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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re: RESIDENTIAL CAPITAL, LLC, *et al*., Debtors.	Chapter 11 Case No. 12-12020 (MG) Jointly Administered
RESIDENTIAL CAPITAL, LLC; *et al.*, Plaintiffs, v. ALLSTATE INSURANCE CO., THE OTHER PARTIES LISTED ON EXHIBIT A TO THE COMPLAINT, JOHN DOES 1-1000, Defendants.	Case No. 12-AP-01671 (MG) Bankruptcy Case No. 12-02020 (MG) Jointly Administered

JOINDER OF UNION CENTRAL LIFE INSURANCE COMPANY, AMERITAS LIFE INSURANCE CORP., AND ACACIA LIFE INSURANCE COMPANY TO OBJECTION OF NEW JERSEY CARPENTERS HEALTH FUND TO DEBTORS' MOTION TO EXTEND AUTOMATIC STAY OR, IN THE ALTERNATIVE, FOR INJUNCTIVE RELIEF ENJOINING PROSECUTION OF CERTAIN PENDING LITIGATION AGAINST DEBTORS' DIRECTORS AND OFFICERS AND NON-DEBTOR CORPORATE AFFILIATES



Union Central Life Insurance Company, Ameritas Life Insurance Corp., and Acacia Life Insurance Company (collectively "Union Central"), plaintiffs in the civil action styled as *Union Cent. Life Ins. Co. et al. v. Credit Suisse First Boston Mortg. Sec. Corp. et al.*, pending in the United States District Court for the Southern District of New York, Case No. 11-CV-2890 (GBD) (the "Union Central Action"), hereby join in the *Objection of New Jersey Carpenters Health Fund to Debtors' Motion To Extend Automatic Stay or, in the Alternative, for Injunctive Relief Enjoining Prosecution of Certain Pending Litigation Against Debtors' Directors and Officers and Non-Debtor Corporate Affiliates* (the "Lead Plaintiff Objection")[1] filed by New Jersey Carpenters Health Fund (the "Lead Plaintiff") on behalf of itself the Putative Class (as defined in the Lead Plaintiff Objection) in opposition to the *Debtors' Motion To Extend Automatic Stay or, in the Alternative, for Injunctive Relief Enjoining Prosecution of Certain Pending Litigation Against Debtors' Directors and Officers and Non-Debtor Corporate Affiliates* (the "Motion") [AP Docket No. 4][2] filed by the debtors and debtors-in-possession (the "Debtors") in the above-captioned chapter 11 bankruptcy cases (the "Bankruptcy Cases"), in their capacity as plaintiffs in the above-captioned adversary proceeding (the "Adversary Proceeding"), on May 25, 2012. In support of this Joinder, Union Central respectfully states as follows:

[1] Capitalized terms used but not defined herein shall have the definitions ascribed thereto in the Lead Plaintiff Objection.

[2] References to the docket in the Bankruptcy Cases are denoted herein as [BK Docket No. __]. References to the docket in the Adversary Proceeding are denoted herein as [AP Docket No. __]. References to the docket in the Union Central Action are denoted herein as [DC Docket No. __].

THE UNION CENTRAL ACTION

Union Central filed the Union Central Action against several dozen defendants in the United States District Court for Southern District of New York (the "District Court") on April 28, 2010. The Union Central Action asserts claims under the Securities Exchange Act of 1934 (the "1934 Act") and New York state law against, among numerous other defendants, (a) Debtors ResCap, RF, and Residential Accredit Loans, Inc. (collectively the "Debtor Defendants") and (b) Non-Debtor Defendants AFI, Ally Securities, and Bruce J. Paradis ("Paradis" and collectively with AFI and Ally Securities, the "Relevant Non-Debtor Defendants"). On May 4, 2012, Union Central filed an *Amended Complaint*, a copy of which is annexed to the Haims Declaration as Exhibit 14 (the "Amended Complaint").

