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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

**PUBLIC EMPLOYEES’
RETIREMENT SYSTEM OF
MISSISSIPPI**, individually and on
behalf of all others similarly situated,

Plaintiff,

v.

MORGAN STANLEY, et al.,

Defendants.

Case No. CV 08-01469 MRP (FMOx)
**ORDER GRANTING Defendants’
Motion to Transfer and
DECLINING TO ADDRESS
Plaintiff’s Motion to Remand**

I.

PROCEDURAL HISTORY

Public Employees’ Retirement System of Mississippi (“Plaintiff”) sues Defendants regarding mortgage-backed securities. Plaintiff filed in California state court, asserting only violations of the federal Securities Act of 1933 (“the ’33 Act”). Defendants removed to federal court.

Plaintiffs move to remand under *Luther v. Countrywide Home Loans Servicing LP*, 533 F.3d 1031 (9th Cir. 2008), which holds that the ’33 Act’s removal bar, 15 U.S.C. § 77v(a), is not superseded by the Class Action Fairness Act (“CAFA”)’s removal provisions. 28 U.S.C. § 1453. Defendants question *Luther*’s continued validity, pointing to post-*Luther* authority on whether cases

1 asserting only '33 Act claims are removable under CAFA. Most notably, the
2 Seventh Circuit recently rejected *Luther* in an opinion by Judge Easterbrook. *Katz*
3 *v. Gerardi*, 552 F.3d 558 (7th Cir. 2009).

4 As an independent alternative basis for jurisdiction and removal, Defendants
5 argue that the bankruptcy law's "related-to" provisions allows jurisdiction and
6 removal due to Defendants' potential indemnity claims against a mortgage
7 originator currently in bankruptcy. 28 U.S.C. §§ 1334, 1452(a).

8 In a motion filed simultaneously with Plaintiff's motion to remand,
9 Defendants move to transfer this case to the Southern District of New York under
10 28 U.S.C. § 1404(a).

11 II.

12 DISCUSSION

13 This case presents difficult questions of statutory interpretation on both of
14 Defendants' bases for removal. For example, the Seventh Circuit in *Katz* recently
15 addressed arguments that the *Luther* Court did not expressly consider. The Seventh
16 Circuit then rejected *Luther*'s holding without dissent. 552 F.3d at 562 (noting that
17 the *Katz* panel "circulated [the opinion] before release to all judges in active
18 service [and n]one of the judges favored a hearing en banc").

19 As for the bankruptcy removal provision, pre-*Luther* authority in this
20 District supports Defendants' arguments. *Carpenters Pension Trust for Southern*
21 *California v. Ebbers*, 299 B.R. 610 (C.D. Cal. 2003). However, the question may
22 be closer after *Luther*'s strong language regarding the '33 Act's removal bar. 533
23 F.3d at 1034.

24 This Court need not address these difficult questions. Defendants submitted
25 a meritorious motion to transfer to the Southern District of New York. This Court
26 need not address the propriety of removal before ruling on the motion to transfer.
27 *Gould v. Nat'l Life Ins. Co.*, 990 F. Supp. 1354, 1362 (M.D. Ala. 1998) ("[T]here
28 is no federal law or statute, or judicial decision, that requires [a] court to decide a

1 motion to remand before it decides a motion to transfer.”).

2 This ’33 Act case arises under federal law and jurisdiction is therefore
3 proper. However, even if removal were clearly improper under *Luther* and this
4 Court should therefore decline to exercise its original jurisdiction under *Luther*,¹
5 there exists potential independent related-to bankruptcy jurisdiction and removal.

6 Whether related-to jurisdiction and removal are appropriate also raises
7 difficult questions that this Court need not address. A decision to transfer for
8 inconvenient forum is not a decision on the merits and therefore does not require a
9 finding of jurisdiction. *Sinochem Int’l Co. v. Malay Int’s Shipping Corp.*, 549 U.S.
10 422 (2007). Section 1404(a) codifies inconvenient forum doctrine. Transfer under
11 § 1404(a) is simply “a determination that the merits should be adjudicated
12 elsewhere” and does not invoke “substantive law-declaring power.” *In re*
13 *LimitNone, LLC*, 551 F.3d 572, 576-77 (7th Cir. 2008) (quoting *Sinochem*, 549
14 U.S. at 432 and applying *Sinochem* to § 1404(a)). Therefore, jurisdiction and
15 removal under the related-to provisions need not be addressed before transfer.

