

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2013

(Argued: June 20, 2014

Decided: October 31, 2014)

Docket Nos. 13-2095-cv(L), 13-2283-cv(XAP), 13-2286-cv(XAP),
13-2287-cv(XAP)

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COMMONWEALTH OF PENNSYLVANIA PUBLIC SCHOOL EMPLOYEES' RETIREMENT
SYSTEM, together and on behalf of all others similarly situated,
COMMERZBANK AG, together and on behalf of all others similarly
situated,

Plaintiffs-Appellants-Cross-Appellees,

ABU DHABI COMMERCIAL BANK, individually and on behalf of all
others similarly situated, KING COUNTY, WASHINGTON, together and
on behalf of all others similarly situated, SEI INVESTMENTS
COMPANY, together and on behalf of all others similarly situated,
THE BANK OF N.T. BUTTERFIELD & SON LIMITED, SFT COLLECTIVE
INVESTMENT FUND, DEUTSCHE POSTBANK AG, GLOBAL INVESTMENT SERVICES
LIMITED, GULF INTERNATIONAL BANK B.S.C., NATIONAL AGRICULTURAL
COOPERATIVE FEDERATION, together and on behalf of all others
similarly situated, STATE BOARD OF ADMINISTRATION OF FLORIDA,
together and on behalf of all others similarly situated, BANK
SINOPAC, together and on behalf of all others similarly situated,
BANK HAPOALIM B.M., together and on behalf of all others
similarly situated, KBL EUROPEAN PRIVATE BANKERS S.A.,

Plaintiffs,

v.

MORGAN STANLEY & CO., INCORPORATED, MORGAN STANLEY & CO.
INTERNATIONAL LIMITED, MOODY'S INVESTOR SERVICE, INC., MOODY'S
INVESTOR SERVICE, LTD., THE MCGRAW-HILL COMPANIES, INC., STANDARD
& POOR'S RATING SERVICES,

Defendants-Appellees-Cross-Appellants,

CHEYNE CAPITAL MANAGEMENT LIMITED, CHEYNE CAPITAL MANAGEMENT (UK) LLP, CHEYNE CAPITAL INTERNATIONAL LIMITED, THE BANK OF NEW YORK MELLON, formerly known as The Bank of New York, QSR MANAGEMENT LIMITED,

Defendants.

B e f o r e: WINTER, LEVAL, and LYNCH, Circuit Judges.

Appeal from a judgment entered in the United States District Court for the Southern District of New York (Shira A. Scheindlin, Judge) denying class certification, dismissing appellant Commerzbank's fraud claims for lack of standing, and dismissing appellant Commonwealth of Pennsylvania Public School Employees' Retirement System's claims for lack of diversity jurisdiction. We affirm the denial of class certification and the dismissal of PSERS's claim, and we certify questions dispositive of Commerzbank's appeal to the New York Court of Appeals.

LUKE O. BROOKS (Joseph D. Daley & Daniel S. Drosman, San Diego, CA) Robbins Geller Rudman & Dowd LLP, San Francisco, CA, for Plaintiffs-Appellants-Cross-Appellees.

JAMES P. ROUHANDEH (Antonio J. Perez-Marques, Paul S. Mishkin, Jessica L. Turner, on the joint brief) Davis Polk & Wardwell LLP, New York, NY, for Defendants-Appellees-Cross-Appellants Morgan Stanley & Co. Inc. and Morgan Stanley & Co. Int'l Ltd.

Dean Ringel, Jason M. Hall, Roxana Labatt, Cahill Gordon & Reindel LLP, New York, NY, on

1 the joint brief,
2 for Defendants-Appellees-
3 Cross-Appellants Standard &
4 Poor's Ratings Services and
5 The McGraw-Hill Companies,
6 Inc.

7
8 Joshua M. Rubins, James J.
9 Coster, Mario Aieta, James I.
10 Doty, Satterlee Stephens Burke
11 & Burke LLP, New York, NY;
12 Mark A. Perry, Gibson, Dunn &
13 Crutcher LLP, Washington, DC,
14 on the joint brief, for
15 Defendants-Appellees-Cross-
16 Appellants Moody's Investors
17 Service, Inc. and Moody's
18 Investors Service Ltd.

