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UNITED STATE 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.	**Hearing Date and Time: March 5, 2013 at 10:00 a.m. (prevailing Eastern Time)** **Objection Deadline (by stipulation): January 23, 2013** **Reply Deadline (by stipulation): February 6, 2013** Adv. Proc. No. 12-ap-02051 Oral Argument Requested

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO REMAND TO NEW YORK STATE SUPREME COURT

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TABLE OF CONTENTS

Page

PRELIMINARY STATEMENT 1

FACTUAL AND PROCEDURAL BACKGROUND 5

ARGUMENT 7

I. Standards Applicable To Defendants' Removal 7

II. The Court Does Not Have "Related To" Bankruptcy Jurisdiction Under 28 U.S.C. § 1334(b) 8

A. The Standards Applicable to "Related To" Bankruptcy Jurisdiction 8

B. This Action Is Not Related To Any Of The Cited Bankruptcies 10

1. Defendants' Proofs of Claim in the ResCap Chapter 11 Proceeding Do Not Support "Related To" Jurisdiction 10

2. This Action Cannot Affect the AHM Bankruptcy Proceedings 11

III. Even If the Court Were to Find "Related To" Jurisdiction, Abstention and Remand is Warranted Pursuant to 28 U.S.C. § 1334(c) 14

A. Mandatory Remand is Required by 28 U.S.C. § 1334(c)(2) 14

B. Equitable Remand Under 28 U.S.C. § 1334 (c)(1) Is Warranted 16

CONCLUSION 20

TABLE OF AUTHORITIES

Page(s)

CASES

Allstate Insurance Co. v. Ace Securities Corp.,
No. Civ. 1914 (LBS), 2011 WL 3628852 (S.D.N.Y. Aug. 17, 2011) 14, 15, 16

Allstate Insurance Co. v. CitiMortgage, Inc.,
No. 11 Civ. 1927 (RJS), 2012 WL 967582 (S.D.N.Y. Mar. 13, 2012) ..... *passim*

Allstate Insurance Co. v. Credit Suisse Securities (USA) LLC,
No. 11 Civ. 2232 (NRB), 2011 WL 4965150 (S.D.N.Y. Oct. 10, 2011) ..... *passim*

Allstate Insurance Co. v. Merrill Lynch & Co.,
11 Civ. 2280 (DAB), 2011 US Dist. LEXIS 124333 (S.D.N.Y. Aug. 15, 2011) 12, 13

Bayerische Landesbank, N.Y. Branch v. Bear Stearns & Co.,
12-cv-2804, slip op. (S.D.N.Y. July 16, 2012) 4, 18

Bayerische Landesbank, N.Y. Branch v. Merrill Lynch & Co.,
12-cv-3856, slip op. (S.D.N.Y. July 16, 2012) 4, 18

Bayerische Landesbank, New York Branch v. Aladdin Capital Management, LLC,
692 F. 3d 42(2d Cir. 2012).....15

Buechner v. Avery,
No. 05 Civ. 2074 (PKC) 2005 WL 3789110 (S.D.N.Y. Feb. 14, 2005).....19

CBS Corp. v. Eaton Corp.,
No. 07 Civ. 11344 (LBS), 2010 WL 1375169 (S.D.N.Y. Mar. 30, 2010) 10

Digital Satellite Lenders, LLC v. Ferchill,
No. 03 Civ. 8803 (RWS), 2004 WL 1794502 (S.D.N.Y. Aug. 10, 2004).....19

General Electric Capital Corp. v. Pro-Fac Cooperative,
No. 01 CIV 10215 LTS JCF, 2002 WL 1300054 (S.D.N.Y. June 11, 2002) 8

Guccione v. Bell,
No. 06 Civ. 492 (SHS), 2006 WL 2032641 (S.D.N.Y. July 20, 2006) 17, 19

In re Balensweig,
410 B.R. 157 (Bankr. S.D.N.Y. 2008).....10

In re Chateaugay Corp.,
213 B.R. 633 (S.D.N.Y. 1997).....9, 10, 13

In re Fairfield Sentry Ltd. Litigation,
458 B.R. 665 (S.D.N.Y. 2011).....14

In re General Media, Inc.,
335 B.R. 66 (Bankr. S.D.N.Y. 2005).....9, 11, 12

In re Lionel Corp.,
722 F.2d 1063 (2d Cir. 1983).....11

In re Manville Forest Products Corp.,
209 F.3d 125 (2d Cir. 2000).....9

In re Metro-Goldwyn Mayer-Studios Inc.,
459 B.R. 550 (Bankr. S.D.N.Y. 2011).....12

In re Urban Box Office Network, Inc.,
No. 01 Civ. 8854 LTS THK, 2003 WL 22971510 (S.D.N.Y. Dec. 18, 2003) 9, 11

In re Village of Kiryas Joel, N.Y.,
No. 11 Civ. 8494 (ER), 2012 WL 1059395 (S.D.N.Y. Mar. 29, 2012).....7

Kerusa Co. LLC v. W10Z/515 Real Estate Ltd. Partnership,
No. 04 Civ. 708 (GEL), 2004 WL 1048239 (S.D.N.Y. May 7, 2004) ..... *passim*

