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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	Case No. 12-12020 (MG)
RESIDENTIAL CAPITAL, LLC, et al.,	Chapter 11
Debtors.	Jointly Administered
RESIDENTIAL CAPITAL, LLC, et al.,	Adv. Case No. 13-01262 (MG)
Plaintiffs,	**DEBTORS' MEMORANDUM OF LAW IN OPPOSITION TO THE MOTION OF AIG ASSET MANAGEMENT (U.S.), LLC, THE ALLSTATE ENTITIES, MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY, AND THE PRUDENTIAL ENTITIES FOR SUMMARY JUDGMENT**
v.	
ALLSTATE INSURANCE COMPANY, et al.,	
Defendants.	

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The Debtors[1] respectfully submit this Opposition to the Motion of AIG Asset Management (U.S.) LLC, the Allstate Entities, Massachusetts Mutual Life Insurance Company, and the Prudential Entities for Summary Judgment (the "Investor Motion").[2]

PRELIMINARY STATEMENT

The Investors' securities claims should be subordinated under Section 510 of the Bankruptcy Code. Absent subordination, the Investor Claims would result in a double recovery for some Certificateholders, put junior Certificates ahead of more senior Certificates, and allow former Certificateholders to recover at the expense of the Certificateholders to whom they sold. The Investors fail to address this inequity. Section 510 includes multiple broadly worded subsections, each designed to prevent exactly these sorts of inequitable results.

First, Section 510(b) mandates subordination of the Investor Claims because those claims arise from the purchase of securities of the Debtors or of affiliates of the Debtors. *See* Section I, *infra*. To avoid the application of Section 510(b), the Investors advocate an unreasonably narrow reading of statutory language that the Court of Appeals for the Second Circuit has directed courts to read expansively. They urge the Court to infer that Congress intended to exclude the "issuers" of the Certificates from Section 510(b) and ask the Court read into the statute an "ownership interest" limitation, notwithstanding that on its face Section 510(b) reflects Congress's intent to reach beyond the Debtors' "own" securities by using the broad preposition "of" and by including securities of affiliates.

[1] Capitalized terms used but not defined herein shall have the meanings ascribed to them in the *Memorandum of Law in Support of the Debtors' Motion for Summary Judgment*, filed on April 2, 2013 [ECF No. 26] (the "Debtor Motion").

[2] The Debtors also submit this memorandum in opposition to the motions for summary judgment filed by New Jersey Carpenters Health Fund [ECF No. 29]; Cambridge Place Investment Management, Inc. [ECF No. 31]; Union Central Life Insurance Company, Ameritas Life Insurance Corp., and Acacia Life Insurance Company [ECF No. 33]; and the National Credit Union Administration Board [ECF No. 34]; all of which adopt the arguments set forth in the Investor Motion.

Nor is there merit to the Investors' argument that the Trusts, of which the Certificates *do* represent an ownership interest, are not "affiliates" of the Debtors. Indeed, the Investors cannot meaningfully dispute that the Debtors contracted to, and did in fact, manage the mortgage loans and perform nearly every other task necessary to carry out the purpose of the Trusts, including making payments to, and engaging in communications with, the Certificateholders. Instead, back-tracking from arguments made in the Rule 3013 Motion, the Investors now argue that the Trusts are not "persons" and have no business. But these are not charitable or estate trusts. The PLS Trusts were formed to generate a positive return for Certificateholders from a pool of actively serviced mortgage loans that they own. These trusts therefore qualify as business trusts and as "persons," and thus were affiliates of the Debtors under Section 510(b) at the time the claims arose.

Second, Section 510(a) mandates subordination of the Investor Claims, because the Certificates are subject to valid subordination agreements among Certificateholders. *See* Section II, *infra*. The Investors cannot deny that, because of the limited resources in the estate, failing to subordinate the Investor Claims would result in recoveries at odds with the contractual allocation among Certificateholders. The Investors ask the Court to ignore these undisputed inequities because their contracts do not expressly address fraud claims. But that argument has been specifically rejected as a basis to evade subordination under Section 510(a), and state law also does not allow them to subvert the contracts by doing indirectly what they are expressly prohibited from doing directly.

Third, if for any reason the Court declines to apply Section 510(a) or 510(b), the Court should equitably subordinate the Investor Claims under Section 510(c). *See* Section III, *infra*. The Investors acknowledge that courts have recognized "no-fault" equitable subordination and

no controlling law dictates otherwise. The Debtors are not requesting "categorical" subordination at the level of policy decisions reserved for Congress. Rather, in keeping with the intent of Section 510, the Debtors seek to subordinate these particular securities claims.

