No. 08-55865

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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DAVID H. LUTHER, Individually and On Behalf of All Others Similarly Situated,

Plaintiff-Appellee,

v.

COUNTRYWIDE HOME LOANS SERVICING, LP, *et al.*,

Defendants-Appellants.

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On Appeal From The United States District Court
For The Central District of California, No. Civ. 07-8165
Honorable Mariana R. Pfaelzer

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BRIEF FOR THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS-APPELLANTS, SUPPORTING REVERSAL

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CORPORATE DISCLOSURE STATEMENT

The Securities Industry and Financial Markets Association is not a publicly traded corporation. It has no parent corporations and no publicly traded corporation owns more than 10% of its stock.

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The Securities Industry and Financial Markets Association ("SIFMA") respectfully submits this brief as *amicus curiae* in support of Defendants-Appellants, supporting reversal of the district court's order granting remand. This *amicus* brief is submitted pursuant to the motion of SIFMA filed contemporaneously with this brief pursuant to Fed. R. App. P. 29.

INTEREST OF THE *AMICUS CURIAE*

SIFMA brings together the shared interests of more than 650 securities firms, banks and asset managers. SIFMA's mission is to promote policies and practices that work to expand and perfect markets, foster the development of new products and services and create efficiencies for member firms, while preserving and enhancing the public's trust and confidence in the markets and the industry. SIFMA works to represent its members' interests locally and globally. It has offices in New York, Washington D.C., and London and its associated organization, the Asia Securities Industry and Financial Markets Association, is based in Hong Kong.

Many of SIFMA's members serve as underwriters for, or otherwise participate in, securities offerings and, as such, they have a vital interest in the issues raised by this appeal. SIFMA regularly files *amicus* briefs in cases with broad implications for financial markets, and frequently has appeared as *amicus*

curiae in this Court. *See, e.g.*, *Safron Capital Corp. v. Leadis Tech. Inc.*, No. 06-15623, 2008 WL 1776407 (9th Cir. Apr. 18, 2008); *Cent. Laborers Pension Fund v. Merix Corp. (In re Merix Corp. Sec. Litig.)*, No. 06-35894, 2008 WL 1816423 (9th Cir. Apr. 22, 2008); *Simpson v. Homestore.com, Inc.*, 519 F.3d 1041 (9th Cir. 2008); *Hadachek v. UBS Fin. Serv., Inc.*, No. 06-35769.[1]

Given the ongoing volatility of the financial markets, the concomitant increase in securities class action filings that has already occurred over the past year[2] and the growing consensus that securities litigation risks are adversely affecting the competitiveness of the U.S. capital markets,[3] this is an issue of exceptional importance to the entire securities industry.

PRELIMINARY STATEMENT

The pending appeal, concerning a $300 billion public offering of securities, presents an issue that is vitally important to *amicus curiae*. SIFMA's members are engaged in the capital raising and formation process. Central to that process is a

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[1] Among SIFMA's 650 members are various Underwriter Appellants, for whom SIFMA's counsel for this brief, Willkie Farr & Gallagher LLP, has served as counsel from time to time on various matters. Willkie Farr represents only SIFMA in this action.

[2] *See* Cornerstone Research, Securities Class Action Case Filings (*2007: A Year in Review*), at 6 (2008), http://cornerstone.com/pdf/practice_securities/2007YIR.pdf.

[3] *See* Interim Report of the Committee on Capital Markets Regulation (Dec. 5, 2006), http://www.capmktsreg.org/pdfs/11.30Committee_Interim_ReportREV2.pdf.

statutory scheme under which plaintiffs bringing multi-billion dollar class action suits based on the federal securities laws are required to bring those suits in federal court. It is only in federal court where, as is the case here, numerous and overlapping securities actions can be consolidated before a single judge for coordinated handling, thereby preventing wasteful and duplicative discovery and inconsistent rulings by state courts.