19
20 WINTER, Circuit Judge:

21 The Commonwealth of Pennsylvania Public School Employees'
22 Retirement System ("PSERS") and Commerzbank AG ("Commerzbank")
23 appeal from Judge Scheindlin's order of final judgment. See Fed.
24 R. Civ. P. 54(b). That judgment encompassed several previous
25 orders that, as relevant to this appeal: (i) denied class
26 certification under Fed. R. Civ. P. 23 based on appellants'
27 failure to establish numerosity and predominance of common
28 issues; (ii) dismissed Commerzbank's claim for lack of standing;
29 and (iii) dismissed PSERS's claim because its presence as a party
30 would destroy complete diversity, the sole basis of subject
31 matter jurisdiction. We affirm the denial of class certification
32 and dismissal of PSERS. However, we hold that it was not a
33 permissible exercise of discretion for the district court to
34 limit Commerzbank's ability to establish its standing. We
35

1 certify to the New York Court of Appeals the question of whether
2 a reasonable trier of fact could find that Commerzbank had
3 acquired from a third party that had purchased securities a fraud
4 claim against Morgan Stanley & Co. ("Morgan Stanley"). We also
5 certify the question whether, if Commerzbank has standing, a
6 reasonable trier of fact could hold Morgan Stanley liable for
7 fraud based on the present record.

8 BACKGROUND

9 a) The Cheyne SIV

10 We view all disputed facts and inferences fairly drawn from
11 those facts in the light most favorable to appellants. Salamon
12 v. Our Lady of Victory Hosp., 514 F.3d 217, 226 (2d Cir. 2008).

13 The present dispute arose out of the collapse of the Cheyne
14 SIV, a structured investment vehicle ("SIV") that was managed by
15 Cheyne Capital ("Cheyne") (a defendant but not a party to this
16 appeal) and structured by appellee Morgan Stanley. Cheyne SIV
17 was launched in 2005 and issued several classes of notes
18 amounting to several billion dollars, before its demise in 2007.
19 The notes had different maturities, return rates, and risk
20 profiles. Because of the complexity of the SIV, the notes could
21 be purchased only by sophisticated institutional investors.
22 Three specific notes are at issue: senior commercial paper
23 notes, senior medium term notes, and mezzanine capital notes.
24 All of them were given high ratings (the senior notes received

1 higher ratings) by the ratings agencies named as defendants:
2 Standard & Poor's Ratings Services and the McGraw-Hill Companies,
3 Inc. ("S&P"); and Moody's Investors Service, Inc. and its
4 subsidiary Moody's Investors Service Ltd..

5 Morgan Stanley included those ratings in selling documents
6 distributed to potential investors. According to appellants, the
7 ratings were unreliable because they were based on outdated
8 models and data. The ratings agencies are alleged to have known
9 of this unreliability. It is also alleged that the use of
10 unreliable models was caused by Morgan Stanley's demand for high
11 ratings. Thus, according to the complaint, the Cheyne SIV as a
12 whole received a triple-A rating despite being loaded with very
13 risky assets, including a significant profile of subprime
14 residential mortgage-backed securities. As is well known, the
15 housing market collapsed in the summer of 2007. The SIV
16 collapsed with it and declared bankruptcy in the fall of 2007.

17 b) Procedural History

18 Following Cheyne's collapse, this lawsuit was filed as a
19 putative class action by Abu Dhabi Commercial Bank ("ADCB") on
20 August 25, 2008. ADCB's complaint alleged common law fraud under
21 New York law and based federal subject matter jurisdiction on
22 diversity of citizenship under 28 U.S.C. § 1332(a). Two
23 additional plaintiffs later joined. They eventually moved for
24 class certification on the common law fraud claims seeking to

1 represent a class of all investors in the Cheyne SIV who
2 purchased notes during a class period from October 2004 to
3 October 2007. The district court denied that motion, holding
4 that plaintiffs failed to establish numerosity and the
5 predominance of common issues. Interlocutory review was denied.
6 Plaintiffs' counsel were then allowed to contact other investors,
7 which led to the addition of twelve new plaintiffs, including
8 Commerzbank and PSERS.

9 In January 2012, appellants filed the complaint operative
10 for purposes of this appeal. Appellees responded with motions to
11 dismiss and for summary judgment on the fraud-related claims
12 shortly thereafter. In their motion for summary judgment,
13 appellees raised, inter alia, the issues before us on appeal:
14 whether Commerzbank had acquired from the original purchaser of
15 some of the notes the purchaser's fraud claim against Morgan
16 Stanley, and whether Morgan Stanley had made actionable
17 misrepresentations.

18 In responding to the motion for summary judgment, all
19 fifteen plaintiffs, including appellants, were limited by the
20 district court to a single three-page "reliance declaration"
21 necessary to establish the reliance of each plaintiff on the
22 alleged misstatements as required to support a valid fraud claim
23 under New York law. With regard to Commerzbank's claim, that
24 declaration stated that Commerzbank had acquired Dresdner Bank AG

1 ("Dresdner") through a merger in 2009, and that Dresdner had
2 earlier purchased Cheyne SIV notes from Allianz Dresdner Daily
3 Asset Fund ("DAF"), the original purchaser, at par -- face value
4 -- after which DAF was "wound down." The declaration further
5 stated that, under German law, "all of Dresdner's assets,
6 liabilities, rights and obligations passed automatically by
7 operation of law to Commerzbank."