Little Rest Twelve, Inc. v. Visan,
458 B.R. 44 (S.D.N.Y. 2011).....15

Parmalat Capital Financial Ltd. v. Bank of America Corp.,
639 F.3d 572 (2d Cir. 2011).....8, 19

Sealink Funding Ltd. v. Bear Stearns & Co.,
No. 12 Civ. 1397 (LTS), 2012 WL 4794450 (S.D.N.Y. Oct. 9, 2012)..... *passim*

Sealink Funding Ltd. v. J.P.Morgan Acceptance Corp. I,
No. 12 Civ. 6242 (LTS), slip op. (S.D.N.Y. Oct. 9, 2012).....4, 5, 6

Volt Viewtech, Inc. v. D'Aprice,
831 N.Y.S. 2d 357.....10

STATUTES

28 U.S.C. § 157(b).....14

28 U.S.C. § 1334..... *passim*

28 U.S.C. § 1447.....8, 14

OTHER AUTHORITIES

Fed. R. Bankr. P. 9027.....14

Sealink Funding Limited ("Sealink" or "Plaintiff") moves for an Order remanding this action to New York State Supreme Court because the Court lacks subject matter jurisdiction under 28 U.S.C. § 1334(b) (actions "related to" bankruptcy). In the alternative, even if the Court were to find subject matter jurisdiction, the Court should remand this action pursuant to 28 U.S.C. § 1334(c)(2) (mandatory remand) or 28 U.S.C. § 1334(c)(1) (equitable remand).

PRELIMINARY STATEMENT

Plaintiff originally filed this action in New York state court asserting fraud claims under New York law against defendants, whose primary places of business are almost entirely in New York, where much of the misconduct giving rise to this action took place. The defendants[1] are five Deutsche Bank entities that created, issued and sold residential mortgage-backed securities ("RMBS") from loans they knew to be exceptionally bad and issued in violation of underwriting guidelines, while making false statements in their offering materials asserting that their RMBS were properly underwritten and were prudent investments. ¶¶26-31, 76-284, Compl. Exs. A-F.[2]

Defendants' November 19, 2012 notice of removal (the "Removal Notice") asserts one ground for removal: "related to" bankruptcy jurisdiction based on their filing of proofs of claim for indemnification in the ResCap Chapter 11 Proceeding (defined below). *See* Wales Decl., Ex. B. As detailed below, this action should be remanded because (i) there is no "related to" bankruptcy jurisdiction; (ii) even if there was, mandatory abstention is required; and (iii) remand is also warranted under the doctrine of equitable abstention.

Defendants contend that eight of the nineteen trusts at issue in this action are "related to" two bankruptcies because Defendants are purportedly indemnified by certain non-defendant

[1] The defendants in this action are Deutsche Bank AG, Deutsche Bank Securities, Inc., ACE Securities Corp., Deutsche Alt-A Securities, Inc., and DB Structured Products, Inc. (collectively, "Deutsche Bank" or "Defendants").

[2] "¶__" refers to the corresponding paragraph in the Amended Complaint dated October 19, 2012 ("Complaint"). *See* Declaration of David L. Wales, dated December 19, 2012 ("Wales Decl."), Ex. A. Unless otherwise indicated, capitalized terms have the same meaning as in the Complaint.

sponsors, depositors, issuers, and originators which are bankrupt. Wales Decl. Ex. B, ¶¶9-14, 18. However, to establish "related to" jurisdiction, Defendants must show that this action will have some ***conceivable effect*** on a pending bankruptcy proceeding.

With respect to the first bankruptcy (the "ResCap Chapter 11 Proceeding") involving various ResCap Debtors,[3] Defendants have wrongly asserted that their claims for indemnification from various non-defendant ResCap Debtors for the claims in this action – *i.e.*, ***Deutsche Bank's own fraud –*** can create jurisdiction or could someday affect the administration of the ResCap Chapter 11 Proceeding. First, it is blackletter New York law that a party is not entitled to indemnification for its own fraud. Moreover, even if Deutsche Bank's indemnification claims were permissible, they are no different than any of the thousands of contingent and unliquidated claims filed in the ResCap Chapter 11 Proceeding, none of which can affect the ResCap Debtors' estate until they are denied or reduced to a liquidated amount, and none of which have ***any effect*** on this litigation. Indeed, the ResCap Debtors have not sought to get involved in this action, or any similar RMBS actions against non-debtor defendants unaffiliated with the ResCap Debtors. *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. R), (where the ResCap Debtors sought to enjoin litigation involving their non-debtor affiliates and current and former directors and officers).[4] As to the

[3] 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.

[4] 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.

other bankruptcy of American Home Mortgage Corporation ("AHM"), there are no live indemnification claims and thus no "related to" jurisdiction because the three proofs of claim which Defendants filed have already been disallowed or settled by stipulation. *See* Wales Decl. Exs. C, D.

