Docket #0007 Date Filed: 12/19/2012

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

SEALINK FUNDING LIMITED, Plaintiff, v. DEUTSCHE BANK AG; DEUTSCHE BANK SECURITIES, INC.; DB STRUCTURED PRODUCTS INC.; ACE SECURITIES CORP.; and DEUTSCHE ALT-A SECURITIES INC., Defendants.	Adv. Proc. No. 12-ap-02051 (MG) Oral Argument Requested

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT
OF ITS MOTION TO WITHDRAW THE REFERENCE

BERNSTEIN LITOWITZ BERGER
& GROSSMANN LLP

David L. Wales
Rebecca E. Boon
1285 Avenue of the Americas, 38th Floor
New York, NY 10019
Tel: (212) 554-1400
Fax: (212)554-1444
dwales@blbglaw.com
rebecca.boon@blbglaw.com

Counsel for Plaintiff Sealink Funding Limited

December 19, 2012

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Plaintiff Sealink Funding Limited ("Sealink" or "Plaintiff"), by its attorneys, respectfully submits this motion pursuant to 28 U.S.C. §157(d), Federal Rule of Bankruptcy Procedure 5011 and Local Bankruptcy Rule 5011-1, for the entry of an order directing the withdrawal of the reference of the above-captioned action to the United States Bankruptcy Court for the Southern District of New York (the "Motion").

PRELIMINARY STATEMENT

This is a state common law fraud private action against Deutsche Bank which was initiated in the Supreme Court of New York, and improperly removed by Defendants to the District Court on November 19, 2012.[1] That same day, the District Court, *sua sponte*, referred this case to the Bankruptcy Court pursuant to 28 U.S.C. §157(a) and the Amended Standing Order (defined below). *See id.*, Ex. A & Amended Standing Order of Reference, *In re: Standing Order of Reference Re: Title 11*, 12 Misc. 00032 (S.D.N.Y. Feb. 1, 2012) ("Amended Standing Order"). Put simply, this case has nothing to do with federal law – let alone bankruptcy law – and is not related to the Residential Capital Chapter 11 Proceeding, Lead Case No. 12-12020, United States Bankruptcy Court, Southern District of New York (the "ResCap Chapter 11 Proceeding"), where it now sits. Indeed, sixteen of the nineteen trusts at issue in this action have absolutely no connection to any Debtor in the ResCap Chapter 11 Proceeding. As more fully set forth below and in the simultaneously filed Remand Motion (defined below), this case is also subject to mandatory abstention and should ultimately be remanded to the Supreme Court of the State of New York in any event.

Most obviously, no Defendant in this case is in bankruptcy and no Defendant is even an affiliate of a Chapter 11 Debtor. Further, no one – including both the parties and the Debtors –

[1] *See* Declaration of David L. Wales, December 19, 2012, ("Wales Decl."), Ex. B; Ex. C (Defendants' Notice of Removal ("Removal Not.")).

asked the Court to refer this case to Bankruptcy Court.[2] On the contrary, Defendants disclaimed the fundamental basis for a referral when they stated point blank in their removal notice that "[t]his is not a core proceeding," and that they "do not consent to entry of final orders of judgment by any bankruptcy judge." Removal Not. ¶29.

In addition, none of the Debtors in the ResCap Chapter 11 Proceeding to which Defendants claim the case relates are defendants in the action nor have they sought removal or the reference of this action to the Bankruptcy Court. Tellingly, when the Debtors sought to extend the automatic stay in connection with RMBS litigation, they did not even attempt to impact claims by third parties like Plaintiff against defendants that are neither debtors, affiliates of debtors, nor former or current officers and directors of the Debtors, like the Defendants in this case. *See* Notice of Debtors' Motion to Extend the Automatic Stay or, in the Alternative, for Injunctive Relief Enjoining Prosecution of Certain Litigation Against Debtors' Directors and Officers and Non-Debtor Corporate Affiliates, *Residential Capital LLC v. Allstate Ins. Co. (In re Residential Capital)*, Case No. 12-12020-mg, Adv. Proc. No. 12-01671-mg (Bankr. S.D.N.Y. May 25, 2012)(Wales Decl. Ex. F). Indeed, we are not aware of any circumstance where the Debtors in the ResCap Chapter 11 Proceeding have sought to impact independent state law claims against non-debtor entities, such as the subject claims here.