ARGUMENT

I. SECTION 510(B) REQUIRES SUBORDINATION OF THE INVESTOR CLAIMS

The Investors concede that their claims seek "damages arising from the purchase or sale of a security" and therefore must be subordinated under Section 510(b) if those securities are "of" a Debtor or "of an affiliate" of a Debtor. (*See generally* Investor Mot. at 11.) To avoid subordination, the Investors urge an unreasonably narrow reading of the statutory text to argue that their securities are neither "of" the Debtors nor "of an affiliate" of the Debtors.

A. The Certificates Are Securities "of" the Debtors

The RMBS Certificates are "of" the Debtors for all the same reasons that the Debtors are the "issuers" under the securities laws. (*See* Debtor Mot. at 9-12.)[3] The Investors offer no support for the counterintuitive argument that, by using the broad term "of," Congress intended a narrower interpretation of Section 510(b) of the Bankruptcy Code that would exclude the "issuers" of the securities as defined by Congress.

To be sure, the Trusts are designed to be bankruptcy remote and the Certificates do not represent an ownership interest in the Debtors or a direct obligation of the Debtors. (*See* Investor Mot. at 11-13, 17.) Moreover, as required by the United States Securities and Exchange

[3] Among other reasons, the Certificates were created using Trusts formed by the Debtors to raise funds for the Debtors' general corporate purposes, backed by assets of the Debtors and that the Debtors continued to service after the assets were transferred to the Trusts, and marketed based on the Debtors' performance history. (Ex. 3 (ProSupp) at S-104; Ex. 12 (Overview of ABS/MBS Products: 2007 U.S. Markets); Ex. 15 ("GMAC-RFC Overview" Investor Presentation); Local Rule 7056-1 Statement ¶¶ 43-51.) To accomplish this, the Certificates were issued pursuant to a Pooling and Servicing Agreement to which the Debtors were a party. (Ex. 2 (Pros.) at 4 ("Each series of certificates will be issued under a pooling and servicing agreement among the depositor . . . the trustee and master servicer . . . or a trust agreement between the depositor and the trustee[.]").) The exhibits cited herein with the prefix "Ex. __" are part of the agreed-to exhibits attached to the Local Rule 7056-1 Statement.

Commission (the "SEC"), each securitization is reported distinctly from the others and from the Debtors' "own" securities. (*See infra* at pp. 4-5.) But Section 510(b) of the Bankruptcy Code does not use the term "ownership" or the phrase "own securities" and there is no basis to read in such a limitation. Rather, Section 510(b) uses the more general preposition "of" the Debtors, reflecting Congress's broad purpose. "Of" is certainly broad enough to cover securities of which the Debtors are the issuers.[4]

1. The Debtors *Are* the "Issuers" as Determined by *Congress*

The Investors ask the Court to ignore that the Debtors are the issuers of the Certificates. To do so, they rely heavily on the specious argument that the ***SEC*** only "***deemed***" depositors to be issuers so that they "take on responsibilities as the 'issuer' for certain purposes under the Securities Act and Securities Exchange Act." (Investor Mot. at 11.) That is simply not true.

Congress (and the vast majority of state legislatures), not the SEC, determined that the sponsors of RMBS ***are*** the issuers. (Debtor Mot. at 9-10.) Although the Investors use the term "deem," or some variant, *seventeen* times throughout their Motion, Congress did not use the word at all in the statutes it enacted and, in lengthy commentary to the applicable regulations, the SEC used the term "deemed" to describe the issuer *one time*. Asset-Backed Securities, SEC Final Rule, Securities Act Release No. 33-8518, Exchange Act Release No. 34-50905, 70 Fed. Reg. 1506, 1562 (Jan. 7, 2005), *available at* http://www.sec.gov/rules/final/33-8518.pdf ("SEC ABS Final Rule"). In doing so, the SEC was *not* stating that the depositors are merely "deemed" issuers, as the Investors would lead the Court to believe. Rather, the SEC was explaining that,

[4] The last edition of Black's Law Dictionary to contain a definition of the word "of" defined it broadly as:

> A term denoting that from which anything proceeds; indicating origin, source, descent, and the like; as, he is of noble blood. Associated with or connected with, usually in some causal relation, efficient, material, formal, or final. The word has been held equivalent to after; at, or belonging to; in possession of; manufactured by; residing at; from.