8 On August 17, 2012, the district court granted appellees'
9 motion for summary judgment in part. As relevant to this appeal,
10 the court held that Commerzbank had failed to establish standing
11 to sue under New York law. It held that, for a subsequent holder
12 of a note to have standing to sue entities involved in the
13 issuance of the note for torts committed in the issuance, the
14 prior holder of a note must assign its tort claims at the time of
15 transfer, and that a simple transfer of the note did not assign
16 those claims. The court determined that Commerzbank's statement
17 in the reliance declaration had not shown that Dresdner acquired
18 DAF's tort claims through the transfer and merger. Commerzbank's
19 claims were, therefore, dismissed. The court did not reach
20 appellees' argument that DAF had not reasonably relied on the
21 Cheyne SIV credit ratings.

22 The district court also dismissed claims against Morgan
23 Stanley for fraud on the grounds that the only misstatements
24 alleged were made by the ratings agencies themselves and that

1 these were not attributable to Morgan Stanley. Therefore, the
2 court reasoned, Morgan Stanley could not be held liable for fraud
3 based on third-party misstatements under New York law.

4 Commerzbank moved for reconsideration of the dismissal of
5 its fraud claims. Attached to the motion was a new declaration
6 ("Williams declaration") that explained the transfer of rights
7 from DAF to Dresdner to Commerzbank. Ten days later, Commerzbank
8 also filed a Fed. R. Civ. P. 17(a)(3) "ratification" of its claim
9 and another declaration ("Shlissel declaration"). These
10 documents were a far more thorough explanation of how DAF was
11 unable, and could not have intended, to retain any interest in
12 the notes, including a right to sue. The court refused to
13 consider the two documents because they were untimely and denied
14 reconsideration.

15 In November 2012, appellees discovered that PSERS had
16 previously represented that it was an arm of the state of
17 Pennsylvania -- now conceded -- and not a citizen of that or any
18 state, as required by 28 U.S.C. § 1332(a). See infra n.1.
19 Appellees accordingly moved to dismiss either PSERS's claims, or
20 the entire action, because PSERS's presence as a plaintiff
21 destroyed complete diversity. The district court held that 28
22 U.S.C. § 1367 did not permit supplemental jurisdiction over a
23 non-diverse party's claims where jurisdiction was based on
24 diversity, even where that party was permissively joined, as

1 PSERS was, under Fed. R. Civ. P. 20. The court therefore
2 dismissed PSERS from the action to preserve its subject matter
3 jurisdiction.

4 All plaintiffs other than appellants agreed to settle
5 following mediation. The action was dismissed with prejudice,
6 and the court entered a Fed. R. Civ. P. 54(b) final judgment
7 incorporating its previous dismissals of PSERS and Commerzbank.
8 This appeal followed.

9 DISCUSSION

10 a) Dismissal of PSERS as a Non-Diverse Plaintiff

11 There being no disputed facts, PSERS's dismissal for lack of
12 subject matter jurisdiction is reviewed de novo. Salamon, 514
13 F.3d at 226.

14 Subject matter jurisdiction is based on 28 U.S.C. § 1332,¹
15 which requires "complete diversity," i.e. all plaintiffs must be
16 citizens of states diverse from those of all defendants. Exxon
17 Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 553 (2005).
18 The party asserting jurisdiction bears the burden of proof.
19 DiTolla v. Doral Dental IPA of N.Y., 469 F.3d 271, 275 (2d Cir.
20 2006).

¹ "The district courts shall have original jurisdiction of all civil matters where the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and is between . . . citizens of different states" 28 U.S.C. § 1332(a)(1).

1 As an arm of the state of Pennsylvania, PSERS concedes that
2 it is not a citizen of any state. Therefore, it cannot be
3 “diverse” for purposes of Section 1332. Moor v. Cnty. of
4 Alameda, 411 U.S. 693, 717 (1973) (the “arm or alter ego” of a
5 state is not a citizen for diversity purposes (quoting State Hwy.
6 Comm’n of Wyo. v. Utah Constr. Co., 278 U.S. 194, 199 (1929))).

7 PSERS nonetheless claims that the district court had
8 supplemental jurisdiction under 28 U.S.C. § 1367, which permits
9 the exercise of diversity jurisdiction over related claims,
10 “includ[ing] claims that involve the joinder or intervention of
11 additional parties,” subject to relevant statutory exceptions.
12 28 U.S.C. § 1367(a). The issue is whether PSERS’s inclusion as a
13 party is consistent with Section 1367(b), an exception preventing
14 the exercise of supplemental jurisdiction over joined parties in
15 diversity cases when their inclusion “would be inconsistent with
16 the jurisdictional requirements of section 1332.”