In addition, because the AHM liquidating bankruptcy plan has already been confirmed, Defendants' burden is even greater—they must establish a "close nexus" to the bankruptcy plan, *i.e.*, that this action would affect the interpretation or execution of the plan. Clearly, Defendants' disallowed and settled proofs of claim cannot affect the AHM plan which contemplates a liquidation of those debtors. Nor can Defendants remedy this situation by now filing additional proofs of claim because the bar date for filing such claims has long passed. *See* Wales Decl. Ex. E. This action has no "conceivable effect" on any bankruptcy, and it must be sent back to state court.

Even if the Court determines that it has "related to" jurisdiction (it does not), the Court must abstain from hearing this matter under 28 U.S.C. § 1334(c)(2). This is a "non-core" state common law fraud case and Defendants agree, as their Removal Notice states, that it "is not a core proceeding." Wales Decl. Ex. B, ¶29. As such, it does not "arise in" or "arise under" title 11. There is no question that this action can be timely adjudicated in the Commercial Division of New York State Supreme Court, where other RMBS fraud actions, including seven brought by the same Plaintiff (and dozens more) are currently pending. Section 1334 is the sole basis for federal jurisdiction over this case, and this Motion has been timely filed. Accordingly, Defendants cannot possibly demonstrate, as they must, that the test for mandatory abstention has not been met and the Court must abstain.

Last, even if abstention is not mandatory (which it is), all of the relevant equitable factors support remand here. Plaintiff brought this action under New York common law against mainly New York Defendants in New York Supreme Court. No Defendant is a debtor in a pending bankruptcy proceeding (or even affiliated with any debtor) and Plaintiff is entitled to a jury trial. The outcome of this action will have no impact whatsoever on the administration of any bankruptcy case. All factors supporting remand under 28 U.S.C. §§ 1334(c)(1) are therefore met, and Plaintiff should be allowed to pursue its claims in state court. As Judge Kaplan recently held in two factually similar RMBS fraud cases, including one where, as here, Defendants had filed a proof of claim in the ResCap Chapter 11 Proceeding, "the degree of relatedness to the bankruptcy cases is slim and there is just no good logical reason for these two cases to be in federal court." Wales Decl. Ex. F, *Bayerische Landesbank, N.Y. Branch v. Bear Stearns & Co.*, 12-cv-2804, slip op. (S.D.N.Y. July 16, 2012), and *Bayerische Landesbank, N.Y. Branch v. Merrill Lynch & Co., et al.*, 12-cv-3856, slip op. (S.D.N.Y. July 16, 2012) (remanding to New York Supreme Court). *Id.* at 21. Indeed, two of Sealink's RMBS actions were recently remanded by Judge Swain who reasoned that "Defendants have not articulated any plausible way in which this action will affect the efficient administration of the Bankrupt Originators' estates" and "Plaintiff's claims exclusively involve state law." *See Sealink Funding Ltd. v. Bear Stearns & Co.*, No. 12 Civ. 1397 (LTS), 2012 WL 4794450, at *4 (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. G).[5] The result should be the same here.

[5] Unless otherwise indicated, all internal citations have been omitted and all emphasis has been added.

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. 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 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, 110-112, 122-28, 136, 152), and closely oversaw the massive bet against the housing market, including against the very shelves of RMBS sold to Sealink's assignors, 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 ResCap Debtors, nor the non-Defendant sponsors, depositors, or issuers, also including certain of 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 this Court on the basis that eight of the 19 trusts at issue in this action are purportedly "related to" the bankruptcy proceedings of two groups of non-defendants. The first bankruptcy involves the ResCap Debtors which acted as sponsor, depositor, issuer and/or originator for three of the eight relevant trusts (RALI 2007-QO2, RAMP 2007-RS1, and DBALT 2007-OA1). The ResCap Debtors all filed for Chapter 11 bankruptcy protection on May 14, 2012, and the ResCap Chapter 11 Proceeding is currently pending before United States Bankruptcy Judge Martin Glenn. Wales Decl. Ex. B, ¶¶8-16. On October 25, 2012, Defendants filed proofs of claim in the ResCap Chapter 11 Proceeding, asserting that if they are found liable in this common law fraud action, the ResCap Debtors must indemnify them for the damages, costs, and expenses incurred. *Id.* ¶15.

The second bankrupt entity, AHM, originated and sold loans to Deutsche Bank that were securitized in five of the eight relevant trusts (ACE 2007-ASAP1, ACE 2007-ASAP2, DBALT 2007-AR1, DBALT 2007-AR2, and DBALT 2007-BAR1). Wales Decl. Ex. B, ¶18. The AHM bankruptcy plan of liquidation has already been confirmed and the effective date has occurred. *See* Wales Decl. Exs. H, I. The bar date for filing proofs of claim was on January 11, 2008 and has long since passed. *See id.*, Ex. E. Defendants filed three proofs of claim for indemnification in the AHM bankruptcy, which were subsequently amended. Wales Decl. Ex. B, ¶20; *Id.* Exs. J-P. The first two AHM claims filed by Defendants Deutsche Bank AG ("DBAG") and Deutsche Bank Securities Inc. ("DBSI"), respectively, have been disallowed. *See id.* Ex. C. The third proof of claim filed by Defendant Deutsche Bank Structured Products ("DBSP") was settled by stipulation over a year after AHM's plan of liquidation was confirmed, and before this action was commenced. *Id.* Ex. D. Accordingly, Defendants have no live claims in the AHM bankruptcy.