Black's Law Dictionary 1080 (6th ed. 1990).

for successive securities issuances by one depositor, that depositor was "deemed" to be a ***different*** issuer for each trust, to ensure that the depositor reported for each issuance independently. Specifically, the SEC stated:

> In particular, the Exchange Act rule clarifies that the depositor for the asset-backed securities . . . ***is*** the issuer for purposes of the asset-backed securities of that issuing entity. Like our similar definition for the Securities Act, the Exchange Act definition specifies that the person acting in its capacity as depositor for the issuing entity of an asset-backed security is a different issuer from that same person acting as a depositor for any other issuing entity or for purposes of that person's own securities. *For example, the depositor for a particular issuing entity created for the first takedown under a shelf registration statement will be* ***deemed to be a different issuer*** *than that depositor acting as depositor for a subsequent issuing entity created for a subsequent takedown under the same registration statement* . . . . [T]his approach differentiates reporting with respect to each issuing entity, and thus each ABS transaction, and does not require continuous reporting with respect to transactions that would otherwise be able to suspend reporting . . . . *[I]ssuers should not combine reporting* regarding multiple transactions in one report or with a report for the depositor's or sponsor's own securities.

SEC ABS Final Rule, 70 Fed. Reg. at 1562 (emphasis added; internal quotations omitted).

For similar reasons, the Investors fare no better with their reliance on the differentiation between the Debtors' "own" securities and the Certificates for which they are the issuers. (Investor Mot. at 17.) Again, the SEC differentiates between the types of securities to make clear that each RMBS issuance is subject to separate reporting requirements and should not be combined with other RMBS issuances or with the Debtors' "own" securities for reporting purposes. *See* SEC ABS Final Rule, 70 Fed. Reg. 1526-27.[5] But Section 510(b) does not use the term "own" or any analogous concept, and instead broadens the scope of the provision to include any securities "of" the debtor and affiliates' securities, which are also not the debtor's "own."

[5] For this reason, as the Investors point out, certain Debtors did not list the Certificates as their securities in a 2009 request for an SEC No-Action Letter. (*See* Investor Mot. at 14 n.9.) That does not mean that the securities are not "of" the Debtors for purposes of Section 510(b).

The Court should reject the Investors' argument that even though Congress expressly reached beyond the Debtors' "own" securities in Section 510(b), Congress implicitly sought, through use of the broad term "of," to limit the application of this broad remedial statute to a group so narrow that it would not include the issuer of the securities.

2. The Bankruptcy Remote Financing Structure Does Not Alter that the Securities Are "of" the Debtors

Contrary to the Investors' argument, recognizing that issuers fall within the purview of Section 510(b) is not tantamount to substantive consolidation of the Trusts with the Debtors, nor is it at odds with the bankruptcy remote structure of the Trusts. (*See* Investor Mot. at 32-33.)[6] The Debtors have never moved to consolidate the Trusts with the Debtors' estates, and the Investors will continue to benefit from the mortgage loans to the exclusion of the Debtors' general unsecured creditors regardless of whether their securities claims are subordinated.[7]

It is thus ironic that the Investors claim that the Debtors are trying to "create tremendous commercial uncertainty over treatment of securitization vehicles" and disturb the bankruptcy-remoteness of the structure. (*See id.* at 31.) On the contrary, it is the Investors who seek to violate the purpose of the bankruptcy remote structure by asserting that they are entitled not only to exclusive access to their respective pools of mortgage loans, but also to a higher priority than the Debtors' "own" securities holders to all other assets of the Debtors.

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[6] The Investors' analogy to the Debtors selling Apple stock that they happened to hold (*see* Investor Mot. at 14), and their reliance on the opinion from which that analogy is lifted more broadly (*see* Investor Mot. at 13-14 (citing *In re Washington Mutual, Inc.*, 462 B.R. 137, 146-47 (Bankr. D. Del. 2011))), are unpersuasive and should be disregarded for the reasons set forth in the Debtors' Motion. (*See* Debtor Mot. at 13-14.)

[7] For the same reason, there is no merit to the Investors' argument that, even were Section 510(b) subordination appropriate, they should be subordinated only below the Debtors' secured creditors and still recover on par with the Debtors' general unsecured creditors. (*See* Investor Mot. at 32-33.) The mortgage loans have not reverted back to the Debtors, and the Investors continue to benefit from their exclusive rights to that income stream as a result of the Trusts' ownership of those loans, not by virtue of any secured claim against the Debtors. The Certificates also entitle the Investors to a contractually determined share of any recovery on the general unsecured Trust Claims. The purpose of subordination under Section 510(b) is that the Investors cannot use securities claims to bootstrap their way to more preferential treatment at the same priority level, which is, of course, exactly what they seek to do here.

