also argue that removal is proper under the CAFA, which allows for the removal of "any civil action" satisfying its requirements. *See* 28 U.S.C. § 1332(d)(2). According to Defendants, the CAFA controls this high-dollar class-action case, not Section 22(a). However, the Ninth Circuit addressed and rejected this argument in *Luther*. The Ninth Circuit reasoned:

CAFA's general grant of the right of removal of high-dollar, class actions does not trump § 22(a)'s specific bar to removal of cases arising under the Securities Act of 1933. 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. Here, the Securities Act of 1933 is the more specific statute; it applies to the narrow subject of securities cases and § 22(a) more precisely applies only to claims arising under the Securities Act of 1933. CAFA, on the other hand, applies to a 'generalized spectrum' of class actions.

Luther, 2008 U.S. App. LEXIS 15115, at *6-7. The reasoning of *Luther* is persuasive


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and is adopted here. Section 22(a), the more specific statute governing securities actions, controls this situation, not the CAFA, which generally governs large class actions.

CONCLUSION

Accordingly, for the reasons stated above, Plaintiff's motion to remand [18] is granted. There being no basis for removal jurisdiction, Defendants' motion to transfer [12] is denied as moot. The case is hereby remanded to state court pursuant to 28 U.S.C § 1447(c).⁴

Date: September 23, 2008


JOHN W. DARRAH
United States District Court Judge

⁴ Plaintiff asks for an award of attorney's fees and costs incurred in litigating the motion to remand. The Court will not award fees and costs.

United States District Court, Northern District of Illinois

MHR

Name of Assigned Judge or Magistrate Judge	John W. Darrah	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	08 C 4035	DATE	9/23/2008
CASE TITLE	Jack P. Katz vs. Ernest A. Gerardi, Jr., et. al.		

DOCKET ENTRY TEXT

For the reasons stated in the attached memorandum opinion and order, plaintiff's motion to remand is granted [18]. Defendants' motion to transfer is moot. Enter Memorandum Opinion and Order. The Court will stay removal of this case until 10/1/08. Status hearing set for 10/1/08 at 9:00 a.m. Defendants are granted leave to file a motion to reconsider by 9/30/08.

[For further detail see separate order(s).]

Docketing to mail notices.

00:10

U.S. DISTRICT COURT NORTHERN DISTRICT OF ILLINOIS	Courtroom Deputy Initials:	MF
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2008 SEP 24 AM 5:43

FILED-001

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**UNITED STATES DISTRICT COURT
FOR THE Northern District of Illinois – CM/ECF LIVE, Ver 3.2.2
Eastern Division**

Jack P. Katz

Plaintiff,

v.

Case No.: 1:08-cv-04035
Honorable John W. Darrah

Ernest A. Gerardi Jr., et al.

Defendant.

NOTIFICATION OF DOCKET ENTRY

This docket entry was made by the Clerk on Thursday, September 25, 2008:

MINUTE entry before the Honorable John W. Darrah: The Court's 9/23/08 order is amended to reflect the following: The Court will stay the remand of this case until 10/1/08. Mailed notice(maf,)

ATTENTION: This notice is being sent pursuant to Rule 77(d) of the Federal Rules of Civil Procedure or Rule 49(c) of the Federal Rules of Criminal Procedure. It was generated by CM/ECF, the automated docketing system used to maintain the civil and criminal dockets of this District. If a minute order or other document is enclosed, please refer to it for additional information.