In fact, this action, and similar RMBS actions asserting state law claims, exist and are proceeding in state and district courts throughout the country irrespective of the ResCap Chapter 11 Proceeding. Here, Plaintiff seeks to hold ***Deutsche Bank*** – which created, issued, underwrote, and sold $960 million of RMBS to Plaintiff's assignors – accountable for its

[2] Sealink filed proofs of claim in the ResCap Chapter 11 Proceeding. *See* claim no. 2642 filed in case no. 12-12054; claim no. 2643 filed in case no. 12-12053; claim no. 2645 filed in case no. 12-12052; & claim no. 2659 filed in case no. 12-12019.

independent and knowing misconduct and fraudulent misrepresentations in connection with those sales, just like it seeks to hold various other entities liable for their own misconduct in connection with fraudulent sales of RMBS in ***seven cases*** concurrently pending in New York Supreme Court. Notably, two of these cases have already been remanded from this District. *See Sealink Funding Ltd. v. Bear Stearns & Co.*, 2012 WL 4794450 (S.D.N.Y. Oct. 9, 2012); *Sealink Funding Ltd. v. J.P.Morgan Acceptance Corp. I*, No. 12 Civ. 6242 (LTS), slip op. (S.D.N.Y. Oct. 9, 2012) (Wales Decl. Ex. D); *see also Bayerische Landesbank, N.Y. Branch v. Bear Stearns & Co., et al.*, 12-cv-2804 (S.D.N.Y. July 16, 2012) (ECF No. 17) & *Bayerische Landesbank, N.Y. Branch v. Merrill Lynch & Co., et al.*, 12-cv-3856 (S.D.N.Y. July 16, 2012) (ECF No. 15) (remanding similar RMBS actions tangentially involving the same ResCap Chapter 11 Proceedings at issue here). (Wales Decl. Ex. E). Even more significantly for purposes of this Motion, ***none*** of these cases, although removed, were referred to the Bankruptcy Court.

The fact that the Bankruptcy Court has no jurisdiction over this action, and that this action would be subject to mandatory abstention by the Bankruptcy Court even if it did, are reasons alone for the reference to Bankruptcy Court to be withdrawn. In any event, Defendants have already admitted that the Bankruptcy Court cannot conduct a jury trial and that the proceeding is non-core. For the reasons set forth herein and in Plaintiff's concurrently filed Motion to Remand to New York Supreme Court (the "Remand Motion"), this action is not "related to" any bankruptcy proceeding. Without bankruptcy court jurisdiction, the reference is void.

Alternatively, the Court should withdraw the reference here because having the Bankruptcy Court administer these proceedings for any purpose has no logical basis. This action is acknowledged by all parties to be a "non-core" proceeding and all parties object to the

entry of final orders by the Bankruptcy Court as well as a jury trial being conducted by the Bankruptcy Court. Decisions by the Bankruptcy Court would therefore and necessarily be subject to *de novo* review by the District Court. The ultimate effect of having the Bankruptcy Court administer this case would be to waste the parties' resources through duplicative briefing, argument and other proceedings, and unnecessarily burden the Bankruptcy Court with complex discovery disputes and expert testimony in connection with purely state law claims, the majority of which do not even involve loans originated by ResCap. This would, in turn, cause undue delay in the adjudication of Plaintiff's claims. This would also serve as precedent for the referral of hundreds of active RMBS fraud cases (and more to come) involving non-debtor entities who are unaffiliated with the Debtor, when such cases involve no bankruptcy law issues. Plainly, such an outcome would flood the Bankruptcy Court with non-bankruptcy state law disputes between non-debtor parties – hardly a desirable or appropriate result.

The referral of this case to the Bankruptcy Court is contrary to the purpose and plain language of this District's Amended Standing Order, and fundamentally disconnected from the ResCap Chapter 11 Proceeding. The reference should be withdrawn.

FACTUAL AND PROCEDURAL BACKGROUND

This case involves an egregious fraud perpetrated by non-debtor Defendants. For more than two years, Defendants created, issued and sold RMBS that they claimed were supported by underlying mortgages that complied with stated underwriting guidelines and were prudent investments. ¶1.[3] In truth, Defendants knew the underlying mortgages violated these standards, and that the RMBS were not prudent investments. For example, Defendants "waived in" approximately 50% of the mortgage loans that their own due diligence providers had identified

[3] References to "¶__" refer to the corresponding paragraphs of Plaintiff's Amended Complaint, attached hereto as Exhibit G.

as failing to meet originators' underwriting guidelines (¶83), internally disparaged the RMBS they were selling as "pigs," "crap" and "generally horrible" (¶¶10, 134, 139, 165), and developed a large short position, which grew to $10 billion, secretly betting that many of the RMBS they had issued would fail. *See id.*; ¶¶1-2. Defendant Deutsche Bank AG controlled the activities of the other defendants, had knowledge of the faulty practices of the originators whose loans were ultimately included in the securitizations at issue here (¶¶94, 110-12, 122-28, 136, 152), and closely oversaw the massive bet against the housing market, including against the very shelves of RMBS sold to BayernLB, that was maintained by Deutsche Bank's global head of RMBS trading. ¶¶136, 141.