3. Subordination of the Investor Claims Furthers the Goals of Section 510(b) of the Bankruptcy Code

The Court of Appeals for Second Circuit has held that subordination is required if the claimants either (i) took on the risk and return expectations of a securities holder, rather than a creditor, ***or*** (ii) seek to recover a contribution to the equity pool presumably relied upon by creditors in deciding whether to extend credit to the debtor. *See Rombro v. Dufrayne (In re Med Diversified, Inc.)*, 461 F.3d 251, 256 (2d Cir. 2006). Just one of these rationales is necessary to mandate subordination. *See Waltzer v. Nisselson (In re MarketXT Holdings Corp.*), 346 Fed. Appx. 744, 746, 2009 U.S. App. LEXIS 20889, at *3-4 (2d Cir. Sept. 22, 2009). While the Investors argue that the first rationale is absent because they purportedly "did not gamble on whether the Debtors would fail or succeed," (Investor Mot. at 14), they cannot dispute that the second rationale is met because the RMBS securitizations contributed to the equity cushion for the Debtors' general creditors. *See* Ex. 3 (Pro. Supp) at S-104 (noting that proceeds may "be used by the depositor for general corporate purposes"); *see also NationsBank, N.A. v. Commercial Fin. Servs. (In re Commercial Fin. Servs.*), 268 B.R. 579, 594 (Bankr. N.D. Okla. 2001) (finding that debtor's "unsecured creditors were dependent upon the proceeds from the [securitization] not only as a 'cushion' but as [the debtor's] principal source of payment of its general operating expenses"). That alone is enough to require subordination of the Investor Claims.

In addition, the Investors' argument that they do not have the risk/return expectations of a securities holder because the Debtors' "financial performance has . . . little to do with whether those mortgages are paid off" is untenable. (Investor Mot. at 14.) The Debtors' ability to underwrite and service loans such that they would be repaid, and to make advances and/or repurchase loans where required — *i.e.* the Debtors' operational performance and financial

condition — is exactly what the Investors were buying.[8] That is how the Certificates were marketed and how they were assessed by the market.[9] That is why the Investors are here; if their risk/return was not tied to the Debtors, this dispute would be much ado about nothing.

* * *

"The Second Circuit has instructed that § 510(b) should be interpret[ed] broadly in light of its legislative history." *Spirnak v. Motor Liquidation Co. GUC Trust (In re Motor Liquidation Co.)*, No. 11 Civ. 7893 (DLC), 2012 U.S. Dist. LEXIS 15838, at *7-8 (S.D.N.Y. Feb. 7, 2012) (citing *In re Med Diversified, Inc.*, 461 F.3d at 259 (internal quotation marks omitted)). This is because Congress enacted Section 510(b) to close a loophole and prevent securities holders from bootstrapping their way to better treatment in a bankruptcy at the expense of the debtor's general unsecured creditors. *See In re Med Diversified, Inc.*, 461 F.3d at 256; *see also Nationsbank, N.A. v. Commercial Fin. Serv., Inc. (In re Commercial Fin. Serv., Inc.)*, Adv. Case No. 98-05166-R, slip op. at 80-81 n.40 (N.D. Okla. July 11, 2003) ("*CFS*") (Section 510(b) "is a remedial statute that must be construed broadly in order to give effect to its purpose — that is, to close the

[8] Local Rule 7056-1 Statement ¶¶ 40 (Debtors made servicer advances); 42 ("Debtors were obligated to repurchase mortgages in specified circumstances pursuant to representations and warranties contained in the governing agreements."); 51 ("Following the offerings, certain of the Debtors were responsible for servicing and administering the mortgage loans . . . .").