17 In Exxon, the Supreme Court considered the question of
18 whether the Section 1367(b) exception prevented supplemental
19 jurisdiction over plaintiffs who failed to meet the Section 1332
20 amount-in-controversy requirement, and held that it did not. 545
21 U.S. at 559-60. In its discussion, the Supreme Court articulated
22 a “contamination theory” governing the interaction of Sections
23 1332 and 1367. In explaining the theory, the Court noted that,
24 while “original jurisdiction” may not literally be required over

1 each individual plaintiff, the view that the inclusion of a non-
2 diverse party “somehow contaminates every other claim in the
3 complaint, depriving the court of original jurisdiction . . . can
4 make some sense in the special context of the complete diversity
5 requirement . . . [because it] eliminates the justification for
6 providing a federal forum.” Id. at 560, 562.

7 We elaborated on the contamination theory in Merrill Lynch &
8 Co. v. Allegheny Energy, Inc., 500 F.3d 171, 179 (2d Cir. 2007).
9 Our discussion there stated:

10 Exxon makes clear that its expansive
11 interpretation of § 1367 does not extend to
12 additional parties whose presence defeats
13 diversity. The reason for the different
14 treatment of these two § 1332 requirements is
15 found in their differing purposes. The
16 purpose of the amount-in-controversy
17 requirement, on one hand, is fulfilled by a
18 single claim of sufficient importance to
19 warrant a federal forum and is not negated by
20 additional, smaller claims. A failure of
21 diversity, on the other hand, contaminates
22 the action, so to speak, and takes away any
23 justification for providing a federal forum.

24 It follows that a defect of the latter
25 sort eliminates every claim in the action,
26 including any jurisdictionally proper action
27 that might otherwise have anchored original
28 jurisdiction, and removes the civil action
29 from the purview of § 1367 altogether.
30 Further, it is clear that a diversity-
31 destroying party joined after the action is
32 underway may catalyze loss of jurisdiction.

33
34 Id. (all internal citations and quotations omitted). This
35 discussion thus adopts the line hinted at in Exxon, namely, that
36 while the amount-in-controversy requirement is somewhat

1 malleable, complete diversity of all parties is an absolute,
2 bright-line prerequisite to federal subject matter jurisdiction.
3 We follow this rationale and hold that PSERS's dismissal was
4 proper, because inclusion of its claim destroyed complete
5 diversity and would have otherwise "catalyze[d] loss of [federal]
6 jurisdiction." Id.

7 PSERS attempts to distinguish Merrill Lynch by noting that
8 it, PSERS, was permissively joined as a plaintiff under Fed. R.
9 Civ. P. 20, while Merrill Lynch involved compulsory joinder of a
10 defendant under Rule 19. It further seeks to explain away
11 Exxon's discussion as dicta. We concede that PSERS's argument
12 for a distinction between parties permissibly and compulsorily
13 joined is not without some appeal. Moreover, on these particular
14 facts, the contamination theory is less obviously applicable
15 because PSERS is not "non-diverse" but is simply not a citizen.
16 And, because it is the arm of a non-forum state, there is an
17 arguable need for a federal forum.

18 Nonetheless, the discussions of complete diversity in Exxon
19 and Merrill Lynch follow a long line of cases holding that the
20 jurisdictional requirements of diversity should track easily
21 adjudicated bright lines following Section 1332(a)(3)'s language
22 of "between citizens of different states." Weighing the need in
23 particular cases for a federal forum is not subject to bright
24 lines at all and is in tension with the statutory language, which

1 omits consideration of such a need. We, therefore, hold that
2 federal subject matter jurisdiction under Section 1332(a)(3)
3 requires complete diversity of all parties, regardless of how
4 they joined the action. We note that in addition to being
5 sensible and workable, this rule tracks the statutory language,
6 follows Merrill Lynch, and accords with a decision of the D.C.
7 Circuit, see In re Lorazepam & Clorazepate Antitrust Litig., 631
8 F.3d 537, 541 (D.C. Cir. 2011) (holding that the D.C. Circuit's
9 absolute, complete diversity requirement remained intact after
10 Exxon).²

11 We thus affirm the dismissal of PSERS's claim.

12 b) Denial of Class Certification

13 District courts' denials of motions for class certification
14 are reviewed for abuse of discretion. Teamsters Local 445
15 Freight Div. Pension Fund v. Bombardier, Inc., 546 F.3d 196, 201
16 (2d Cir. 2008). The party seeking certification must establish
17 the Fed. R. Civ. P. 23 requirements by a preponderance of the
18 evidence. Id. at 202.

19 Under Rule 23, a movant seeking certification of a class
20 must establish: (i) numerosity, (ii) commonality, (iii)
21 typicality, and (iv) adequacy. Fed. R. Civ. P. 23(a)(1)-(4); id.