Plaintiff's position in this action would wreak havoc with the policy objectives underlying the statutory schemes at issue in this case – securities law and nationwide class actions. As the district court observed, Plaintiff here "has stretched every pleading limit to remain in state court." But the district court erroneously rewarded Plaintiff's tactical maneuver to avoid bringing his lawsuit within the scope of the Class Action Fairness Act of 2005.[4] CAFA mandates that nationwide class actions, including securities actions, be removable to federal court, except in limited circumstances, not present here, involving truly local controversies or state corporate governance matters, or those already covered by SLUSA.[5] Together, CAFA and SLUSA evince congressional intent that securities claims are a matter of particular federal concern and seek to concentrate such

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[4] Pub. L. No. 109-2, 119 Stat. 4 (codified at 28 U.S.C. § 1332(d) (2008) ("CAFA").

[5] The Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227 (codified at 15 U.S.C. §§ 78p(c) & 78bb(f)(2) (2008)).

litigation in the federal courts where Congress "firmly believes that such cases properly belong."[6] As the Second Circuit held just last month, CAFA takes SLUSA's expansion of federal class action jurisdiction a step further, providing an alternative, diversity-based source of federal jurisdiction for "all securities cases that have national impact" but which, for one reason or another, do not fall within SLUSA's grant of expanded federal question jurisdiction. *See Estate of Pew v. Cardarelli*, No. 06-5703-mv, 2008 WL 2042809, at *6 (2d Cir. May 13, 2008).

Section 22(a), the provision of the Securities Act of 1933 ("'33 Act") on which Plaintiff relied to avoid removal,[7] was enacted long before the development of the modern class action device as well as the multiplicity of nationwide securities class action suits. The '33 Act's prohibition on the removal of "cases" arising under that Act must, under established principles of statutory construction, yield to the more recent and more specific admonition in CAFA that "*any . . . class action*" meeting CAFA's requirements, including, with certain exceptions, any securities class action, be brought in federal court.[8] Permitting Plaintiff, and other class action plaintiffs, to pursue their claims in various state courts would create

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[6] *See* S. Rep. No. 109-14 (2005), at 5, *reprinted in* 2005 U.S.C.C.A.N. 3, 6 ("Senate CAFA Report"). Citations to the Senate CAFA Report in this brief are to the U.S.C.C.A.N. page(s), unless otherwise indicated.

[7] 15 U.S.C. § 77v(a) (2008) ("Section 22(a)").

[8] *See* 28 U.S.C. § 1332(d) (2008).

real potential for inconsistent rulings on law and fact, thereby undermining the strong federal interest in maintaining uniformity and integrity in the interpretation and application of the federal securities laws.

Affirmance of the district court's order would also increase the risks and costs associated with underwriting a national securities offering, as securities industry participants would be forced to defend sprawling litigation in multiple state jurisdictions around the country. It would thus contribute to making access to U.S. capital markets more expensive as investors bear the higher transaction costs to compensate financial institutions for soaring expenses. Foreign markets – which limit or prohibit private class actions – are becoming more attractive to both U.S. and foreign companies, depriving American investors of *bona fide* investment opportunities.[9] The end result: securities class-action litigation, which is already

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[9] *See* H.R. Rep. No. 104-50, at 20 (1995) ("Fear of [securities] litigation keeps companies out of the capital markets."); *see also* Commission on the Regulation of U.S. Capital Markets in the 21st Century, Report and Recommendations, at 30 (2007), http://www.capitalmarketscommission.com/portal/capmarkets/default.htm) (follow "Download Full Report" hyperlink) ("[I]nternational observers increasingly cite the U.S. legal and regulatory environment as a critical factor discouraging companies and other market participants from accessing the U.S. markets.").

cited as a key deterrent to foreign issuers considering entry into U.S. markets,[10] would continue to sabotage the competitive footing of U.S. capital markets.

ARGUMENT

THE DISTRICT COURT ERRONEOUSLY HELD THAT SECTION 22(a) BARRED REMOVAL OF PLAINTIFF'S SECURITIES CLAIMS.

A. Plaintiff's Purported Application of Section 22(a) to Prevent Removal under CAFA is Contrary to Legislative Intent and the Policy Objectives of CAFA.