[9] *See, e.g.*, Exs. 12 (Overview of ABS/MBS Products: 2007 U.S. Markets), 15 ("GMAC-RFC Overview" Investor Presentation) (marketing based on Debtors' performance and condition); s*ee also generally* Rui Pereria & Mary Osako, *Rating ABS Seller/Servicers: Credit Where Credit is Due*, Asset Securitization Report, Sept. 13, 2004 *available at* http://www.lexis.com, at 12-13 ("[Fitch] recognizes that *the quality, stability, and financial condition of seller/servicer operations have a direct effect on the performance of asset-backed securities (ABS) transactions . . .* .") (emphasis added); Kevin Duignan & Roger Merritt, *Seller/Servicer Risk Trumps Trustee's Role*, Asset Securitization Report. Feb. 24, 2003 at 9 *available at* http://www.securitization.net/pdf/fitch_risk_022403.pdf. ("Fitch believes it is important to consider the *critical role played by the seller/servicer in ABS transactions, which is heavily dependent on the stability of their business model and financial viability.*") (emphasis added); Anthony Pennington-Cross & Giang Ho, *Loan Servicer Heterogeneity and the Termination of Subprime Mortgages* 19-20 (Fed. Reserve Bank of St. Louis, Research Div., Working Paper 2006-024A, Apr. 2006), *available at* http://research.stlouisfed.org/wp/2006/2006-024.pdf ("[I]t is potentially more important to consider who is servicing loans than the loan or pool characteristics.").

loophole").[10] The Investors' cramped reading of Section 510(b) conflicts with the Second Circuit's directive that the statute be read broadly to achieve its remedial purpose.

Consistent with Congress's determination that the depositor-Debtors are issuers of the Certificates, and because the broad "of the Debtor" language of Section 510(b) does not even suggest, much less require, a limiting interpretation that would frustrate Congress's broad remedial purpose in subordinating securities claims, the Investor Claims should be subordinated as securities "of the Debtors."

B. The Trusts Were "Affiliates" of the Debtors at the Time the Claims Arose

Even if the Certificates were deemed by the Court to be only securities "of" the Trusts, the Investor Claims still must be subordinated because the Trusts were affiliates of the Debtors as defined in the Bankruptcy Code at the time the claims arose. "Affiliate" includes any "person whose business is operated under a lease or operating agreement by a debtor, or person substantially all of whose property is operated under an operating agreement with the debtor." 11 U.S.C. § 101(2)(C).

The Investors do not contest that the Debtors performed essentially all functions related to the mortgage loans held by the Trusts, as well as numerous tasks essential to the preparation and distribution of payments and information to Certificateholders. Instead, the Investors argue that the Court should nevertheless find that the Trusts were not affiliates of the Debtors at the time the Investor Claims arose, because, they argue: (i) the Trusts should not be viewed as

[10] In enacting Section 510(b), Congress went further than the commentators on whom they principally relied — Professors Slain and Kripke — would have gone. *See* H.R. Rep. No. 95–595, at 196 (1978) ("The bill generally adopts the Slain/Kripke position."); John J. Slain & Homer Kripke, *The Interface Between Securities Regulation and Bankruptcy — Allocating the Risk of Illegal Securities Issuance Between Securityholders and the Issuer's Creditors*, 48 N.Y.U. L. Rev. 261, 288 (1973) ("Slain & Kripke," attached as Ex. 12 to the Kotliar Decl.). Slain and Kripke focused on the subordination solely of equity and subordinated debt securities. Slain & Kripke at 267-68. However, Congress included all securities of a debtor, or of an affiliate of the debtor, within Section 510(b)'s scope, again demonstrating that the sweep was intended to be broad. *See* 11 U.S.C. § 510(b).

"persons"; (ii) the Court should construe the services performed by the Debtors as something other than operating the business or property of the Trusts; and (iii) along similar lines, the governing documents should not be considered operating agreements. The Investors' arguments conflict with their own prior positions and with common sense.

1. The Trusts Are "Persons" Under the Bankruptcy Code

The Trusts are "persons" because persons include "corporations," and corporations in turn include "business trusts." 11 U.S.C. §§ 101(41); (9).[11] RMBS securitization trusts are business trusts because they are formed as profit-making enterprises and not merely grantor trusts to preserve the *res*. The Investors cannot dispute that the only case directly to address whether asset-backed securitization trusts are "persons" under the Bankruptcy Code — *In re Commercial Fin. Serv., Inc.* ("*CFS*") — held that the securitization trust that performed the same depositor, sponsor, and servicer roles as the Debtors did here was a "business trust" and thus an affiliate of the debtors. The Investors try to distinguish *CFS* by pointing to the Court of Appeals for the Second Circuit's opinion in *Shawmut Bank Conn. v. First Fidelity Bank (In re Secured Equip. Trust of E. Air Lines)*, 38 F.3d 86, 87-88 (2d Cir. 1994) ("*Eastern Airlines*"). (*See* Investor Mot. at 18-20.) But *CFS* and *Eastern Airlines* present no conflict; both lead to the conclusion that the Investor Claims should be subordinated.

a) The Trusts Are "Business Trusts"