ARGUMENT

I. Standards Applicable To Defendants' Removal

Civil actions brought in state court may be removed to this Court "only if the federal courts have original jurisdiction over the matter." *Allstate Ins. Co. v. Credit Suisse Sec. (USA) LLC*, 2011 WL 4965150, at *2 (S.D.N.Y. Oct. 10, 2011) (citing 28 U.S.C. § 1441 (a)). "When challenged, the party seeking removal bears the burden of establishing [that the federal district court has] jurisdiction." *Sealink*, 2012 WL 4794450, at *2 (quoting *Allstate Ins. Co. v. CitiMortgage, Inc.*, 2012 WL 967582, at *2 (S.D.N.Y. Mar. 13, 2012)).[6] "On a motion for

[6] *See also In re Village of Kiryas Joel, N.Y.*, 2012 WL 1059395, at *2 (S.D.N.Y. Mar. 29, 2012) ("On a motion to remand, the party seeking to sustain the removal, not the party seeking remand, bears the burden of demonstrating that removal was proper.' If the removing party fails to meet this burden, the case must be remanded.") (collecting cases).

remand, the Court 'must construe all disputed questions of fact and controlling substantive law in favor of the plaintiff.'" *Id.* (quoting *In re NASDAQ Mkt. Makers Antitrust Litig.*, 929 F. Supp. 174, 178 (S.D.N.Y. 1996)). Further, "out of respect for the limited jurisdiction of federal courts and the rights of states, [courts] must resolve any doubts against removability." *Allstate*, 2012 WL 967582, at *2. If the Court determines that it lacks jurisdiction, the case must be remanded. 28 U.S.C. § 1447. District court decisions ordering remand are not subject to appellate review. 28 U.S.C § 1447(d).

II. The Court Does Not Have "Related To" Bankruptcy Jurisdiction Under 28 U.S.C. § 1334(b)

A. The Standards Applicable to "Related To" Bankruptcy Jurisdiction

An action is "related to" a bankruptcy proceeding only "if the action's outcome might have any conceivable effect on the bankrupt estate." *Parmalat Cap. Fin. Ltd. v. Bank of Am. Corp.*, 639 F.3d 572, 579 (2d Cir. 2011) (quotations omitted). "Conceivable effects typically manifest themselves by altering the amount of property available for distribution to the creditors of a bankruptcy estate or the allocation of property among such creditors." *CitiMortgage*, 2012 WL 967582, at *4.

Although contingent outcomes can satisfy the conceivable effects test, "the potential applicability of indemnification provisions is not by itself the equivalent of an effect on an indemnifier's bankruptcy proceedings." *Credit Suisse*, 2011 WL 4965150, at *4; *see also Gen. Electric Cap. Corp. v. Pro-Fac Coop.*, 2002 WL 1300054, at *2 (S.D.N.Y. June 11, 2002) ("potential ramifications are insufficient to render the claims that have been asserted against the non-debtor Defendants 'related to' Debtor's bankruptcy proceeding").[7] On the contrary, proofs

[7] "An indemnification right arises at the time the indemnification agreement is executed, and it constitutes a claim under the Bankruptcy Code even if the act giving rise to the indemnification has not yet occurred." *Credit Suisse*,

of claim "have to be . . . 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 also In re Chateaugay Corp.*, 213 B.R. 633, 640 (S.D.N.Y. 1997) ("the mere assertion of an indemnity claim…cannot trigger bankruptcy jurisdiction"). Here, there is no way for Plaintiff to know whether Defendants' indemnification claims against the ResCap Debtors are valid because such information is uniquely within Defendants' possession and a determination of their validity has yet to be made. *See generally CitiMortgage*, 2012 WL 967582, at *2 ("the party seeking removal bears the burden of establishing that the federal district court has jurisdiction"). However, as discussed below, it is blackletter New York law that a party cannot be indemnified for its own fraud, and Deutsche Bank's fraud is the subject of the state law claims at issue here. *See infra*, at B.1.

Moreover, once a bankruptcy plan of reorganization is confirmed (as in the case of AHM), a district court's "related to" jurisdiction is limited to "matters pertaining to the implementation or execution of the plan," because "the debtor's estate, and thus bankruptcy jurisdiction, [otherwise] ceases to exist." *In re Urban Box Office Network, Inc.*, 2003 WL 22971510, at *3 (S.D.N.Y. Dec. 18, 2003). In order for this Court to have "related to" jurisdiction post-confirmation, this action must meet two requirements: (1) the matter must have a close nexus to the bankruptcy plan of reorganization or proceedings, and (2) the plan must provide for retention of jurisdiction over the dispute. *In re Gen. Media, Inc.*, 335 B.R. 66, 73 (Bankr. S.D.N.Y. 2005). Even if a timely proof of claim has been filed, the Court's "related to"

2011 WL 4965150, at *5. *See also In re Manville Forest Prods. Corp.*, 209 F.3d 125, 128-29 (2d Cir. 2000) ("a right to payment based on a written indemnification contract arises at the time the indemnification agreement is executed," and constitutes a "valid contingent claim" in bankruptcy, even if the act giving rise to indemnification has not yet occurred).

jurisdiction ceases once that claim has been disallowed or settled because there is no "legal basis for an indemnity action against [the] Debtors." *Chateaugay*, 213 B.R. at 640.