Allowing plaintiffs to defeat federal jurisdiction over securities class actions through tactical pleading devices is directly contrary to the intent of Congress and policy objectives of CAFA. There is no doubt that CAFA's general purpose was to significantly expand federal court jurisdiction over multistate class action litigation. As one federal judge has commented, "CAFA represents the largest expansion of federal jurisdiction in recent memory." Sarah S. Vance, *A Primer on*

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[10] Interim Report of the Committee on Capital Markets Regulation, at 11 (Dec. 5, 2006), http://www.capmktsreg.org/pdfs/11.30Committee_Interim_ReportREV2.pdf ("Foreign companies commonly cite the U.S. class action enforcement system as the most important reason why they do not want to list in the U.S. market."); *see also Stoneridge Invest. Partners, LLC. v. Scientific-Atlanta, Inc.*, 128 S. Ct 761, 772 (2008) (citing "practical consequences" of increased risks from securities claims as "raising the costs of doing business," and noting that "[o]verseas firms with no other exposure to our securities laws could be deterred from doing business here . . . [t]his, in turn, may raise the cost of being a publicly traded company under our law and shift securities offerings away from domestic capital markets").

the Class Action Fairness Act of 2005, 80 Tul. L. Rev. 1617, 1643 (2006).[11] And as the Senate Judiciary Committee Report accompanying the bill that became CAFA emphasized, there are "numerous problems with our current class action system . . . . One key reason for these problems is that most class actions are currently adjudicated in state courts, where the governing rules are applied inconsistently (frequently in a manner that contravenes basic fairness and due process considerations) and where there is often inadequate supervision over litigation procedures and proposed settlements." Senate CAFA Report at 5; *see id.* at 6 ("Because interstate class actions typically involve more people, more money, and more interstate commerce ramifications than any other type of lawsuit, the Committee firmly believes that such cases properly belong in federal court.").

The drafters of CAFA intended that the statute "preserve primary state court jurisdiction over primarily local matters." *Id.* at 7. But this case is not one of those matters. It concerns a national offering of $300 billion in securities, thousands of investors from across the country, defendant underwriters that the complaint describes as "global" financial services, investment banking and securities firms, and damages claims running potentially into the billions. This is precisely the sort

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[11] *See also* 28 U.S.C. § 1711 (2008) (Historical and Statutory Notes) (purposes of CAFA include 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").

of case that Congress believes properly belongs in federal court. *See Estate of Pew*, 2008 WL 2042809, at *6 ("Review of SLUSA and CAFA confirms an overall design to assure that the federal courts are available for all securities cases that have national impact . . . .").

Contrary to what Plaintiff contends, Congress's objective in CAFA was more than just "salvaging diversity actions." (Plaintiff's Brief at 25.) To be sure, one aim of CAFA was to prevent the sort of artful pleading that Plaintiff has engaged in here. But the legislative history indicates a broader goal: CAFA "makes it harder for plaintiffs' counsel to 'game the system' by trying to defeat diversity jurisdiction, *creates efficiencies in the judicial system by allowing overlapping and 'copycat' cases to be consolidated in a single federal court*, [and] *places the determination of more interstate class action lawsuits in the proper forum – the federal courts.*" Senate CAFA Report at 6 (emphasis added).

Indeed, a particular policy objective of CAFA, directly relevant to this case, was to facilitate coordination of multiple and overlapping class actions by providing a federal forum where they can be consolidated for discovery and other pre-trial proceedings, avoiding duplication and the potential for inconsistent rulings. As the Senate CAFA Report noted:

> [F]ederal courts can coordinate "copy cat" or overlapping class actions . . . . [I]t is not uncommon to see twenty, thirty, or even 100 class actions filed on the same subject matter . . . . When these similar, overlapping class actions

> are filed in state courts of different jurisdictions, there is no way to consolidate or coordinate the cases. The result is enormous waste, to say nothing of the unfairness.