On June 22, 2012, Plaintiff filed an initial complaint in New York Supreme Court asserting claims for fraud, fraudulent inducement, and aiding and abetting fraud. On October 19, 2012, Plaintiff filed and served the operative Amended Complaint asserting the same claims for fraud. Plaintiff Sealink was established to receive, hold and manage RMBS purchased by certain special purpose vehicles ("SPVs") formerly sponsored by Sachsen LB. ¶¶17-25. The RMBS at issue here were purchased by the SPVs and subsequently transferred to Sealink. ¶17. Sealink is the exclusive assignee of the claims in the Complaint. *Id.* Plaintiff's assignors purchased approximately $960 million worth of Defendants' RMBS in 19 offerings between 2006 and 2007. ¶3. Plaintiff asserts claims against the Deutsche Bank entities that purchased the underlying loan pools, deposited those loan pools into trusts that they controlled, structured the trusts into RMBS, and sold the RMBS to Plaintiff. ¶¶26-31. None of the numerous originators of the underlying loans, including American Home Mortgage Corporation ("AHM") and certain

of the ResCap Debtors,[4] nor the non-Defendant sponsors, depositors, or issuers, including the ResCap Debtors, are defendants in this action. ¶¶66, 149.

As alleged in the Complaint, Defendants, as the sponsors and underwriters of the RMBS, had exclusive access to information about the quality of the underlying mortgage pools, including access to the loan files and the results of their own due diligence. ¶5, 49, 68. In contrast, Plaintiff's assignors did not have access to the loan files or due diligence results, and reasonably relied on Defendants' representations regarding the quality of the mortgage pools backing the RMBS. *Id.*; ¶¶285-91.

On November 19, 2012, Defendants removed this action to the District Court, premised on the grounds that an unspecified number of loans backing eight of the RMBS sold by Defendants were sponsored, deposited, issued, or originated by one of two entities that have since filed voluntary petitions for reorganization under Chapter 11 of the United States Bankruptcy Code: the ResCap Debtors and AHM. Defendants contend that the District Court has "related to" bankruptcy jurisdiction because they purportedly have rights to indemnification from the ResCap Debtors and AHM. Removal Not., ¶¶8-21. However, Defendants' contention is contrary to blackletter New York law which provides that a party cannot be indemnified for its own fraud. *See, e.g., CBS Corp. v. Eaton Corp.*, 2010 WL 1375169, at *2 (S.D.N.Y. Mar. 30, 2010) ("contracts that would indemnify a party for intentional or fraudulent conduct are void as against public policy in New York"). Moreover, Defendants' speculative assertion that their proofs of claim could somehow affect this action ignores the reality that Defendants' claims are merely a handful of the thousands of contingent and unliquidated claims that have been filed in

[4] The relevant ResCap Debtors are: Residential Funding Company, LLC, a/k/a Residential Funding Corporation, Residential Accredit Loans, Inc., Residential Asset Mortgage Products, Inc., Homecomings Financial, LLC, and GMAC Mortgage, LLC.

the ResCap Chapter 11 Proceeding, all of which "will have to be resolved and either denied or reduced to a liquidated amount before there can be any effect on the bankruptcy estate." *Kerusa Co. LLC v. W10Z/515 Real Estate Ltd. P'ship*, 2004 WL 1048239, at *4 (S.D.N.Y. May 7, 2004); *see* Remand Mot. at II.B.1. Defendants simply cannot rely on their proofs of claim in the AHM bankruptcy, where a plan of liquidation was confirmed on February 23, 2009 and has gone effective, because those claims have all been disallowed or settled. Remand Mot. at II.B.2.

On the same day as Defendants' removal, the District Court *sua sponte* transferred this action to the Bankruptcy Court pursuant to this District's Amended Standing Order, as "related to" the ResCap Chapter 11 Proceeding. This Motion follows.