B. <u>This Action Is Not Related To Any Of The Cited Bankruptcies</u>

1. Defendants' Proofs of Claim in the ResCap Chapter 11 Proceeding Do Not Support "Related To" Jurisdiction

The mere filing of a proof of claim for indemnification in the ResCap Chapter 11 Proceeding does not create "related to" jurisdiction over this common law fraud action. First, Defendants' indemnification claims purport to assert a right that does not exist under New York law. Indeed, it is well-settled that in New York, "contracts that would indemnify a party for intentional or fraudulent conduct are void as against public policy." *CBS Corp. v. Eaton Corp.*, 2010 WL 1375169, at *2 (S.D.N.Y. Mar. 30, 2010); *see also, e.g., Volt Viewtech, Inc. v. D'Aprice*, 831 N.Y.S. 2d 357 (table), at *4 (Sup. Ct. Sept. 21, 2006) ("Indemnification is for the one who, ***without any fault of his own***, is held liable to a third party by operation of law due to the fault of another. … One who has actually participated in the wrong may not be indemnified.").

Second, any effect of Defendants' indemnification proofs of claims on the bankrupt estate is speculative at best. Defendants' claims, like the thousands of other contingent and unliquidated claims in the ResCap Chapter 11 Proceeding, "will have to be … either denied or reduced to a liquidated amount before there can be any effect on the bankruptcy estate." *Kerusa*, 2004 WL 1048239, at *3; *see also In re Balensweig*, 410 B.R. 157, 164 (Bankr. S.D.N.Y. 2008) (no "related to" jurisdiction where adversary proceeding "will only have a 'speculative, indirect or incidental' effect on the Debtor's estate").

Moreover, none of the ResCap Debtors have ever sought to impact claims by third parties like Plaintiff against defendants that are neither debtors, affiliates of debtors, nor current or

former directors and officers of the Debtors, like the Defendants in this case, even when seeking to extend the automatic stay in connection with RMBS litigation. *See* Wales Decl. Ex. R (where the ResCap Debtors sought to enjoin any claims against their non-debtor affiliates, or former and current directors and officers). Indeed, we are not aware of any circumstance where the Debtors have sought the removal or referral of any similar RMBS actions on the basis that they "relate to" the ResCap Chapter 11 Proceedings.

Accordingly, Defendants' proofs of claim in the ResCap Chapter 11 Proceeding do not support "related to" jurisdiction here.

2. This Action Cannot Affect the AHM Bankruptcy Proceedings

Defendants' reliance on the AHM bankruptcy fares even worse. Here, the AHM plan has already been confirmed, and Defendants' claims resolved.

A confirmed bankruptcy plan redefines a debtor's obligations to its creditors. *See In re Lionel Corp.*, 722 F.2d 1063, 1070 (2d Cir. 1983) ("The plan of reorganization determines how much and in what form creditors will be paid, whether stockholders will continue to retain any interests, and in what form the business will continue"). In AHM, there was no reorganization, but merely a liquidation in Chapter 11. Therefore, any nexus with the AHM Chapter 11 is even more attenuated because there is no reorganized operating entity.

Once a bankruptcy plan has been confirmed, the Court's "related to" bankruptcy jurisdiction "shrinks." *See Gen. Media*, 335 B.R. at 73 ("all courts that have addressed the question have ruled that once confirmation occurs, the bankruptcy court's jurisdiction shrinks"); *see also Urban Box Office*, 2003 WL 22971510, at *3 ("After a debtor's reorganization plan has been confirmed, the debtor's estate, and thus bankruptcy jurisdiction, ceases to exist, ***other than for matters pertaining to the implementation or execution of the plan***") (emphasis in original).

Following plan confirmation, the action must meet two requirements to be sufficiently "related to" bankruptcy:

> First, the matter must have a close nexus to the bankruptcy plan or proceeding, as when a matter affects the interpretation, implementation, consummation, execution or administration of the confirmed plan or incorporated litigation trust agreement…
>
> Second, the plan must provide for the retention of jurisdiction over the dispute.

Gen. Media at 73-74.[8] The Court need not even reach the second requirement because Defendants have not shown a close nexus between this action and the AHM bankruptcy proceedings, which culminated in confirmation of the liquidating plan on February 23, 2009, and that "at the post-confirmation stage, the matter before the court 'affect[s] an integral aspect of the bankruptcy process.'" *In re Metro-Goldwyn Mayer-Studios Inc.*, 459 B.R. 550, 556 (Bankr. S.D.N.Y. 2011). On the contrary, the three AHM claims Deutsche Bank filed cannot affect the AHM bankruptcy plan because they have been either expunged or resolved.