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United States District Court
Northern District of Illinois - CM/ECF LIVE, Ver 3.2.2 (Chicago)
CIVIL DOCKET FOR CASE #: 1:08-cv-04035
Internal Use Only

Katz v. Gerardi et al
Assigned to: Honorable John W. Darrah
Case in other court: Circuit Court of Cook County,
08CH17172
Cause: 28:1441 Petition for Removal

Date Filed: 07/16/2008
Date Terminated: 10/01/2008
Jury Demand: Both
Nature of Suit: 850
Securities/Commodities
Jurisdiction: Federal Question

Plaintiff

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similarly situated*

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ATTORNEY TO BE NOTICED

Defendant

Stephen R. Demeritt

represented by **Steven Lawrence Merouse**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Christopher Qualley King
(See above for address)
ATTORNEY TO BE NOTICED

Jeffery S Davis
(See above for address)
ATTORNEY TO BE NOTICED

Melissa Angelica Economy
(See above for address)
ATTORNEY TO BE NOTICED

Defendant

Charles Mueller, Jr.

represented by **Steven Lawrence Merouse**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Christopher Qualley King
(See above for address)
ATTORNEY TO BE NOTICED

Jeffery S Davis
(See above for address)

ATTORNEY TO BE NOTICED

Melissa Angelica Economy

(See above for address)

ATTORNEY TO BE NOTICED

Defendant

Caroline Brower

represented by **Steven Lawrence Merouse**

(See above for address)

LEAD ATTORNEY

ATTORNEY TO BE NOTICED

Christopher Qualley King

(See above for address)

ATTORNEY TO BE NOTICED

Jeffery S Davis

(See above for address)

ATTORNEY TO BE NOTICED

Melissa Angelica Economy

(See above for address)

ATTORNEY TO BE NOTICED

Defendant

Mark Schumacher

represented by **Steven Lawrence Merouse**

(See above for address)

LEAD ATTORNEY

ATTORNEY TO BE NOTICED

Christopher Qualley King

(See above for address)

ATTORNEY TO BE NOTICED

Jeffery S Davis

(See above for address)

ATTORNEY TO BE NOTICED

Melissa Angelica Economy

(See above for address)

ATTORNEY TO BE NOTICED

Defendant

Alfred G. Neely

represented by **Steven Lawrence Merouse**

(See above for address)

LEAD ATTORNEY

ATTORNEY TO BE NOTICED

Christopher Qualley King
(See above for address)
ATTORNEY TO BE NOTICED

Jeffery S Davis
(See above for address)
ATTORNEY TO BE NOTICED

Melissa Angelica Economy
(See above for address)
ATTORNEY TO BE NOTICED

Defendant

Archstone-Smith Operating Trust

represented by **Steven Lawrence Merouse**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Christopher Qualley King
(See above for address)
ATTORNEY TO BE NOTICED

Jeffery S Davis
(See above for address)
ATTORNEY TO BE NOTICED

Melissa Angelica Economy
(See above for address)
ATTORNEY TO BE NOTICED

Defendant

Archstone-Smith Trust

represented by **Steven Lawrence Merouse**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Christopher Qualley King
(See above for address)
ATTORNEY TO BE NOTICED

Jeffery S Davis
(See above for address)
ATTORNEY TO BE NOTICED

Melissa Angelica Economy
(See above for address)

ATTORNEY TO BE NOTICED

Defendant

Lehman Brothers Holdings, Inc.
TERMINATED: 09/26/2008

represented by **Steven Lawrence Merouse**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Christopher Qualley King
(See above for address)
ATTORNEY TO BE NOTICED

Jeffery S Davis
(See above for address)
ATTORNEY TO BE NOTICED

Melissa Angelica Economy
(See above for address)
ATTORNEY TO BE NOTICED

Defendant

Tishman Speyer Development Corporation

represented by **Steven Lawrence Merouse**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Christopher Qualley King
(See above for address)
ATTORNEY TO BE NOTICED

Jeffery S Davis
(See above for address)
ATTORNEY TO BE NOTICED

Melissa Angelica Economy
(See above for address)
ATTORNEY TO BE NOTICED

Defendant

Robert H. Smith

represented by **Steven Lawrence Merouse**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Christopher Qualley King
(See above for address)
ATTORNEY TO BE NOTICED

Jeffery S Davis

(See above for address)

*ATTORNEY TO BE NOTICED***Melissa Angelica Economy**

(See above for address)

ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
07/16/2008	<u>2</u>	NOTICE of Removal from Circuit Court of Cook County with copy of the complaint, case number (08CH17172) filed by Ned S. Holmes, Robert P. Kogod, James H. Polk, III, John C. Schweitzer, R. Scot Sellers, Stephen R. Demeritt, Charles Mueller, Jr, Caroline Brower, Ernest A. Gerardi, Jr, Mark Schumacher, Alfred G. Neely, Archstone-Smith Operating Trust, Archstone-Smith Trust, Lehman Brothers Holdings, Inc., Tishman Speyer Development Corporation, Ruth Ann M. Gillis Filing fee \$ 350. (Attachments: # <u>1</u> Exhibit A, # <u>2</u> Exhibit B, # <u>3</u> Exhibit C)(aac,) (Entered: 07/17/2008)
07/16/2008	<u>3</u>	CIVIL Cover Sheet.(aac,) (Entered: 07/17/2008)
07/16/2008	<u>4</u>	ATTORNEY Appearance for Defendants by Steven Lawrence Merouse. (aac,) (Entered: 07/17/2008)
07/16/2008	<u>5</u>	ATTORNEY Appearance for Defendants by Christopher Qualley King. (aac,) (Entered: 07/17/2008)
07/16/2008	<u>6</u>	ATTORNEY Appearance for Defendants by Melissa Angelica Economy. (aac,) (Entered: 07/17/2008)
07/16/2008	<u>7</u>	NOTICE by all defendants re notice of removal <u>2</u> .(aac,) (Entered: 07/17/2008)
07/16/2008	<u>8</u>	(Court only) RECEIPT regarding payment of filing fee paid on 7/16/2008 in the amount of \$350.00, receipt number 2938673. (aac,) (Entered: 07/17/2008)
07/17/2008	<u>1</u>	ATTORNEY Appearance for Defendants Ned S. Holmes, Robert P. Kogod, James H. Polk, III, John C. Schweitzer, R. Scot Sellers, Stephen R. Demeritt, Charles Mueller, Jr, Caroline Brower, Ernest A. Gerardi, Jr, Mark Schumacher, Alfred G. Neely, Archstone-Smith Operating Trust, Archstone-Smith Trust, Lehman Brothers Holdings, Inc., Tishman Speyer Development Corporation, Ruth Ann M. Gillis by Jeffery S Davis (Davis, Jeffery) (Entered: 07/17/2008)
07/17/2008		MAILED Notice of Removal letter to Plaintiff's counsel of record.(aac,) (Entered: 07/17/2008)
07/18/2008	<u>9</u>	MOTION by Defendants Robert H. Smith, Ned S. Holmes, Robert P. Kogod, James H. Polk, III, John C. Schweitzer, R. Scot Sellers, Stephen R. Demeritt, Charles Mueller, Jr, Caroline Brower, Ernest A. Gerardi, Jr, Mark Schumacher, Alfred G. Neely, Archstone-Smith Operating Trust, Archstone-Smith Trust, Lehman Brothers Holdings, Inc., Tishman Speyer Development Corporation,