ARGUMENT

I. NO REFERENCE TO THE BANKRUPTCY COURT IS WARRANTED

A. Standards Governing Withdrawal Of The Reference

The reference of this action to the Bankruptcy Court ***must*** be withdrawn because the Amended Standing Order cannot automatically apply to this case unless the Bankruptcy Court possesses "related to" subject matter jurisdiction. Here, there is no bankruptcy jurisdiction because this action neither "arises in" or "arises under" title 11, nor is it "related to a case under title 11." 28 U.S.C. §157(a). For these reasons, the removal of this state court action has no legal basis in the first instance, and the referral to the Bankruptcy Court under the Amended Standing Order is void.

Even if the action were somehow determined to be "related to" the ResCap Chapter 11 Proceeding, the reference ***should*** be withdrawn "for cause." Permissive withdrawal of the reference is governed by 28 U.S.C. §157(d) which proscribes, in relevant part, that "[t]he district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown." 28 U.S.C. §157(d). The

statute does not specify what constitutes "cause," and the scope of that inquiry has been developed by the courts, in particular the Second Circuit's decision in *In re Orion Pictures Corp.*, 4 F.3d 1095, 1101 (2d Cir. 1993) and its progeny, discussed below.

Moreover, although the claims asserted by Plaintiff are purely state law claims and mandatory withdrawal under 28 U.S.C. §157(d) does not technically apply, this case would nevertheless be subject to mandatory abstention by the Bankruptcy Court under 28 U.S.C. §1334(c)(2), a fact which should be taken into consideration by this Court in the context of withdrawal of the reference because it is a limitation on the Bankruptcy Court's ability to hear indisputably non-core claims. *See* Remand Mot. at III.A; *see also In re Marathon Home Loans*, 96 B.R. 296, 301 (E.D. Cal. 1989) (noting that "mandatory abstention . . . is a limit on [bankruptcy] removal that cannot be ignored"); *see generally In re New 118th LLC*, 396 B.R. 885, 893-95 (Bankr. S.D.N.Y. 2008) (remanding action to New York state court on the ground of mandatory abstention); *In re Amanat*, 338 B.R. 574, 581-83 (Bankr. S.D.N.Y. 2005) (same).

B. The Reference To Bankruptcy Court Is Void And Must Be Withdrawn

28 U.S.C. §157(a) divides bankruptcy proceedings into three categories: those that "arise in" title 11; those that "arise under" title 11; and those that are "related to a case under title 11." 28 U.S.C. §157(a). This language mirrors 28 U.S.C. §1334(b) which addresses the district court's bankruptcy jurisdiction, stating that the district court has "original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11." 28 U.S.C. §1334(b). District courts may refer any such proceeding to the bankruptcy judges of their district. *See* 28 U.S.C. §157(a); Amended Standing Order. In order for the automatic referral of the reference to be valid, the prerequisites of "arising in," "arising under," or "related to" jurisdiction must be met. *Id*. Because this action meets none of these criteria, it is not subject to the Amended Standing Order and is not referable under section 157(a).

As a "non-core" proceeding, this action does not "arise in" or "arise under" title 11. *See* Removal Not. ¶29; *In re Fairfield Sentry Ltd. Litig.*, 458 B.R. 655, 674 (S.D.N.Y. 2011) ("Core claims are those proceedings 'arising under title 11' and proceedings that 'arise in' cases under title 11"). Therefore, the only jurisdictional question for this Court is whether Sealink's common law fraud claims are subject to "related to" jurisdiction. For all the reasons set forth herein and in the Remand Motion, they are not and this case is not "related to" any bankruptcy proceedings. *See* Remand Mot. at II. Further, because the parties dispute the application of the Amended Standing Order to this action, the District Court must first decide, on this Motion, the issue of whether the case is within the Bankruptcy Court's jurisdiction before the Amended Standing Order referral can be implemented. The Court need not reach the issue of subject matter jurisdiction on this Motion, however, because a) the referral should also be withdrawn "for cause" pursuant to 28 U.S.C. §157(d) and b) in any event, this case is subject to mandatory abstention pursuant to 28 U.S.C. §1334(c)(2). *See* Remand Mot. at III.A.

C. The *Orion* Factors Heavily Support Permissive Withdrawal of the Reference

Even if the Court concluded that this action was "related to" the ResCap Chapter 11 Proceeding, the reference should still be withdrawn for "cause" because the remaining *Orion* factors all weigh in favor of withdrawal. Put simply, there is no good reason to keep this case in Bankruptcy Court, and every good reason to withdraw the reference. In *In re Orion Pictures Corp.*, the Second Circuit held that the determination of whether the requisite "cause" exists to withdraw the reference entailed a two-step inquiry. First, the district court must determine "whether the claim is core or non-core, since it is upon this issue that questions of efficiency and uniformity will turn." 4 F. 3d at 1101. Then, the district court "should weigh questions of efficient use of judicial resources, delay and costs to the parties, uniformity of bankruptcy administration, the prevention of forum shopping, and other related factors." *Id.* Courts in the

Second Circuit have routinely applied the *Orion* test for nearly two decades. *See, e.g.*, *Solutia Inc. v. FMC Corp.*, 2004 WL 1661115, at *2 (S.D.N.Y. July 27, 2004).