First, Defendant DBAG filed a proof of claim in the AHM bankruptcy on January 11, 2008 (amended on March 3, 2008) that was subsequently disallowed on the grounds that "AHM Corp. has no liability because AHM Corp. was not a party to the [relevant agreement, and] has no indemnification obligations in connection with the [relevant agreement]." Wales Decl. Exs. C, M-N, Q. Second, Defendant DBSI filed a proof of claim in the AHM bankruptcy proceeding on January 11, 2008 (amended on August 15, 2008 and February 4, 2010) that was also

[8] Courts in this district are divided over the question whether the removing party must show a "close nexus" between the action and the bankruptcy plan after the bankruptcy court has approved the plan. *See CitiMortgage*, 2012 WL 967582, at *5 (recognizing that "courts in this district have reached different conclusions as to whether the close nexus test should be applied"). However, even if this Court finds that the "close nexus" test does not apply to the AHM bankruptcy, it should still find that because "related to" bankruptcy jurisdiction decreases after plan confirmation, especially a plan that calls for the liquidation of the debtor, there is no "related to" jurisdiction here. Numerous courts in this district have held that "the scope of bankruptcy court jurisdiction diminishes with plan confirmation." *Allstate Ins. Co. v. Merrill Lynch & Co.*, 2011 US Dist. LEXIS 124333, at *11 (S.D.N.Y. Aug. 15, 2011) (collecting authorities).

disallowed. Wales Decl. Exs. C, O-P, Q. When a claim is disallowed, there is no longer any basis for the court to have "related to" jurisdiction. Therefore, these proofs of claim do not support a finding that there is a close nexus between the AHM bankruptcy and this action. *See Chateaugay*, 213 B.R. at 640 (no "related to" jurisdiction "in absence of any articulated legal basis for an indemnity action against Debtors").

Third, Defendant DBSP settled its proof of claim that was filed in the AHM bankruptcy on January 11, 2008 (amended on August 15, 2008 and February 2, 2010). Wales Decl. Exs. J, K, and L. On October 17, 2011, DBSP entered into a stipulation resolving its claim for indemnification against AHM, which was docketed on October 18, 2011. *See id.* Ex. D ("[e]ffective upon the docketing of th[e] Stipulation with the Bankruptcy Court."). Having settled its claim, DBSP cannot establish a close nexus with the AHM bankruptcy. *See Allstate v. Merrill Lynch*, 2011 U.S. Dist. LEXIS 124333, at *10-11 (finding that defendants failed to establish a close nexus between originators' bankruptcies and the current action where defendants had entered into settlement agreements for their indemnification claims). In addition, the bar date to file proofs of claim has passed. *See* Wales Dec. Ex. E; *Credit Suisse*, 2011 WL 4965150, at *4 (finding that court-ordered bar dates are set "[i]n order to provide the debtor and its creditors with finality").[9]

Accordingly, this Court does not have "related to" jurisdiction and this action should be remanded.

[9] Notably, it is unclear with respect to the ACE 2007-ASAP2 RMBS whether any AHM loans actually are contained therein. In their Removal Notice, Defendants claim that this RMBS contains loans purchased from AHM (Removal Not. ¶18), but the basis of this claim is not provided and verification of such information from publicly available documents is not possible. Defendants should not be permitted to rely on the AHM bankruptcy as a basis for "related to" jurisdiction with respect to the ACE 2007-ASAP2 RMBS when they have not proffered any evidence regarding the identity of the originators, known only to them. *See CitiMortgage, Inc.*, 2012 WL 967582, at *2 ("the party seeking removal bears the burden of establishing that the federal district court has jurisdiction").

III. Even If the Court Were to Find "Related To" Jurisdiction, Abstention and Remand is Warranted Pursuant to 28 U.S.C. § 1334(c)

A. Mandatory Remand is Required by 28 U.S.C. §1334(c)(2)

Even if the Court concludes that it has "related to" bankruptcy jurisdiction, it must abstain from hearing this action. Section 1334(c)(2) requires district courts to abstain from hearing a case if "(1) the motion was timely brought; (2) the proceeding in federal court is based upon a state law claim; (3) the proceeding is related to a bankruptcy proceeding, but does not arise under title 11 or arise in a title 11 case; (4) section 1334 is the sole basis for federal jurisdiction; (5) an action is commenced in state court; and (6) the action can be timely adjudicated in state court.'" *Allstate Ins. Co. v. Ace Sec. Corp.*, 2011 WL 3628852, at *6 (S.D.N.Y. Aug. 17, 2011). Moreover, "***Defendants*** bear the burden of demonstrating that the test for mandatory abstention has not been met." *Id*. at *7 (citing *Parmalat Cap.*, 639 F.3d at 582).

Here, the test for mandatory abstention has been met.

First, Plaintiff's abstention motion is timely under 28 U.S.C. § 1447(c), having been filed within 30 days of removal of the action.

Second, Plaintiff's claims are based solely on New York state law.