Senate CAFA Report at 49.[12]

Numerous securities class action suits against Countrywide and its affiliates, as well as a number of the underwriter defendants, alleging misrepresentations and omissions in connection with loan origination practices and risks associated with the mortgage securities publicly offered by Countrywide, are pending and have been consolidated in the district court for the Central District of California. These class actions (some of them brought by Plaintiff's counsel on this appeal) involve various combinations of claims under the '33 Act as well as the Securities Exchange Act of 1934 ("'34 Act") and state common law. The *Luther* case that is subject to this appeal is an outlier in that it alleges only '33 Act claims, was brought in state court and, because the mortgage pass-through certificates at issue do not meet the statutory definition of "covered securities," could not be removed under SLUSA.[13] Yet because many of the practices and misrepresentations it

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[12] "In contrast, if overlapping or similar class actions are filed against the same defendant in two or more different federal courts, the multidistrict litigation process (established by 28 U.S.C. § 1407) permits the transfer and consolidation of those cases to a single judge. The federal court multidistrict litigation system regularly consolidates multiple overlapping class actions in this manner, preventing the waste that occurs in state courts." Senate CAFA Report at 49.

[13] As the district court noted, a split of authority exists over whether SLUSA permits removal of securities claims brought exclusively under the '33 Act, even if

alleges are similar to those alleged in the consolidated federal actions, there necessarily would be overlapping discovery between the *Luther* case and the other securities class actions involving Countryside securities, and different judicial decisions on common issues of law and fact, if *Luther* remains in state court.

Allowing cases such as *Luther* to escape CAFA removal would incentivize securities class action plaintiffs to bring their cases in state court and limit their claims to those arising under the '33 Act. As a result, plaintiffs would be able to proceed in one state court with their '33 Act claims while other claims involving largely the same factual and legal issues (including both '33 Act and '34 Act claims, which are often brought together) proceed in different state and federal courts on different discovery and pre-trial schedules and before different judges. That is not what Congress had in mind when it passed CAFA. To the contrary, CAFA, as well as SLUSA and the PSLRA, evince a preference for concentrating securities litigation in federal courts. The waste, duplication and conflicting outcomes that inevitably would result from litigating the same matters in multiple

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a "covered" security is involved. (Op. at 3 n.4.) Those decisions allowing SLUSA removal refute the notion that Section 22(a) provides an "absolute" choice of forum for plaintiffs asserting solely '33 Act claims. *See, e.g.*, *Brody v. Homestore, Inc.*, 240 F. Supp. 2d 1122, 1123 (C.D. Cal. 2003) (permitting SLUSA removal of class action asserting violations of '33 Act); *In re King Pharms., Inc.*, 230 F.R.D. 503, 505 (E.D. Tenn. 2004) (same). In any event, where non-covered securities are involved, CAFA provides federal jurisdiction over class actions alleging '33 Act claims.

courts across the country would increase litigation costs, undermine the strong federal interest in maintaining uniformity and integrity in the interpretation and application of the federal securities laws, and leave unchecked the abuses in state court class action litigation that Congress sought to avoid.

B. The Plain Terms of CAFA Permit Removal.

CAFA provides that "the district courts shall have original jurisdiction of *any* civil action in which the matter in controversy exceeds the sum of $5,000,000, exclusive of interest and costs, *and is a class action*," so long as it otherwise meets the requirements of CAFA and does not fall within specific exceptions, including specific types of securities claims. *See* 28 U.S.C. § 1332(d)(2) (emphasis added); 28 U.S.C. § 1453 (providing that a "class action" may be removed to federal court). Under the plain meaning of CAFA, then, *all* class actions are removable with only six enumerated exceptions, only one of which has even been argued by Plaintiff to apply here.

Three of CAFA's exceptions turn on such factors as the citizenship of the defendants and the place of injury and are not relevant here.[14] The other three exceptions, contained in 28 U.S.C. § 1332(d)(9), are for class actions involving claims (A) solely concerning a "covered security" as defined in the '33 Act and '34 Act (which claims are already governed by SLUSA); (B) solely relating to the

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[14] *See* 28 U.S.C. §§ 1332(d)(3); (d)(4)(A); (d)(4)(B).

internal affairs or corporate governance of a corporation arising under the law of its state of incorporation; and (C) solely relating to "the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to *any* security" (*i.e.*, including any non-covered security not governed by SLUSA) (emphasis added). It is only this latter exception, found in 28 U.S.C. § 1332(d)(9)(C), which Plaintiff claims to apply here.[15]