After the Supreme Court's recent decision in *Stern v. Marshall*, 131 S. Ct. 2594 (2011), "a court's consideration of a motion to withdraw the reference to bankruptcy court should—in addition to the *Orion* factors—include consideration of: whether the claims at issue involve a public or private right; whether the claims will be resolved in ruling on a creditor's proof of claim, if any; and whether the parties consent to final adjudication by a non-Article III tribunal." *See Adelphia Recovery Trust v. FLP Grp., Inc.*, 2012 WL 264180, at *3 (S.D.N.Y. Jan. 30, 2012) (citing *Dev. Specialists, Inc. v. Akin Gump Strauss Hauer & Feld LLP*, 462 B.R. 457, 467 (S.D.N.Y. 2011)). Following *Stern*, "where the Bankruptcy Court lacks final adjudicative authority, the remaining *Orion* considerations will often tend to point toward withdrawal." *Dev. Specialists*, 462 B.R. at 467.

All of the *Orion* factors weigh in favor of withdrawal of the reference here. *First* and foremost, the action is a "non-core" proceeding for which the Bankruptcy Court lacks final adjudicative authority. Defendants agree. *See* Removal Not. ¶29 ("This is not a core proceeding under 28 U.S.C. §157(b) or Fed. R. Bankr. P. 9027. Defendants do not consent to entry of final orders of judgment by any bankruptcy judge.").

Second, as a non-core proceeding, the Bankruptcy Court may only make proposed findings of fact or law that are subject to *de novo* review by the District Court for final adjudication. Any decision by the Bankruptcy Court would therefore result in an appeal to the District Court. This would waste judicial resources, result in duplicative proceedings and breifing, and cause both parties to incur unnecessary expense. It would also unnecessarily involve the Debtors in the ResCap Chapter 11 Proceeding who have given no indication that they

have any intention or desire to get anywhere near this purely state law claim between non-debtor parties that have no affiliation with the ResCap Debtors. The Bankruptcy Court would also be burdened by having to make recommendations in this state common law fraud case, as well as managing complex discovery issues and expert testimony, in addition to administering the unrelated complex bankruptcy and associated proceedings on its docket. Moreover, *de novo* review by the District Court would cause excessive delay, in combination with the delay associated with involving the Bankruptcy Court, one of the busiest courts in the country, merely as a weigh station for this litigation.

Third, the fact that there are no bankruptcy issues at play here guarantees that rather than "promote the uniformity of bankruptcy administration," keeping the case in Bankruptcy Court will create confusion and unnecessarily duplicate effort for the parties as well as the Bankruptcy Court. In fact, two of Plaintiff's other RMBS fraud cases have already been remanded to state court, and it would be just as efficient and appropriate to do the same here.

Fourth, withdrawal of the reference is consistent with the District Court's disapproval of forum shopping. When Defendants removed the action to the District Court, they did not also seek to refer the case to the Bankruptcy Court. On the contrary, they unequivocally stated in their Removal Notice that the action was not core, and that they would not consent to final adjudication by a bankruptcy judge (Removal Not., ¶29). Yet, they declined to consent to withdrawal of the reference to Bankruptcy Court. Their decision to take advantage of the District Court's *sua sponte* referral is self-evident and has already caused Plaintiff unnecessary time and expense. Such forum-shopping must be discouraged.

Finally, pursuant to Fed. R. Bankr. P. 7012(b), "in non-core proceedings, final orders and judgments shall not be entered on a bankruptcy judge's order except with the express consent of

the parties." Plaintiff does not consent to such entry, and Defendants are in agreement. Removal Not., ¶29. The reference must be withdrawn because it was not required in the first place, and all of the applicable factors weigh in favor of permissive withdrawal.