		Ruth Ann M. Gillis for extension of time to <i>Answer or Otherwise Plead to the Complaint (Unopposed)</i> (Davis, Jeffery) (Entered: 07/18/2008)
07/18/2008	10	NOTICE of Motion by Jeffery S Davis for presentment of extension of time, <u>9</u> before Honorable John W. Darrah on 7/24/2008 at 09:00 AM. (Davis, Jeffery) (Entered: 07/18/2008)
07/21/2008	11	MINUTE entry before the Honorable John W. Darrah:Defendants' unopposed motion for extension of time to answer or otherwise plead <u>9</u> is granted. Defendants to respond or answer by 9/8/08.Mailed notice (smm) (Entered: 07/22/2008)
07/23/2008	12	MOTION by Defendants Archstone-Smith Operating Trust, Archstone-Smith Trust, Lehman Brothers Holdings, Inc., Tishman Speyer Development Corporation to transfer case <i>Pursuant to 28 USC 1404(a)</i> (Davis, Jeffery) (Entered: 07/23/2008)
07/23/2008	13	MEMORANDUM by Archstone-Smith Operating Trust, Archstone-Smith Trust, Lehman Brothers Holdings, Inc., Tishman Speyer Development Corporation in support of motion to transfer case <u>12</u> <i>Pursuant to 28 USC 1404(a)</i> (Attachments: # <u>1</u> Exhibit A - B, # <u>2</u> Exhibit C-F)(Davis, Jeffery) (Entered: 07/23/2008)
07/23/2008	14	NOTICE of Motion by Jeffery S Davis for presentment of motion to transfer case <u>12</u> before Honorable John W. Darrah on 7/29/2008 at 09:00 AM. (Davis, Jeffery) (Entered: 07/23/2008)
07/23/2008	15	ATTORNEY Appearance for Plaintiff Jack P. Katz by Sedef Melisa Twomey (Twomey, Sedef) (Entered: 07/23/2008)
07/23/2008	16	ATTORNEY Appearance for Plaintiff Jack P. Katz by Kenneth A. Wexler (Wexler, Kenneth) (Entered: 07/23/2008)
07/23/2008	17	ATTORNEY Appearance for Plaintiff Jack P. Katz by Edward Anthony Wallace (Wallace, Edward) (Entered: 07/23/2008)
07/23/2008	18	MOTION by Plaintiff Jack P. Katz to remand (Wallace, Edward) (Entered: 07/23/2008)
07/23/2008	19	MEMORANDUM by Jack P. Katz in support of motion to remand <u>18</u> (Wallace, Edward) (Entered: 07/23/2008)
07/23/2008	20	NOTICE of Motion by Edward Anthony Wallace for presentment of motion to remand <u>18</u> before Honorable John W. Darrah on 7/29/2008 at 09:00 AM. (Wallace, Edward) (Entered: 07/23/2008)
07/23/2008	21	RESPONSE by Jack P. Katzin Opposition to MOTION by Defendants Archstone-Smith Operating Trust, Archstone-Smith Trust, Lehman Brothers Holdings, Inc., Tishman Speyer Development Corporation to transfer case <i>Pursuant to 28 USC 1404(a)</i> <u>12</u> (Wallace, Edward) (Entered: 07/23/2008)
07/24/2008	22	ATTORNEY Appearance for Plaintiff Jack P. Katz by Christopher James Stuart (Attachments: # <u>1</u> Certificate of Service)(Stuart, Christopher) (Entered: 07/24/2008)