Third, the action does not "arise in" a Title 11 case because the parties all agree that the action is not a "core" proceeding. *See* Wales Decl. Ex. B, ¶29 ("This is not a core proceeding under 28 U.S.C. § 157(b) or Fed. R. Bankr. P. 9027."); s*ee also In re Fairfield Sentry Ltd. Litig.*, 458 B.R. 665, 674 (S.D.N.Y. 2011) (actions arise in a title 11 proceeding if they "are not based on any right expressly created by title 11, but nevertheless, would have no existence outside of the bankruptcy") (citations omitted); *Ace*, 2011 WL 3628852, at *8-9 (finding that plaintiffs were entitled to mandatory abstention because federal questions of law were not "necessary to

resolve Plaintiffs' [New York] state common law claims"); *Little Rest Twelve, Inc. v. Visan*, 458 B.R. 44, 59 (S.D.N.Y. 2011) (in granting mandatory abstention, there was no reason to keep the case in federal court when "all claims are wholly based on New York state law, with which the state courts have great expertise").

Fourth, it is undisputed that this Court has no independent basis for exercising jurisdiction and the Defendants assert none in their removal petition, relying solely on "related to" bankruptcy jurisdiction.[10]

Fifth and Sixth, this action was commenced in state court and the New York State Supreme Court, New York County, Commercial Division, is a highly-regarded court that is currently presiding over numerous RMBS cases, many of which have been remanded from the Southern District of New York, including two initiated by Plaintiff. *See Sealink*, 2012 WL 4794450; Wales Decl. Ex. G (remanding RMBS cases to New York Supreme Court). As such, there is no indication that the New York Supreme Court would be incapable of timely adjudicating this matter. On the contrary, "because the underlying action alleges only state claims, the Commercial [D]ivision may have an edge in the relevant legal expertise." *Credit Suisse*, 2011 WL 4965150, *7; *see also Ace*, 2011 WL 3628852, at *10 (noting that New York Supreme Court "is currently hearing a number of cases involving both contract and common-law tort claims against mortgage loan originators [that] raise the same claims of fraud and negligent misrepresentation alleged here").

[10] The action does not involve a federal question and cannot be premised on diversity jurisdiction because of the presence of a non-U.S. plaintiff and New York-based defendants and a non-U.S. defendant (Deutsche Bank AG). *See supra* at 14-15 (no federal question); *see also Bayerische Landesbank, New York Branch v. Aladdin Capital Mgmt., LLC*, 692 F. 3d 42, 49(2d Cir. 2012) (noting that federal courts "do not have diversity jurisdiction over cases between aliens") (citing *Universal Licensing Corp. v. Paola del Lungo S.p.A.*, 293 F.3d 579, 581 (2d Cir. 2002) ("[D]iversity is lacking…where the only parties are foreign entities, or where on one side there are citizens and aliens and on the opposite side there are only aliens.")).

If the Court remands this action, it will be assigned to the New York Supreme Court's Commercial Division – a specialized division for complex commercial cases with a well-deserved reputation for capable and timely resolution of similar cases. *See id.*; *see also Credit Suisse*, 2011 WL 4965150, at *7 (noting that "[w]hile this district has seen its share of residential mortgage-backed securities cases, so has the Commercial Division") (collecting cases).

Accordingly, all mandatory abstention factors of 28 U.S.C. § 1334(c)(2) are met.

B. Equitable Remand Under 28 U.S.C. § 1334 (c)(1) Is Warranted

Even if the Court were to find that it has "related to" jurisdiction and that abstention is not mandatory, the Court should still remand pursuant to 28 U.S.C. § 1334(c)(1), which provides that "nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11." Here, as in Sealink's RMBS actions against J.P. Morgan and Bear Stearns which have already been remanded, none of the Defendants are debtors, state law issues overwhelmingly predominate, and nearly all of the Defendants have their primary place of business in New York. *See Sealink*, 2012 WL 4794450, at *4 (applying equitable abstention where "Plaintiff's claims exclusively involve state law" and "[c]omity considerations favor remand."); Wales Decl. Ex. G (same). Indeed, Deutsche Bank's only "live" proofs of claim are in the ResCap Chapter 11 Proceeding, and sixteen out of the nineteen trusts at issue have no connection whatsoever to ResCap. Moreover, Plaintiff should be allowed to present its case to a jury in its chosen forum in New York state court. *See id.* ("Remanding to state court preserves the parties' right to avail themselves of a jury trial").

"Courts in this district look to the following non-exclusive list of factors in determining whether equitable remand is appropriate: (1) the effect on the efficient administration of the bankrupt estate; (2) the extent to which issues of state law predominate; (3) the difficulty or unsettled nature of the applicable state law; (4) comity; (5) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case; (6) the existence of the right to a jury trial; and (7) prejudice to the involuntarily removed defendants." *Id.*; *see also Guccione v. Bell*, 2006 WL 2032641, at *5 (S.D.N.Y. July 20, 2006) (same; explaining that the bankruptcy removal statute "grants courts discretion to remand such cases on equitable grounds") (citing 28 U.S.C. §1452(b)); *Kerusa*, 2004 WL 1048239, at *3 (recognizing that the Court's "power to abstain or remand … is broad"). Here, these factors strongly favor remand.