A. The Union Central Action Asserts Direct Claims Against the Relevant Non-Debtor Defendants.

The Amended Complaint asserts six causes of action for

- common-law fraud, against all defendants (Amended Complaint at ¶¶ 815–27);
- unjust enrichment, against all defendants (id. at 828–31);
- aiding and abetting, against all defendants (id. at 832–36);
- violations of section 10(b)(5) of the 1934 Act and Rule 10b-5 promulgated thereunder ("Rule 10b-5"), against, among other defendants, the Debtor Defendants and the Relevant Non-Debtor Defendants (id. at 837–46);
- violations of section 20(a) of the 1934 Act, against, among other defendants, the Relevant Non-Debtor Defendants (id. at 847–56); and
- violations of section 20(b) of the 1934 Act, against, among other defendants, the Relevant Non-Debtor Defendants (id. at 857–60).

As discussed below, the Relevant Non-Debtor Defendants' potential liability under each of these causes of action is either (a) direct, with respect to the causes of action arising under New York common law or section 10(b) of the 1934 Act and Rule 10b-5, or (b) based upon their own conduct and the conduct of others who may or may not be affiliated with the Debtors, with respect to the cause of action arising under section 20(a) of the 1934 Act. Thus, a finding of liability against the Relevant Non-Debtor Defendants in the Union Central Action does not constitute a *de facto* finding of liability on the part of any Debtor, nor does it depend upon a finding of liability against any Debtor. In either instance, and as discussed at length in the Lead Plaintiff Objection, the Debtors would not be bound by any finding or judgment against the Relevant Non-Debtor Defendants in the Union Central Action.

Common-law fraud is a direct cause of action.

The first cause of action set forth in the Amended Complaint, common-law fraud, is a direct cause of action against the Relevant Non-Debtor Defendants, alleging that the Relevant Non-Debtor Defendants (among others) made materially inaccurate written representations and omissions, and knew or recklessly disregarded the false and misleading nature of those representations and omissions. (Amended Complaint at ¶¶ 817–20.) Accordingly, the Relevant Non-Debtor Defendants' potential liability under this cause of action is based solely upon their own conduct, and is not derivative of any other party's conduct or liability.

Unjust enrichment is a direct cause of action.

The second cause of action set forth in the Amended Complaint, unjust enrichment, is also a direct cause of action against the Relevant Non-Debtor Defendants. In this cause of action, Union Central asserts that the Relevant Non-Debtor Defendants (among others) were unjustly enriched by the compensation they received for selling RMBS to investors, which

"should be disgorged in favor of [Union Central] in order to protect and promote" New York's public policy interest in market integrity and transparency. (Amended Complaint at ¶¶ 829-31.) The injustice of permitting the Relevant Non-Debtor Defendants to retain such gains stems from the Relevant Non-Debtor Defendants' own alleged conduct, and is not derivative of the conduct or liability of any other party, including the Debtors.

Liability for aiding and abetting, while necessarily linked to the conduct of others, cannot be a basis for the extraordinary relief sought by the Debtors.

Liability of the Relevant Non-Debtor Defendants for the third cause of action set forth in the Amended Complaint, aiding and abetting the violations of law of other defendants, is, by definition, linked to the liability of other parties. However, because the Union Central Action cannot proceed against any of the Debtors by operation of the automatic stay, to the extent that the conduct of the Debtors becomes relevant to this cause of action, no finding can result in collateral estoppel or issue preclusion against the Debtors, for the reasons set forth in the Lead Plaintiff Objection.

The Relevant Non-Debtor Defendants' liability under Section 10(b) of the 1934 Act and Rule 10b-5 is direct liability.

Section 10(b) of the 1934 Act provides that

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—
>
> . . .
>
> b. To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

15 U.S.C. § 78j(b) (2012).

Pursuant to Rule 10b-5, promulgated by the United States Securities and Exchange Commission pursuant to section 10(b),

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
>
> a. To employ any device, scheme, or artifice to defraud,
>
> b. To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> c. To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,
>
> in connection with the purchase or sale of any security.

17 C.F.R. § 240.10b-5.

By the terms of the 1934 Act and associated rule, liability under section 10(b) and Rule 10b-5 is direct and does not rely upon the establishment of liability of any other person. To the extent that any Relevant Non-Debtor Defendant is found liable to Union Central for the fourth cause of action under section 10(b) and Rule 10b-5, such liability is direct liability of that Relevant Non-Debtor Defendant, based upon its own actions (or inactions), and is neither based upon nor relies upon the conduct or liability on the part of the Debtors or any other party.