		07/24/2008)
07/24/2008	<u>23</u>	AMENDED NOTICE of Motion by Edward Anthony Wallace for presentment of motion to remand <u>18</u> before Honorable John W. Darrah on 9/9/2008 at 09:00 AM. (Wallace, Edward) (Entered: 07/24/2008)
07/24/2008	<u>24</u>	MINUTE entry before the Honorable John W. Darrah:Defendant's motion to transfer [12, 13, 14] and Plaintiff's motion to remand [18, 19, 20] are entered and continued. The motions are to be briefed as follows: Defendant to file a reply in its motion to transfer 8/6/08 <u>12</u> . Defendant to respond to Plaintiff's motion to remand <u>18</u> by 8/25/08; Plaintiff to reply by 9/8/08. The case is set for status on 10/14/2008 at 9:00 A.M.Mailed notice (smm) (Entered: 07/25/2008)
08/01/2008	<u>25</u>	MOTION by Defendants Archstone-Smith Operating Trust, Archstone-Smith Trust, Lehman Brothers Holdings, Inc., Tishman Speyer Development Corporation for leave to file excess pages (<i>Unopposed</i>) (Davis, Jeffery) (Entered: 08/01/2008)
08/01/2008	<u>26</u>	NOTICE of Motion by Jeffery S Davis for presentment of motion for leave to file excess pages <u>25</u> before Honorable John W. Darrah on 8/7/2008 at 09:00 AM. (Davis, Jeffery) (Entered: 08/01/2008)
08/04/2008	<u>27</u>	MINUTE entry before the Honorable John W. Darrah:Certain defendants' unopposed Motion for leave to file brief exceeding 15 pages <u>25</u> is granted.Mailed notice (ep,) (Entered: 08/05/2008)
08/06/2008	<u>28</u>	REPLY by Defendants Archstone-Smith Operating Trust, Archstone-Smith Trust, Lehman Brothers Holdings, Inc., Tishman Speyer Development Corporation to motion to transfer case <u>12</u> <i>in support</i> (Economy, Melissa) (Entered: 08/06/2008)
08/15/2008	<u>29</u>	MOTION by Defendants Robert H. Smith, Ned S. Holmes, Robert P. Kogod, James H. Polk, III, John C. Schweitzer, R. Scot Sellers, Stephen R. Demeritt, Charles Mueller, Jr, Caroline Brower, Ernest A. Gerardi, Jr, Mark Schumacher, Alfred G. Neely, Archstone-Smith Operating Trust, Archstone-Smith Trust, Lehman Brothers Holdings, Inc., Tishman Speyer Development Corporation, Ruth Ann M. Gillis for extension of time <i>to Answer or Otherwise Plead</i> (Davis, Jeffery) (Entered: 08/15/2008)
08/15/2008	<u>30</u>	NOTICE of Motion by Jeffery S Davis for presentment of extension of time, <u>29</u> before Honorable John W. Darrah on 8/21/2008 at 09:00 AM. (Davis, Jeffery) (Entered: 08/15/2008)
08/18/2008	<u>31</u>	MINUTE entry before the Honorable John W. Darrah: Defendants' Unopposed Motion for Extension of Time to Answer or Otherwise Plead to the Complaint [29, 30] is granted. Mailed notice (ep,) (Entered: 08/19/2008)
08/25/2008	<u>32</u>	WAIVER OF SERVICE returned executed by Jack P. Katz. Ruth Ann M. Gillis waiver sent on 8/18/2008, answer due 10/17/2008. (Stuart, Christopher) (Entered: 08/25/2008)