1. This Action Is A Non-Core Proceeding Over Which The Bankruptcy Court Has No Final Adjudicative Authority

As noted above, the parties are in agreement that this is not a core proceeding. *See* Removal Not. ¶29. "A proceeding that involves rights created by bankruptcy law, or that could arise only in a bankruptcy case, is a core proceeding." *United Orient Bank v. Green (In re Green),* 200 B.R. 296, 298 (S.D.N.Y.1996) (collecting cases); *see also Joseph DelGreco & Co., Inc. v. DLA Piper LLP (In re Joseph DelGreco & Co.),* 2011 WL 350281, at *2 (S.D.N.Y. Jan. 26, 2011). By contrast, "[a]n action that does not depend on the bankruptcy laws for its existence and which could proceed in a court that lacks federal bankruptcy jurisdiction is non-core." *In re Green,* 200 B.R. at 298 (collecting cases); *see also DLA Piper,* 2011 WL 350281, at *2.

Plaintiff's state common law fraud action against unaffiliated non-debtor Defendants is clearly not a core proceeding. *See, e.g., In re 131 Liquidating Corp.*, 222 B.R. 209, 211 (S.D.N.Y. 1998) (finding claim for fraud against the individual defendants "[t]he claim that is most obviously non-core" and withdrawing reference); *In re WorldCom, Inc.*, 2008 WL 2441062, at *5 (S.D.N.Y. June 18, 2008) (finding liability for common law fraud non-core and withdrawing reference); *In re Johnson*, 2012 WL 1110342, at *7 (Bankr. W.D. Tex. Apr. 2, 2012) (noting that fraud is not a core proceeding, as opposed to fraudulent conveyance under 28 U.S.C. §157(b)).

The factors established in *Stern* likewise support withdrawal. *Stern* requires the court to determine "whether the rights being adjudicated (1) are public rights, or (2) will necessarily be resolved in the disposition of a creditor's proof of claim-or, of course, on the parties

unanimously consenting to bankruptcy court adjudication." *Dev. Specialists*, 462 B.R. at 467. Plaintiff's fraud claims against Deutsche Bank involve private rights that will not be resolved in ruling on a creditor's purported independent proof of claim and over which the Bankruptcy Court lacks final adjudicative authority. *See* Fed. R. Bankr. P. 7012(b). Under the guidance of both *Orion* and *Stern*, the referral of this non-core proceeding must be withdrawn. *See Dynegy Danskammer, L.L.C. v. Peabody COALTRADE Int'l Ltd.*, --F. Supp. 2d--, 2012 WL 5464619, at *6 (S.D.N.Y. Nov. 7, 2012) ("Because none of the three [*Stern*] exceptions applies here, Article III prohibits the bankruptcy court from issuing a final determination of [plaintiff's state law claims]. This conclusion tips the scales towards withdrawal."). Moreover, when the Bankruptcy Court has no power to finally adjudicate claims, "the remaining *Orion* considerations will often tend to point toward withdrawal." *Dev. Specialists*, 462 B.R. at 467.

2. The Remainder of the *Orion* Factors Support Withdrawal

"[O]nce a district court makes the core/non-core determination, it should weigh questions of efficient use of judicial resources, delay and costs to the parties, uniformity of bankruptcy administration, the prevention of forum shopping, and other related factors." *In re Orion*, 4 F.3d at 1101. As previously discussed above and as further demonstrated below, each of these factors counsels in favor of withdrawing the reference to the Bankruptcy Court.

a. Withdrawal Of The Reference Promotes Judicial Economy

Litigating this case in Bankruptcy Court would waste everyone's time, and withdrawing the reference at this nascent stage of this case would promote judicial economy. Because Plaintiff's fraud claims are non-core, the case must ultimately be tried by a state trial court, or the District Court if no remand or abstention is granted. "[A]s a bankruptcy court's ruling on a non-core matter is subject to *de novo* review, a district court may conclude that its adjudication of the matter in the first instance would be more efficient." *In re WorldCom, Inc.*, 2008 WL 2441062,

at *3; *see In re Durso Supermarkets, Inc.*, 170 B.R. 211, 214 (S.D.N.Y. 1994) (same); *see also* 28 U.S.C. §157(c)(1)-(2). Here, any finding on remand by the Bankruptcy Court would be appealed by the losing party to the District Court. This wastes judicial resources because duplicative briefing would result and two courts would have to analyze the same issue. *See id.*; *see also Solutia*, at 2004 WL 1661115, at *3. Indeed, as Judge Karas recently found, withdrawal is especially more efficient where, as here, the action is subject to *de novo* review, it was referred "shortly after the Complaint was filed, and no discovery or extensive motion practice has come before the bankruptcy court. As a result, the bankruptcy court likely does not have extensive familiarity with the record related to the Complaint." *Dynegy*, 2012 WL 5464619, at *7 (finding that "efficiency considerations weigh in favor of withdrawing the reference.").