² PSERS makes an alternative argument that diversity jurisdiction exists under the Class Action Fairness Act, 28 U.S.C. § 1332(d)(2)(A). This argument was not raised in the district court and, as was conceded at oral argument, has no merit unless we reverse the denial of class certification. Because we affirm that denial, we need not address the argument.

1 at 201-02. The district court's analysis of the Rule 23 factors
2 determined that appellants had failed to demonstrate either
3 numerosity or the predominance of common issues. Fed. R. Civ. P.
4 23(b). It did not abuse its discretion in doing so.

5 Numerosity is presumed for classes larger than forty
6 members. Consol. Rail Corp. v. Town of Hyde Park, 47 F.3d 473,
7 483 (2d Cir. 1995). Appellants submitted evidence of the
8 existence of over 100 potential class members based on the number
9 of investors who purchased the various SIV notes. However, the
10 numerosity inquiry is not strictly mathematical but must take
11 into account the context of the particular case, in particular
12 whether a class is superior to joinder based on other relevant
13 factors including: (i) judicial economy, (ii) geographic
14 dispersion, (iii) the financial resources of class members, (iv)
15 their ability to sue separately, and (v) requests for injunctive
16 relief that would involve future class members. Robidoux v.
17 Celani, 987 F.2d 931, 936 (2d Cir. 1993).

18 The district court concluded that the Robidoux factors
19 "weigh heavily in favor of concluding that joinder is not
20 impracticable." Specifically, the class was limited and
21 identifiable, and composed of sophisticated SIV investors, all of
22 whom had millions of dollars at stake and were able to pursue
23 their own claims.

1 Appellants contend that this determination was error because
2 the court failed to resolve a dispute over the class's size, and
3 because the class was simply too large not to be certified on
4 that basis. Although the purported class was large and
5 relatively diverse geographically, the district court was within
6 its discretion to conclude that the size, sophistication, and
7 individual stakes of the parties counseled in favor of joinder.
8 See id. at 936 ("Determination of practicability [of joinder]
9 depends on all the circumstances surrounding a case, not on mere
10 numbers."); accord Deen v. New Sch. Univ., No. 05 Civ. 7174
11 (KMW), 2008 WL 331366, at *3 (S.D.N.Y. Feb. 4, 2008) (denying
12 certification to a putative class of 110 where plaintiffs
13 "provide[d] no evidence that joinder . . . would be difficult to
14 accomplish, or . . . would be somehow less efficient than class
15 certification"); Ansari v. N.Y. Univ., 179 F.R.D. 112, 115-16
16 (S.D.N.Y. 1998) (denying certification despite geographic
17 dispersion where the identity of the potential plaintiffs was
18 known and the potential class members likely had the financial
19 resources to individually bring suit). We would add that, given
20 the different classes of notes, and their differences in maturity
21 dates, rates of return, and risk-profile, the efficiencies
22 available through class certification are less than the number of
23 potential class members would make them appear.

1 Appellants' argument regarding commonality is based on a
2 relatively recently created "fraud-created-the-market" theory,
3 i.e., that but for the defendant's fraud, no market for the notes
4 would have existed at all. The district court rejected this
5 theory and determined that the putative class members would face
6 differing individual issues of reliance, loss causation, and
7 damages. See Amgen Inc. v. Conn. Ret. Plans & Trust Funds, 133
8 S. Ct. 1184, 1193 (2013) (absence of fraud-on-the-market theory
9 "would ordinarily preclude certification of a class action
10 seeking money damages because individual reliance issues would
11 overwhelm questions common to the class").

12 The fraud-created-the-market theory is a matter of first
13 impression for us but has been rejected or questioned by four
14 other circuits. See Nuveen Mun. High Income Opportunity Fund v.
15 City of Alameda, 730 F.3d 1111, 1121 n.4 (9th Cir. 2013); Malack
16 v. BDO Seidman LLP, 617 F.3d 743, 756 (3d Cir. 2010); Ockerman v.
17 May Zima & Co., 27 F.3d 1151, 1160 (6th Cir. 1994); Eckstein v.
18 Balcor Film Investors, 8 F.3d 1121, 1130-31 (7th Cir. 1993).

19 Whatever may be the merits of this putative doctrine in
20 other contexts, we see no reason to give it weight here. The
21 complaint raises only New York common law fraud claims. While
22 the theory is used to argue that none of the notes would have
23 been sold but for the fraud, that argument establishes only "but-
24 for" causation; it does not establish reliance. It is quite

1 possible that some buyers of the notes might have known the
2 underlying facts, believed in the models, and held the same rosy
3 view of the residential housing market as did many government and
4 private financial officers. Appellants thus seek to use the
5 theory to eliminate the need to prove reliance, a traditional
6 element of common law fraud. No hint has been offered by New
7 York courts that such a radical doctrinal shift is in the offing.