08/25/2008	<u>33</u>	MEMORANDUM by Archstone-Smith Operating Trust, Archstone-Smith Trust, Lehman Brothers Holdings, Inc., Tishman Speyer Development Corporation in Opposition to motion to remand <u>18</u> (Attachments: # <u>1</u> Exhibit A and B, # <u>2</u> Exhibit C and D)(Davis, Jeffery) (Entered: 08/25/2008)
08/29/2008	<u>34</u>	MOTION by Plaintiff Jack P. Katz for leave to file excess pages (Stuart, Christopher) (Entered: 08/29/2008)
08/29/2008	<u>35</u>	NOTICE of Motion by Christopher James Stuart for presentment of motion for leave to file excess pages 34 before Honorable John W. Darrah on 9/4/2008 at 09:00 AM. (Stuart, Christopher) (Entered: 08/29/2008)
08/29/2008	<u>36</u>	WAIVER OF SERVICE returned executed by Jack P. Katz. (Stuart, Christopher) (Entered: 08/29/2008)
09/02/2008	<u>37</u>	MINUTE entry before the Honorable John W. Darrah:Plaintiff's motion for leave to exceed page limit [34, 35] is granted.Mailed notice (smm) (Entered: 09/02/2008)
09/08/2008		(Court only) ***Deadlines terminated. (maf,) (Entered: 09/08/2008)
09/08/2008	<u>38</u>	REPLY by Plaintiff Jack P. Katz <i>Memorandum of Law In Further Support of Plaintiff's Motion to Remand</i> (Wallace, Edward) (Entered: 09/08/2008)
09/15/2008	<u>39</u>	MOTION by Defendants Archstone-Smith Operating Trust, Archstone-Smith Trust, Tishman Speyer Development Corporation for leave to file <i>Surreply Memorandum of Law in Further Support of Their Opposition to Plaintiff's Motion to Remand</i> (Attachments: # <u>1</u> Exhibit A)(Davis, Jeffery) (Entered: 09/15/2008)
09/15/2008	<u>40</u>	NOTICE of Motion by Jeffery S Davis for presentment of motion for leave to file, <u>39</u> before Honorable John W. Darrah on 9/23/2008 at 09:00 AM. (Davis, Jeffery) (Entered: 09/15/2008)
09/16/2008	<u>41</u>	SUGGESTION of Bankruptcy as to Lehman Brothers Holdings Inc. (Attachments: # <u>1</u> Exhibit A)(Davis, Jeffery) (Entered: 09/16/2008)
09/16/2008	<u>42</u>	Notice Of Firm Name Change by Jack P. Katz (Wallace, Edward) (Entered: 09/16/2008)
09/19/2008	<u>43</u>	RESPONSE by Jack P. Katzin Opposition to MOTION by Defendants Archstone-Smith Operating Trust, Archstone-Smith Trust, Tishman Speyer Development Corporation for leave to file <i>Surreply Memorandum of Law in Further Support of Their Opposition to Plaintiff's Motion to Remand</i> <u>39</u> (Stuart, Christopher) (Entered: 09/19/2008)
09/23/2008	<u>44</u>	NOTICE of Voluntary Dismissal by Jack P. Katz (Stuart, Christopher) (Entered: 09/23/2008)
09/23/2008	<u>45</u>	MINUTE entry before the Honorable John W. Darrah: For the reasons stated in the attached memorandum opinion and order, plaintiff's motion to remand is granted <u>18</u> . Defendants' motion to transfer is moot. Enter Memorandum Opinion and Order. The Court will stay removal of this case until 10/1/08.

		Status hearing set for 10/1/2008 at 09:00 AM. Defendants are granted leave to file a motion to reconsider by 9/30/08. (For further detail see separate order(s)). Mailed notice. (jj,) (Entered: 09/25/2008)
09/23/2008	<u>46</u>	MEMORANDUM Opinion and Order Signed by the Honorable John W. Darrah on 9/23/2008.(jj,) (Entered: 09/25/2008)
09/25/2008	<u>47</u>	MINUTE entry before the Honorable John W. Darrah:The Court's 9/23/08 order is amended to reflect the following: The Court will stay the remand of this case until 10/1/08. Mailed notice(maf,) (Entered: 09/25/2008)
09/26/2008	<u>48</u>	MINUTE entry before the Honorable John W. Darrah:Plaintiff having filed a notice of voluntary dismissal without prejudice, defendant Lehman Brothers Holdings, Inc. is terminated from this lawsuit. Lehman Brothers Holdings, Inc. terminated.Mailed notice (smm) (Entered: 09/26/2008)
09/29/2008	<u>49</u>	SUR-REPLY by Defendants Archstone-Smith Operating Trust, Archstone-Smith Trust, Tishman Speyer Development Corporation to motion to remand <u>18</u> (Davis, Jeffery) (Entered: 09/29/2008)
10/01/2008	<u>50</u>	MINUTE entry before the Honorable John W. Darrah:The clerk is directed to remand this case to the Circuit Court of Cook County, forthwith. See the Court's order of 9/23/08 granting plaintiff's motion to remand. Status hearing set for 10/1/08 is vacated. Civil case terminated. Mailed notice (smm) (Entered: 10/03/2008)
10/01/2008	<u>51</u>	ENTERED JUDGMENT. (smm) (Entered: 10/03/2008)
10/06/2008	<u>52</u>	MAILED remand letter with certified copies of minute orders dated 9/23/2008, 9/25/2008 and 10/1/2008 to Circuit Court of Cook County. (hp,) (Entered: 10/06/2008)