The *Solutia* case is also instructive. In *Solutia*, plaintiff brought state common law claims, including claims for fraud and fraud in the inducement for damages arising out of defendants' breach of a joint venture agreement. *See Solutia*, 2004 WL 1661115, at *2. After noting that "[i]t is undisputed that this action concerns a non-core dispute," Judge Pauley found that "judicial economy favors withdrawal of the reference. By litigating this non-core matter in the district court, judicial resources will be conserved instead of having two courts administer two rounds of briefing and argument on the same issues." *Id*. at *2-3. The Court further found that an extensive discovery period and a trial weighed in favor of withdrawing the reference because the Bankruptcy Court would be unduly burdened by having to address "discovery disputes that require judicial intervention." *Id.*; *see also In re Complete Mgmt., Inc.*, 2002 WL 31163878, at *3 (S.D.N.Y. Sept. 27, 2002) (withdrawing reference where "the advancement of this action will involve extensive discovery, expert testimony, and a lengthy and complex trial requiring a jury.").

The courts of this District, and particularly New York courts, are unquestionably more qualified to address these issues of common law fraud, and typically do. *See, e.g., id.* at *3 (withdrawing reference; noting that state common law claims are "more commonly resolved by this court than the bankruptcy courts"). Indeed, at least 125 RMBS fraud cases, including ***ten cases*** brought by Plaintiff against different defendants for similar fraudulent conduct are currently pending before these courts.[5]

b. Delay and Expense to the Parties

Having the Bankruptcy Court administer this common law fraud case would also waste the parties' time and money and subject Plaintiff to undue delay. Due to the fact that the Bankruptcy Court's findings are subject to *de novo* review by the District Court, in effect, the parties would have to "relitigat[e] [] claims[,] [resulting in] significant additional costs and expenditures of time and effort to both parties." *Solutia*, 2004 WL 1661115, at *3; *see In re Durso Supermarkets, Inc.*, 170 B.R. 211, 214 (S.D.N.Y. 1994) ("unnecessary costs could be avoided by a single proceeding in the district court.") (quoting *Orion*, 4 F.3d at 1101); *see also Dynegy*, 2012 WL 5464619, at *6 ("if a district court must review recommendations *de novo*, it would be inefficient to allow the proceedings to go forward, knowing that they will have to be substantially repeated."). Such "duplication of effort" should be avoided here. *See In re McMahon*, 222 B.R. 205, 208 (S.D.N.Y. 1998); *Solutia*, 2004 WL 1661115, at *3.

[5] *See, e.g.*, *Sealink Funding Ltd. v. Barclays Bank Plc.*, 12 Civ. 7966 (S.D.N.Y.); *Sealink Funding Ltd. v. Bear Stearns & Co.*, 652681/2011 (Sup. Ct.); *Sealink Funding Ltd. v. Citigroup Inc.*, 653844/2012 (Sup. Ct.); *Sealink Funding Ltd. v. Countrywide Financial Corp.*, 11 Civ. 7082 (S.D.N.Y.); *Sealink Funding Ltd. v. Credit Suisse Holdings USA Inv.*, 652962/2012 (Sup. Ct.); *Sealink Funding Ltd. v. Goldman Sachs Group Inc.*, 652810/2012 (Sup. Ct.); *Sealink Funding Ltd. v. J.P. Morgan Acceptance Corp. I*, 650979/2012 (Sup. Ct.); *Sealink Funding Ltd. v. Morgan Stanley*, 650196/2012 (Sup. Ct.); *Sealink Funding Ltd. v. RBS Holdings USA Inc.*, 12 Civ. 5118 (S.D.N.Y.); *Sealink Funding Ltd. v. UBS AG*, 653102/2012 (Sup. Ct.).