The outcome of this action will have no effect on the administration of any identified bankruptcy. Any potential effects of this action on the administration of the cited bankruptcies are at best remote, contingent and uncertain because there will be no effect whatsoever unless Plaintiff obtains a judgment against Defendants in this action that can result in an allowed and liquidated indemnification claim by Defendants in either bankruptcy case. *See Sealink*, 2012 WL 4794450, at *4 (remanding where "Defendants have not articulated any plausible way in which this action will affect the efficient administration of the Bankrupt Originators' estates"); Wales Decl. Ex. G (same); *CitiMortgage*, 2012 WL 967582, at *6 (ordering remand where "Defendants have not articulated any way in which this action will impact the efficient administration of the AHM bankruptcy"); *Kerusa*, 2004 WL 1048239, at *4 (ordering remand in part because "the claims of these plaintiffs will have to be resolved and either denied or reduced to a [specified] amount before there can be any effect on the bankruptcy estate"). Indeed, as

detailed above, the outcome of this action will have no effect on the administration of any identified bankruptcy.

Bayerische Landesbank, New York Branch v. Merrill Lynch and *Bayerische Landesbank, New York Branch v. Bear Stearns* are instructive. There, defendants asserted "related to" jurisdiction over an action asserting New York common law fraud claims based on many of the same bankruptcies at issue here, including the ResCap Chapter 11 Proceeding and AHM. Further, one of the defendants (Merrill Lynch) had asserted its purported indemnification claims in the ResCap Chapter 11 Proceeding, as have Defendants here. Judge Kaplan declined to exercise "related to" jurisdiction because "the degree of relatedness to the bankruptcy cases is slim and there is just no good logical reason for these two cases to be in federal court." Wales Decl., Ex. F, at 21. Similarly, in Sealink's RMBS actions against Bear Stearns and J.P. Morgan, the Court found that "[e]ven if [these] action[s] did have the potential to affect the Bankrupt Originators' bankruptcies, any effect would be so attenuated and tangential that the Court would exercise its discretion to abstain." 2012 WL 4794450, at *4; Wales Decl. Ex. G. The same is true here.

In addition, as in *Sealink, Bayerische Landesbank, N.Y. Branch v. Bear Stearns*, *Bayerische Landesbank, N.Y. Branch v. Merrill Lynch*, *CitiMortgage, Guccione* and *Kerusa*, state law issues plainly predominate. *See e.g.*, *Sealink*, 2012 WL 4794450, at *4 (finding under similar facts that "state issues substantially predominate") (Wales Decl. Ex. G); *Bayerische Landesbank, N.Y. Branch v. Bear Stearns* (same); *Bayerische Landesbank, N.Y. Branch v. Merrill Lynch* (same) (Wales Decl. Ex. F); *CitiMortgage*, 2012 WL 967582, at *7 ("Significantly, while this case presents some questions of federal law, it does not require the resolution of ***any*** bankruptcy issues") (emphasis in original). Here, none of Plaintiff's claims

involve federal law, let alone bankruptcy law. Rather, all of Plaintiff's claims are based on New York law. *See Sealink*, 2012 WL 4794450, at *4 (remanding where "Plaintiff's claims exclusively involve state law"); *Guccione*, 2006 WL 2032641, at *6 (ordering remand where "[a]t best, [plaintiff's] severance claim invokes issues of federal law, whereas the remaining ten claims will require interpreting and applying New York law"); *Buechner v. Avery*, 2005 WL 3789110, at *5 (S.D.N.Y. Feb. 14, 2005) ("Only state law claims [including common law fraud] are asserted, all purportedly arising under New York law…This factor weighs in favor of remand"); *Kerusa*, 2004 WL 1048239, at *2 (remanding "perfectly ordinary state-law actions that invoke no aspect of bankruptcy law, that proceed against numerous defendants who are not in bankruptcy and who are jointly and severally liable for all claims, and that, even as to the bankrupt defendant, concern actions taken long before the bankruptcy filing"); *Digital Satellite Lenders, LLC v. Ferchill*, 2004 WL 1794502, at *6 (S.D.N.Y. Aug. 10, 2004) (ordering equitable remand where the "action turns entirely on questions of New York law [including common law fraud]").

Comity also favors remand as "it is well-settled that comity considerations dictate that federal courts should be hesitant to exercise jurisdiction when state issues substantially predominate." *Sealink*, 2012 WL 4794450, at *4 (citing *In re 9281 Shore Road Owners Corp.*, 214 B.R. 676, 696 (E.D.N.Y. 1997)). There is also no question that this action "can be timely adjudicated in [New York] state court at the present time." *Parmalat Cap.*, 639 F.3d at 582.

When, as here, removal does not accomplish the goal of the removal statute – namely, the efficient administration of bankruptcy proceedings – the case should be remanded. Keeping this action in a federal forum would serve ***none*** of the purposes of the removal statute, because it is unnecessary to coordinate this action with the two bankruptcy proceedings to which Defendants

assert this case is related. As set forth above, not even the ResCap Debtors themselves have any interest in this litigation. Defendants' attempt at removal is plainly more a litigation tactic than a genuine effort to ensure the smooth administration of complex Chapter 11 proceedings. Indeed, denying remand here would impede the smooth administration of justice. The law gives Plaintiff's choice of a state court forum significant weight, and gives no weight to Defendants' preference for a federal forum. The Court should remand.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court remand this action to the New York State Supreme Court.

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