Plaintiff effectively seeks to engraft a seventh exception into CAFA for securities class action claims brought in state court solely under the '33 Act. The problem with this assertion is CAFA contains no such exception and the court may not create one. *See Webb v. Smart Document Solutions, LLC*, 499 F.3d 1078, 1084 (9th Cir. 2007) ("The canon of statutory construction *expressio unius est exclusio alterius* . . . 'creates a presumption that when a statute designates certain persons, things, or manners of operation, all omissions should be understood as exclusions.'") (quoting *Silvers v. Sony Pictures Entm't, Inc.*, 402 F.3d 881, 885 (9th Cir. 2005) (en banc)).

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[15] SIFMA agrees with Defendants-Appellants and with the Second Circuit's recent decision in *Estate of Pew* that the 28 U.S.C. § 1332(d)(9)(C) exception is inapplicable because Plaintiff's claims in this case do not concern the terms of the mortgage securities themselves, but rather disclosure duties externally imposed by the federal securities laws.

Congress was presumed to know of the '33 Act non-removal provision (Section 22(a)) when it enacted CAFA. *See Transcon Lines v. Sterling Press* (*In re Transcon Lines*), 58 F.3d 1432, 1440 (9th Cir. 1995) ("We have repeated time and time again that 'Congress must be presumed to have known of its former legislation . . . and to have passed . . . new laws in view of the provisions of the legislation already enacted.'") (omission in original) (quoting *Hellon & Assoc. v. Phoenix Resort Corp.*, 958 F.2d 295, 297 (9th Cir. 1992)). Had it wanted to, Congress could have simply provided in CAFA that securities actions brought solely under the '33 Act are not removable. It did not.

That omission is particularly telling, and the "*expressio unius*" canon has special force, given that CAFA's enumerated list of exceptions *do* include certain specified securities claims, and specifically refer to the '33 Act. *See* 28 U.S.C. §§ 1332(d)(9)(A), (C). Having specifically addressed the subject matter of the exceptions to removability of securities cases in CAFA, Congress cannot be presumed to have intended other exceptions involving the very same subject matter. *See Tucker v. Alexandroff*, 183 U.S. 424, 436 (1901) ("Upon general principles applicable to the construction of written instruments, the enumeration of certain powers with respect to a particular subject-matter is a negation of all other analogous powers with respect to the same subject-matter . . . . [t]he rule is curtly stated in the familiar legal maxim, *Expressio unius est exclusio alterius.*"); *Colo. &*

Wyo. Ry. Co. v. Atchison, Topeka & Santa Fe Ry. Co., Civ. A. C-5582, 1974 WL 964, at *10 (D. Colo. Oct. 2, 1974) ("[W]hile there may be cases calling for an *implied* antitrust immunity arising from other sections of the [Interstate Commerce] Act, such an implication is inappropriate where, as here, express immunity is provided for agreements dealing with the same subject matter. *Expressio unius est exclusio alterius.*")[16]

Even without adding a seventh exception to CAFA for securities class actions brought in state court solely under the '33 Act, Congress might have accomplished the same thing by inserting a "savings clause" into CAFA's removal provision, 28 U.S.C. § 1453, for claims arising under other Acts of Congress that explicitly prohibit removal. Significantly, 28 U.S.C. § 1441(a), the general removal statute, provides that state court cases over which the district courts have original jurisdiction may be removed, "Except as otherwise expressly provided by Act of Congress." 28 U.S.C. § 1441(a) (2008). But no such savings clause was included in the CAFA removal statute.

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[16] Thus, contrary to Plaintiff's argument (Plaintiff's Br. at 22 n.15), the floor statement by a CAFA proponent that CAFA "*specifically* excludes *a number* of Federal securities and State-based corporate fraud lawsuits" (149 Cong. Rec. H5282 (daily ed. June, 2003) (statement of Rep. Sensenbrenner) (emphasis added), *supports* the conclusion that only certain enumerated exceptions were intended.