16 Given Defendants’ sound arguments for transfer, this Court concludes that it
17 should not address the motion to remand before transfer. Defendants’ submissions
18 on their transfer motion demonstrate that the operative facts bear only a tenuous
19 relationship to California and that Plaintiff will not be materially inconvenienced
20 by transfer to New York. In fact, Plaintiff recently filed in the Southern District of
21 New York a complaint “that is virtually identical to the Complaint in this action—
22 even though the three mortgage trusts in that case have comparable or higher
23 percentages of California mortgages.” Defendants’ Reply in Supp. of Mtn. to
24 Transfer at 1.

25 The only plausible reason that Plaintiffs sued in California state court is that
26

27 ¹ The Court expresses no opinion on whether removal under CAFA was improper.
28 Defendants appear to have nonfrivolous arguments for a change in the law due to
post-*Luther* developments.

1 courts in the Southern District of New York take a different view of '33 Act
2 removal than do courts in the Ninth Circuit. *New Jersey Carpenters Vacation Fund*
3 *v. HarborView Mortgage Loan Trust*, 581 F. Supp. 2d 581 (S.D.N.Y. 2008)
4 (rejecting *Luther*). But “no litigant has a right to have the interpretation of one
5 federal court rather than that of another determine his case.” *Menowitz v. Brown*,
6 991 F.2d 36, 40 (2d Cir. 1993) (internal citation and quotation omitted). This is
7 because “[a]lthough federal courts sometimes arrive at different constructions of
8 federal law, federal law . . . is supposed to be unitary.” *Id.*

9 This Mississippi Plaintiff could properly have sued in New York rather than
10 California. It is not in the interests of justice to subject Defendants to further
11 litigation activity, such as a hearing on the motion to remand, in California. The
12 Southern District of New York is the appropriate forum to consider the issues
13 raised in Plaintiffs’ motion to remand, as well as any subsequent determinations
14 required in this case.

15 III.

16 CONCLUSION

17 This Court declines to address Plaintiff’s motion to remand. That motion
18 shall be transferred with this case and may be decided by the transferee Court.

19 Defendants’ motion to transfer to the Southern District of New York is
20 GRANTED.

21
22 IT IS SO ORDERED.

23
24 DATED: March 5, 2009

25 _____
26 Hon. Mariana R. Pfaelzer
27 United States District Judge
28



**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION**
312 North Spring Street, Room G-8
Los Angeles, CA 90012
Tel: (213) 894-3535

SOUTHERN DIVISION
411 West Fourth Street, Suite 1053
Santa Ana, CA 92701-4516
(714) 338-4750

EASTERN DIVISION
3470 Twelfth Street, Room 134
Riverside, CA 92501
(951) 328-4450

TERRY NAFISI
District Court Executive and
Clerk of Court

To: Clerk, United States District Court
Southern District of New York
500 Pearl Street
New York, NY 10007

Re: Transfer of our Civil Case No. CV 08-01469 MRP (FMOx)
Case Title: Public Employees' Retirement System of Mississippi v. Morgan Stanley, et al.,

Dear Sir/Madam:

An order having been made transferring the above-numbered case to your district, we are transmitting herewith our file:

- Original case file documents are enclosed in paper format.
- Electronic Documents are accessible through Pacer.
- Other: _____

Very truly yours,

Clerk, U.S. District Court

Date: 3/6/09

By Madelina Guerrero (213) 894-2053
Deputy Clerk

cc: *All counsel of record*

TO BE COMPLETED BY RECEIVING DISTRICT

Please acknowledge receipt via e-mail to appropriate address listed below and provide the case number assigned in your district:

- CivilIntakecourtdocs-LA@caed.uscourts.gov (Los Angeles Office)
- CivilIntakecourtdocs-RS@caed.uscourts.gov (Riverside Office)
- CivilIntakecourtdocs-SA@caed.uscourts.gov (Santa Ana Office)

Case Number: _____

Clerk, U.S. District Court

Date: _____

By _____
Deputy Clerk