c. No Issues of Uniform Bankruptcy Administration

No issues in this case involve the application of bankruptcy law, so withdrawing the reference would not undermine uniform bankruptcy administration. Indeed, such uniformity would be promoted by saving the Bankruptcy Court the unnecessary effort of addressing non-core issues between non-debtors that are subject to *de novo* review in the District Court. This case involves state law claims which arose prior to the bankruptcy filing, and which do not raise any substantive issues of bankruptcy law. Indeed, "there is no indication that any bankruptcy-specific legal analysis will be required." *See Dynegy*, 2012 WL 5464619, at *7 ("Courts routinely have found no benefit [to uniform administration] where claims are based on state law. In contrast, courts have found a benefit where the claims are based on bankruptcy law itself.") (collecting cases); *see also DLA Piper*, 2011 WL 350281, at * 5; *M. Fabrikant & Sons, Inc. v. Long's Jewelers Ltd.*, 2008 WL 2596322, at *4 (S.D.N.Y. June 26, 2008); *In re VWE Grp.*, 359 B.R. 441, 451 (S.D.N.Y. 2007); *In re FMI Forwarding Co., Inc.*, 2004 WL 1348956, at *7 (S.D.N.Y. June 16, 2004). The issues presented in the underlying fraud case against Deutsche Bank are not even "related to" the ResCap Chapter 11 Proceeding. *See* Remand Mot. at II. Indeed, sixteen of the nineteen trusts at issue in this action have no connection to any ResCap Debtor whatsoever. Moreover, the Debtors in the ResCap Chapter 11 Proceeding have had no involvement in Defendants' actions that have resulted in the reference to the Bankruptcy Court and have paid this litigation no attention. There simply "are no bankruptcy-related issues here." *Solutia*, 2004 WL 1661115, at *4.

In addition, the issues that are the subject of this and the Remand Motion are issues of federalism, namely, the scope of the District Court's bankruptcy jurisdiction and whether, upon withdrawal, the District Court must, or at least should, abstain from deciding these issues so that

they can be timely adjudicated in state court. Article III judges are particularly qualified to resolve these questions. As the Supreme Court explained in *Stern*,

> When a suit is made of 'the stuff of the traditional actions at common law tried by the courts at Westminster in 1789,' and is brought within the bounds of federal jurisdiction, the responsibility for deciding that suit rests with Article III judges in Article III courts. The Constitution assigns that job—resolution of 'the mundane as well as the glamorous, matters of common law and statute as well as constitutional law, issues of fact as well as issues of law'—to the Judiciary.

Stern, 131 S. Ct. at 2609 (citing *Northern Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 90, 86–87, n. 39 (1982) (plurality opinion)); *see also Eastern Airlines, Inc. v. Air Line Pilots Assoc. (In re Ionosphere Clubs, Inc.)*, 1990 WL 5203, at *5 (S.D.N.Y. 1990) ("The purpose of § 157(d) is to assure that an Article III judge decides issues calling for more than routine application of statutes outside the Bankruptcy Code").

Finally, not only did the Debtors in the ResCap Chapter 11 Proceeding to which this case has been referred not request this reference, they have not sought to interfere with any similar actions that do not involve the ResCap Debtors directly, their non-debtor affiliates, or their current and former directors and officers. *See supra*, at 2. They have no interest in this litigation, nor does the resolution of this litigation impact their bankruptcy proceedings. The effort to remove this state court case by Defendants is more a litigation tactic as opposed to a genuine desire to ensure the uniform administration of bankruptcy law.

d. Defendants' Forum-Shopping Weighs In Favor Of Withdrawal

Withdrawing the reference would also discourage forum shopping. In removing their case to the District Court, Defendants expressly did not seek to refer the case to the Bankruptcy Court. To the contrary, they stated explicitly that this action is not a core proceeding and that they did not consent to final adjudication before a bankruptcy judge. *See* Removal Not. ¶29. Defendants' prior admissions belie any assertion that Defendants may make – after the fact – that

they ever intended to have this case referred to any bankruptcy court, let alone that doing so would serve any legitimate purpose. Indeed, Defendants themselves clearly sought to ***avoid*** this outcome by disclaiming the key factor for bankruptcy court jurisdiction, namely whether the case is a core proceeding. *See id.* Defendants should not be permitted to engage in such forum-shopping and the reference should be withdrawn. *See In re Houbigant, Inc.*, 185 B.R. 680, 686 (S.D.N.Y. 1995) ("the concern about forum shopping alone, almost compels the Court to keep the case [in District Court].").

CONCLUSION

For all of the foregoing reasons, Plaintiff's Motion should be granted, the reference to the Bankruptcy Court withdrawn, and this action transferred back to the District Court for adjudication of the pending Motion to Remand and any subsequent motions. Plaintiff respectfully requests oral argument on this Motion.

Dated: December 19, 2012
New York, New York

BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP

/s/ David L. Wales

David L. Wales
Rebecca E. Boon
1285 Avenue of the Americas, 38th Floor
New York, NY 10019
Tel: (212) 554-1400
Fax: (212) 554-1444
dwales@blbglaw.com
rebecca.boon@blbglaw.com

Counsel for Plaintiff Sealink Funding Limited