Thus, in *California Public Employees' Retirement System v. Worldcom, Inc.*, 368 F.3d 86 (2d Cir. 2004), the Second Circuit held that the anti-removal provision of the '33 Act did *not* trump the bankruptcy removal statute (28 U.S.C. § 1452(a)), which permits removal of any claim "related to a bankruptcy case." The Second Circuit reasoned that, unlike the general removal statute (28 U.S.C. § 1441(a)), the bankruptcy removal statute "contains no exception for claims arising under an Act of Congress that prohibits removal." *Id.* at 90. Similar to CAFA, the bankruptcy removal statute "contains just two enumerated exceptions" that were inapplicable in *Worldcom*. *Id.* at 98. The enumeration of specific exceptions, together with the absence a savings clause of the type contained in Section 1441(a) (which the court viewed as "crucial"), led the Second Circuit to conclude that the supposedly "absolute choice of forum" created by Section 22(a) did not preclude removal of securities claims related to a bankruptcy case. *Id.* at 92, 106-08.

As the *Worldcom* court held, "when an anti-removal provision such as Section 22(a) is invoked, the threshold question is whether removal is being effectuated by way of the general removal statute, 28 U.S.C. § 1441(a), or by way of a separate removal provision that 'grants *additional* removal jurisdiction in a class of cases which would not otherwise be removable under the prior grant.'" *Id.* at 107 (quoting *Gonsalves v. Amoco Shipping Co.*, 733 F.2d 1020, 1022 (2d Cir. 1984)). Thus, "[i]f removal is being effectuated through a provision that confers

additional removal jurisdiction, and that provision contains no exception for nonremovable federal claims, the provision should be given full effect." *Id.* The result was that, with the two enumerated exceptions, Section 1452(a) confers removal jurisdiction over *all* claims related to a bankruptcy case, and is not trumped by Section 22(a). *Id.* at 107-08; *see also Carpenters Pension Trust for S. Cal. v. Ebbers*, 299 B.R. 610, 615 (C.D. Cal. 2003 (same); *Hesselman v. Arthur Anderson LLP* (*In re Global Crossing Ltd. Sec. Litig.*), No. 02 Civ. 910 GEL, 2003 WL 21659360, at *3 (S.D.N.Y. July 15, 2003) (same); *Pac. Life Ins. Co. v. J.P. Morgan Chase & Co.*, No. SA CV 03-813GLT (ANX), 2003 WL 22025158, at *2 (C.D. Cal. June 20, 2003) (same).

The same reasoning applies here. CAFA contains a removal provision, separate from Section 1441(a), that grants *additional* removal jurisdiction in securities class action cases that would not otherwise be removable. All such class actions, with the enumerated exceptions, are removable notwithstanding Section 22(a). This Court should likewise hold that the so-called "absolute" forum selection provision of Section 22(a) does not trump the additional removal jurisdiction created by CAFA for securities class actions.

C. CAFA is the More Recent and Specific Statute.

Further supporting the conclusion that Section 22(a) does not trump CAFA in these circumstances is the fact that CAFA is the more recent statute and the

more specific one on the point at issue. As the Supreme Court has held, "the meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000); *see also United States v. Estate of Romani*, 523 U.S. 517, 530-33 (1998) ("[T]here are sound reasons for treating the Tax Lien Act of 1966 as the governing statute . . . . [T]he Tax Lien Act is the later statute, the more specific statute, and its provisions are comprehensive, reflecting an obvious attempt to accommodate the strong policy objections to the enforcement of secret liens.").[17]

Here, CAFA is the more recent statute. The '33 Act was passed more than 70 years before CAFA, and the 1998 SLUSA amendment to Section 22(a) also predated CAFA. Insofar as is relevant here, CAFA is also more specific than the '33 Act because Section 22(a) addresses removal of "cases" arising under the '33 Act, while CAFA addresses the removability of *class actions* and only a subset of '33 Act cases – securities class actions. CAFA further specifically delineates that only those '33 Act class actions that are not locally oriented within the meaning of CAFA, and are not "covered" class actions under SLUSA, and do not concern

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[17] *See also Glacier Bay Kee Leasing Co. v. McGahan*, 944 F.2d 577, 581 (9th Cir. 1991) ("[W]here provisions in two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one").

corporate governance matters or the rights and terms of the securities themselves, are removable.