8 Even in the case of the fraud-on-the-market theory,³
9 recognized for purposes of federal securities fraud, we
10 “repeatedly have refused to apply [it] to state common law
11 cases.” Secs. Investor Prot. Corp. v. BDO Seidman, LLP, 222 F.3d
12 63, 73 (2d Cir. 2000). Moreover, the record here is replete with
13 significant differences in the investment decision processes of
14 the various putative class members, a variance compounded by the
15 differences between the three types of notes offered by Cheyne.
16 As the district court noted, some investors were permitted only
17 to invest in top-rated instruments, while others were permitted

³ We note that although the fraud-created-the-market doctrine uses a name similar to the accepted fraud-on-the-market doctrine, the two have little to do with each other. “Fraud-on-the-market” is based on the efficient market hypothesis, which postulates that an efficient market incorporates fraudulent statements into a price viewed by investors as based on available accurate information. See In re Initial Pub. Offerings Secs. Litig., 471 F.3d 24, 42 (2d Cir. 2006) (rejecting application of the fraud-on-the-market theory to establish classwide reliance because a “primary market for newly issued securities is not efficient or developed under any definition of these terms,” so the normal linkage between price and available information is not applicable) (internal quotation marks and alterations omitted). “Fraud-created-the-market” asserts that, absent the fraud, the securities in question were unmarketable.

1 to invest in lower or unrated securities. Particularly in the
2 context of a newly issued instrument, the district court did not
3 err in concluding that class-wide reliance was not established as
4 a common issue.⁴

5 c) Commerzbank's Right to Sue Under New York Law

6 Commerzbank argues that the district court erred in its view
7 of the requirements for assignment under New York law and in
8 refusing to consider the additional documentation meant to meet
9 the standard it applied. We agree that the district court erred
10 in refusing to consider the additional evidence. However, we
11 certify the questions of: (i) whether a trier of fact could find
12 that Commerzbank's evidence of a transfer of the right to sue
13 meets the requirements of New York law; and (ii) whether, if it
14 does, a trier of fact could find Morgan Stanley liable for fraud
15 on the record established in the summary judgment proceeding.

16 1) Abuse of Discretion

17 We review the district court's refusal to consider
18 Commerzbank's evidence of a transfer of DAF's fraud claim for
19 abuse of discretion. Universal Church v. Geltzer, 463 F.3d 218,
20 228 (2d Cir. 2005).

⁴ Although the district court did not reach the issues of adequacy or typicality, we note that the same elements of the case that undercut plaintiffs' commonality and numerosity arguments -- the size of the individual claims, the sophistication of the parties, and, most importantly, the variances in each putative class member's investment strategy and decision-making process and in the notes themselves, cut against class certification on those elements as well.

1 The district court required all fifteen plaintiffs involved
2 at the time of the dismissal to demonstrate each plaintiff's
3 evidence of reliance on the allegedly false ratings in a three-
4 page document, thereby rejecting their request to provide more
5 documentation. There was no indication that the separate issue
6 of a transfer of rights, or standing, might arise from, much less
7 be dependent on, that declaration.

8 After the district court used Commerzbank's small portion of
9 the three-page statement to raise this issue and to dismiss
10 Commerzbank's claim, the district court denied the motion to
11 reconsider without considering the additional evidence proffered.
12 The district court determined that the level and type of detail
13 provided by Commerzbank in the three-page reliance declaration
14 (of all plaintiffs) was a "tactical decision[]" by which
15 Commerzbank was bound. However, as our certification of this
16 question indicates, the standing issue is sufficiently
17 complicated that a single paragraph, or perhaps even the entire
18 three pages, was unlikely to suffice to provide the detail needed
19 for an informed decision. Commerzbank's "tactical decision" was
20 thus the result of being put in an impossible position by the
21 district court. The court should either have allowed more room
22 for explication originally, called for more explication when it
23 decided to raise the transfer of right to sue issue, or have

1 considered the new evidence proffered in the motion for
2 reconsideration and ratification.⁵

3 We do not preclude district court efforts to force counsel
4 to make their points efficiently, but where it appears that
5 limits on pages are arbitrarily preventing adequate elaboration
6 of a party's position, some flexibility must be shown by district
7 courts. It was not a permissible exercise of discretion for the
8 district court not to have shown such flexibility in this matter.
9 We now turn to this evidence proffered in the motion for
10 reconsideration.