The Relevant Non-Debtor Defendants' liability under section 20 of the 1934 Act, while necessarily linked to the conduct of others, cannot form the basis for the extraordinary injunctive relief sought by the Debtors.

The final two causes of action set forth in the Amended Complaint are for (a) "control person" liability, under section 20(a) of the 1934 Act, and (b) violations of the 1934 Act through or by means of others, under section 20(b) of the 1934 Act, against (among other defendants) the Relevant Non-Debtor Defendants.

Section 20(a) renders "[e]very person who, directly or indirectly, controls any person liable under any provision of [the 1934 Act] or of any rule or regulation thereunder" liable jointly and severally with and to the same extent as the controlled person who violated the 1934 Act, "unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action." 15 U.S.C. § 78t(a). Section 20(b) provides that "[i]t shall be unlawful for any person, directly or indirectly, to do any act or thing which it would be unlawful for such person to do under the provisions of [the 1934 Act] or any rule or regulation thereunder through or by means of any other person." Id. § 78t(b). As with aiding and abetting liability, liability under section 20 is necessarily linked to another person's conduct—in this instance, a violation of the 1934 Act. However, because the Union Central Action cannot proceed against the Debtors due to the automatic stay, the Relevant Non-Debtor Defendants' liability under section 20 cannot result in collateral estoppel or issue preclusion against the Debtors for the reasons set forth in the Lead Plaintiff Objection.

B. Procedural Status of the Union Central Action[3]

The deadline for the defendants in the Union Central Action to file motions to dismiss the Amended Complaint is July 13, 2012. Union Central's briefs in opposition to any motions to dismiss the Amended complaint are due on August 31, 2012, and the defendants' reply briefs are due on October 9, 2012. Given this briefing schedule, and due to the number of defendants involved in the Union Central Action and the extent of their likely briefing on a motion or motions to dismiss, it is unlikely that the District Court will rule on any motions to dismiss the Amended Complaint until sometime in 2013, after the expected conclusion of the Bankruptcy Cases. The motions to dismiss are fundamentally lawyer-driven, and do not require any participation by the Debtors or the Relevant Non-Debtor Defendants.

[3] In the interest of brevity, procedural history not relevant here has been omitted.

C. The Union Central Action will pose no discovery burden whatsoever on the Debtors or the Non-Debtor Defendants during the Bankruptcy Cases.

Discovery in the Union Central Action cannot proceed until after motions to dismiss the Amended Complaint have been adjudicated. On March 19, 2012, the defendants jointly objected to all proposed discovery requests, on the ground that the Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in various sections of the 1934 Act) (the "PSLRA") bars any discovery in the Union Central Action until motions to dismiss the Amended complaint have been resolved. On June 1, 2012, Union Central filed a motion [DC Docket Nos. 157–59] seeking to require certain defendants, not including the Debtor Defendants or the Relevant Non-Debtor Defendants, to respond to the proposed document discovery. Accordingly, there is no discovery currently being sought against the Relevant Non-Debtor Defendants, nor will there be until after motions to dismiss the Amended Complaint have been decided. Of course, the Debtor Defendants are now protected by the automatic stay. The Union Central Action thus poses no potential discovery burden whatsoever on the Debtors or the Non-Debtor Defendants.

[***signature page immediately follows***]

WHEREFORE, based upon the actual status of the Union Central Action, the fact that discovery against the Relevant Non-Debtor Defendants cannot proceed until after motions to dismiss the Amended Complaint are resolved, the fact that the Debtors cannot be bound by any judgment in the Union Central Action (which, in any event, is not likely to be entered until after the conclusion of the Debtors' bankruptcy cases), the fact that the motions to dismiss are entirely lawyer-driven, and the other facts and circumstances set forth in the Lead Plaintiff Objection, Union Central joins in the Lead Plaintiff Objection and respectfully requests that the Court deny the Motion and grant Union Central such other and further relief as the Court deems just and appropriate.

Dated: June 28, 2012
New York, New York

/s/ Michael S. Etkin

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