Because CAFA deals specifically with the removal of securities class actions, as opposed to securities "cases," the district court erred in concluding that Section 22(a) was the more specific of the two statutes. The Second Circuit in *Worldcom* similarly concluded that Section 22(a) was *not* more specific than the class of claims covered by the bankruptcy removal statute (28 U.S.C. § 1452(a)). Section 22(a) did not cover only a subset of the claims covered by Section 1452(a), but rather, applied to many claims that are not "related to" a bankruptcy. *Worldcom*, 368 F.3d at 102. The same is true here: Section 22(a) applies to all '33 Act claims, including many that fall outside CAFA – for example, individual as opposed to class actions, and class actions concerning "covered" securities. The '33 Act claims removable under CAFA, by contrast, are only a subset of all '33 Act claims. Insofar as the removability of '33 Act claims goes (the issue on this appeal), CAFA is the much more specific statute. Indeed, the greater specificity of CAFA is even more apparent here than in *Worldcom*, since CAFA, unlike the bankruptcy removal statute, specifically addresses the removability of securities class actions.

CAFA's focus on class actions also reflects legislative concerns more recent and specific than those Congress faced in 1933. Rule 23 of the Federal Rules of

Civil Procedure was not adopted until 1938, and class actions did not come into vogue until the 1966 amendments to Rule 23. *See* Senate CAFA Report at 7. Even then, and for many years afterward, class actions were "primarily a tool for civil rights litigations seeking injunctions in discrimination cases." *Id.* at 8. The drafters of Section 22(a) simply never envisioned the types of billion-dollar nationwide securities class actions, and corresponding abuses, that prompted the passage of CAFA following upon SLUSA and the PSLRA.[18]

Thus, for the additional reason that it is the more recent and specifically drawn statute in relation to securities class actions, CAFA should be held to control over Section 22(a) in this case. But even if one were to conclude, wrongly, that Section 22(a) is the more specific statute, it would not control. 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. *See Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 156 (1976); *Worldcom*, 368 F.3d at 103. For the reasons discussed in Point A. above, the policy objectives of CAFA – centralizing national securities litigation in federal court – would be greatly undermined if '33 Act class actions could be kept in state court. *Cf. Worldcom*, 368 F.3d at 103-04 (Section 22(a) could interfere with

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[18] The Private Securities Litigation Reform Act of 1995, Pub. L. 104-67, 109 Stat. 737 (codified at 15 U.S.C. § 78u-4).

"Congress's purpose of centralizing bankruptcy litigation in a federal forum" if construed to trump the bankruptcy removal statute).

D. Allowing Removal in these Circumstances Best Harmonizes the Statutes in Question.

Finally, allowing removal in this case would harmonize both Section 22(a) and CAFA without nullifying either statute. As this Court has stated, "we must, whenever possible, attempt to reconcile potential conflicts in statutory provisions." *Transcon Lines*, 58 F.3d at 1440; *see also Momeni v. Chertoff*, 521 F.3d 1094, 1097 (9th Cir. 2007) ("Where an appellate court can construe two statutes so that they conflict, or so that they can be reconciled and both can be applied, it is obliged to reconcile them.").

Section 22(a) and CAFA can be reconciled by interpreting the former to preclude removal of individual "cases" arising under the '33 Act, while interpreting CAFA to permit removal of securities class actions asserting '33 Act claims, provided they otherwise satisfy CAFA. Such an interpretation would give effect to both statutes in conformity with established principles of construction.[19]

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[19] *Cf. Rabkin v. Or. Health Sciences Univ.*, 350 F.3d 967, 974 (9th Cir. 2003) ("The harmony sought . . . is not necessarily a perfect symmetry of the statutes dealt with; it is sufficient if we arrive at a construction representing a reasonable consistency between the affected parts.") (applying Oregon law).

CONCLUSION

The district court's remand order should be reversed.

Dated: New York, New York
June 13, 2008

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed R. App. P. 29(d) and 9th Cir. R. 32-1, the attached *amicus* brief is proportionally spaced, has a typeface of 14 points or more, and contains 7,000 words or less.

Dated: New York, New York
June 13, 2008

/s/
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