11 2) Evidence of a Right to Sue Under New York Law

12 Generally speaking, under New York law, only the original
13 purchaser of a note has standing to sue for fraud, because only
14 it could have relied upon the fraudulent statements. See
15 Fraternity Fund Ltd. v. Beacon Hill Asset Mgmt., LLC, 479 F.
16 Supp. 2d 349, 373 (S.D.N.Y. 2007). The right to sue for fraud
17 may be assigned in New York, however, subject to limitations
18 inapplicable here. See Banque Arabe et Int'l D'Investissement v.
19 Md. Nat'l Bank, 57 F.3d 146, 151 (2d Cir. 1995). Federal courts

⁵ The district court denied Commerzbank's Fed. R. Civ. P. 17(a)(3) motion to ratify its claim by a successor entity to DAF. That motion was made in the alternative to its motion to reconsider, and we decline to reach it in light of our certification of the ultimate issue of standing. We note, however, that the rule permits ratification of a claim within a "reasonable time" after a standing objection is raised, the breadth of which is left to the district court to determine. See Stichting Ter Behartiging v. Schreiber, 407 F.3d 34, 43-44 (2d Cir. 2005). Commerzbank's motion was made on September 10, 2012, after summary judgment and even after the filing of the motion to reconsider, when the matter was raised as early as defendants' answers in March 2011 and again in its motion for summary judgment on January 23, 2012.

1 have found that an assignment is defined in New York as "a
2 transfer or setting over of property, or of some right or
3 interest therein, from one person to another, and, unless in some
4 way qualified, it is properly the transfer of one whole interest
5 in an estate or chattel or other thing." Int'l Design Concepts,
6 LLC v. Saks, Inc., 486 F. Supp. 2d 229, 236 (S.D.N.Y. 2007)
7 (internal quotation marks omitted). The question in this case is
8 whether Commerzbank has offered sufficient evidence to allow a
9 trier of fact to find that DAF assigned its entire interest in
10 the notes to Dresdner, including, therefore, its right to sue for
11 fraud.

12 The original reliance declaration stated only that Dresdner
13 bought the notes "at par" from DAF and that DAF was wound down
14 ten months later. We need not decide whether these statements
15 alone are sufficient to permit an inference of transfer because,
16 as discussed supra, it was not a permissible exercise of
17 discretion not to consider the additional evidence submitted.
18 The Williams and Shlissel declarations -- from the New York
19 counsel of Commerzbank and CEO of the successor entity to DAF,
20 respectively -- are significantly more thorough with respect to
21 the issue of transfer. Among other things, they describe in more
22 detail the circumstances surrounding DAF's sale to related entity
23 Dresdner, including the fact that DAF suffered no loss on the
24 sale because Dresdner bought the already-downgraded securities at

1 par, that neither DAF nor the company that administered its trust
2 retained any claims or causes of action, and that all parties
3 believed any claims would be automatically transferred under
4 German law.

5 The question, therefore, is whether, based on the
6 declarations and documentary evidence presented by Commerzbank, a
7 reasonable trier of fact could find that DAF validly assigned its
8 right to sue for common law fraud to Dresdner in connection with
9 its sale of Cheyne SIV notes.

10 3) Certification

11 We believe that resolution of this dispositive question
12 would require us to pass upon a question open under New York
13 caselaw, and that the question should be resolved by the New York
14 Court of Appeals upon a certificate from this court. See 22
15 N.Y.C.R.R. § 500.27; 2d Cir. R. 0.27.2.

16 We are not aware of any "controlling precedent of the Court
17 of Appeals." 22 N.Y.C.R.R. § 500.27(a). On the one hand, New
18 York law is clear that specific incantations of "assignment" are
19 unnecessary to perfect a transfer. See Leon v. Martinez, 84
20 N.Y.2d 83, 88 (1994). Moreover, we have elsewhere noted a
21 general trend in New York toward adopting principles of free
22 assignability of claims, including those of fraud. Banque Arabe,
23 57 F.3d at 153 (citing N.Y. Gen. Oblig. Law §§ 13-105 & 13-107
24 (McKinney 1978); ACLI Int'l Commodity Servs., Inc. v. Banque

1 Populaire Suisse, 609 F. Supp. 434, 441-42 (S.D.N.Y. 1984)).

2 However, there is also a strain of New York law that treats tort
3 and contractual claims in a particular instrument separately.

4 See Fox v. Hirschfeld, 157 A.D. 364, 142 N.Y.S. 261, 262-63 (1st
5 Dep't 1913) (assignment of all rights "in and to the within
6 contract" did not include assignment of the right to sue for
7 fraud).

8 We believe these jurisprudential trends present an as-yet
9 unresolved issue when applied to this case. Specifically, it is
10 unclear whether the intent of parties to transfer a whole
11 interest, combined with the absence of limiting language,
12 suffices to transfer an assignor's tort claims, or whether an
13 additional, more specific statement of an intent to transfer tort
14 claims is required. We certify that issue to the New York Court
15 of Appeals.

16 The parties also disagree, of course, regarding Morgan
17 Stanley's liability for the allegedly fraudulent ratings. The
18 need to resolve that dispute depends on the antecedent issue of
19 Commerzbank's standing. However, in the event that the New York
20 Court of Appeals allows Commerzbank's claim to proceed, we
21 further ask it to resolve, and certify to it, the question of
22 Morgan Stanley's potential liability on the present record.

23 The district court held that, as a matter of New York law,
24 the allegedly fraudulent ratings could be attributed only to the

1 ratings agencies themselves. Cf. Eurycleia Partners, LP v.
2 Seward & Kissel, LLP, 849 N.Y.S.2d 510, 512 (1st Dep't 2007)
3 (lawyers and auditors not responsible for fraudulent
4 representations originally made by hedge fund). Because Morgan
5 Stanley did not issue the ratings, the district court held that
6 it could not be directly liable and that there was no claim of
7 aiding-and-abetting liability. Appellants argue that Morgan
8 Stanley is nonetheless liable because it exerted pressure on the
9 ratings agencies to obtain the fraudulently high ratings, even
10 participating in a "scheme" to do so. Indeed, the district court
11 noted that appellants had presented some evidence that Morgan
12 Stanley had "manipulated the Cheyne SIV modeling process to
13 create the ratings it desired," and had otherwise influenced the
14 process beyond simply hiring the agencies. This would suffice
15 under some New York decisions to impose liability on "parties who
16 make, authorize or cause a [fraudulent] representation to be
17 made." See Metro. Life Ins. Co. v. Morgan Stanley, No.
18 651360/2012, 2013 N.Y.Misc. LEXIS 3056, at *34 (N.Y. Sup. Ct.
19 July 8, 2013) (Morgan Stanley could be held liable for false
20 ratings it influenced with false statements and disseminated).
21 Other New York decisions, however, which were discussed
22 extensively by the district court, Abu Dhabi Commercial Bank v.
23 Morgan Stanley & Co., 888 F. Supp. 2d 431, 448-54 (S.D.N.Y.
24 2012), seem to foreclose suits against third parties based on the

1 misrepresentations of another, even where that party was alleged
2 to have known about the misstatement; see Mateo v. Senterfitt,
3 918 N.Y.S.2d 438, 440 (1st Dep't 2011); Eurycleia, 849 N.Y.S.2d
4 at 512.

5 Therefore, we certify to the New York Court of Appeals a
6 second question to be resolved if that court holds that
7 Commerzbank may bring a fraud claim against Morgan Stanley. That
8 question is whether, on the record established during the summary
9 judgment proceedings, a reasonable trier of fact could find
10 Morgan Stanley liable for fraud under New York law.

11 CONCLUSION

12 For the foregoing reasons, we affirm the district court in
13 part, holding that: (i) PSERS's dismissal on grounds that its
14 status as a party destroyed complete diversity under 28 U.S.C. §
15 1332 was correct; and (ii) the district court's denial of class
16 certification under Fed. R. Civ. P. 23 was within its discretion.

17 However, we find that the district court erred in refusing
18 to consider Commerzbank's proffered evidence with regard to a
19 transfer of the fraud claim it seeks to bring. We further
20 conclude that the question of standing turns on an unresolved
21 issue of state law, and thus certification to the New York Court
22 of Appeals pursuant to Second Circuit Local Rule § 0.27.2 and New
23 York Court of Appeals Rule § 500.27, is appropriate. We also
24 certify a second question: whether, if Commerzbank can pursue

1 its fraud claim, a reasonable trier of fact could find Morgan
2 Stanley liable based on the evidence adduced during the summary
3 judgment proceedings. This panel will retain jurisdiction to
4 render a final decision once either certification is denied or we
5 have the benefit of the Court of Appeals's view of the correct
6 legal standard and its application to this case. The parties are
7 ordered to bear equally any costs that may be required by the
8 Court of Appeals as part of certification.

9
10 **CERTIFICATE**

11 **Commonwealth of Pennsylvania Public School Employees' Retirement**
12 **System v. Morgan Stanley & Co. Inc.**

13 **13-2095-cv(L), 13-2283-cv(XAP), 13-2286-cv(XAP), 13-2287-cv(XAP)**

14 **The following questions are hereby certified to the New York**
15 **Court of Appeals pursuant to Second Circuit Local Rule § 0.27 and**
16 **New York Court of Appeals Rule § 500.27, as ordered by the Second**
17 **Circuit:**

18 **Based on the declarations and documentary evidence presented**
19 **by Commerzbank, could a reasonable trier of fact find that DAF**
20 **validly assigned its right to sue for common law fraud to**
21 **Dresdner in connection with its sale of Cheyne SIV notes? If so,**
22 **based on the record established in the summary judgment**

1 proceedings in the district court, could a reasonable trier of
2 fact find Morgan Stanley liable for fraud under New York law?

3 The Court of Appeals may, of course, reformulate these
4 issues or resolve other matters it deems relevant.

5

6