The only court to address whether asset-backed securitization trusts are business trusts under the Bankruptcy Code — *CFS* — concluded that they are and therefore subordinated the

[11] Even if the Trusts were not "business trusts" under any particular understanding of that term, they nevertheless would be corporations under the Bankruptcy Code for the same substantive reasons. Specifically, the Trusts are "association[s] having a power or privilege that a private corporation, but not an individual or a partnership, possess[]." 11 U.S.C. § 101(9)(A)(i). The Trusts have transferable shares, centralized management, and limited liability, all hallmarks of a "private corporation" that an individual or partnership does not possess. *CFS*, slip op. at 80 n. 39 (finding that securitization trust would meet this alternative definition of "corporation" even were it not a "business trust").

securities claims of the certificateholders. The Investors fail to meaningfully distinguish *CFS*, and their assertion that *CFS* is "at odds with Second Circuit precedent" is mistaken.

In *CFS*, the certificateholders similarly argued that the trusts were not "persons" under the Bankruptcy Code. The court conducted an extended analysis of business trust law and of the securitization trust before it, and concluded that the trust was a business trust because it had "corporate powers and attributes." *CFS*, slip op. at 71-72, 79-81. As the court explained, unlike a grantor or testamentary trust, a securitization trust "has a business purpose and a profit-motive (to earn and distribute interest to Noteholders)." *Id.* at 80.

CFS is not in conflict with *Eastern Airlines*. On the contrary, *CFS* expressly considered *Eastern Airlines*, as well as various other articulations of the test discussed by other courts. *See id.* at 56-70 (referring to the *Eastern Airlines* test of whether the trust carried on some type of business or existed only to protect and preserve the *res* as the "active/passive distinction"). The court explicitly stated that it would have come to the same result under any of the tests, and specifically with respect to the *Eastern Airlines* test "conclude[d] that the Series Trust falls within the 'active business' category of trusts." *Id.* at 67 n.32.

The Trusts here are not meaningfully different from the trusts in *CFS*. As the Investors argue, the *CFS* court identified "whether the trust was in compliance with state law, whether the purpose stated in the trust document precludes the trust from being a business trust, and whether the trust had a business or commercial purpose as 'recurring' considerations" in determining whether a trust was a business trust. (Investor Mot. at 30.) Under each of these factors, the Trusts are indistinguishable from the *CFS* trusts. Like the trusts in *CFS*, the PLS Trusts (1) are business trusts under applicable state law;[12] (2) are not precluded from being business trusts

[12] The PLS Trusts formed as Delaware statutory trusts have precisely the same status under Delaware state law as the statutory trusts in *CFS*. And the PLS Trusts formed as New York common law trusts are business trusts under

under the trust documents; and (3) have the same commercial purpose of "earn[ing] and distribut[ing] interest to Noteholders." *CFS*, slip op. at 79-80.

Similarly, in *In re General Growth Properties, Inc.*, 409 B.R. 43 (Bankr. S.D.N.Y. 2009) (Gropper, J.), the court held that one of the debtor entities was a "business trust" and thus a "person" eligible for bankruptcy protection because it was "a profit-making enterprise [whose] purpose goes beyond merely conserving a trust res or holding title to land." *Id*. at 70-71 (citing *Eastern Airlines*). This made it a business trust even though it had no employees, independent managers, governing board, or transferable equity interest. *Id*. The Trusts at issue here, like the trust in *General Growth Properties*, are not trusts that merely hold title to assets. Rather, they hold mortgage loans that are actively managed to generate a return for Certificateholders — a return that, as history has shown, was far from guaranteed.[13]

New York law. Under New York law, the key distinction between a business trust and a nonbusiness trust "is that between an entity used to make profit (directly or indirectly) and one used to effect a gift or transfer of property." *Denmark Cheese Ass'n v. Hazard Advertising Co.*, 59 Misc. 2d 182, 298 N.Y.S.2d 98, 100 (N.Y. Sup. 1969), *modified on other grounds*, 33 A.D.2d 761 (N.Y. App. Div. 1969). The definition is intended to "to exclude family or strictly private trusts from the operation of the [business associations] act." N.Y. Legis. Doc., 1937, No. 65L, p. 8; 1937 Report, N.Y. Law Rev. Comm., p. 251. The PLS Trusts are not charitable or estate-planning vehicles, but entities formed for a business purpose, and thus qualify as business trusts. The distinction between the two forms of trusts is irrelevant here, not only because both were formed as business trusts under their applicable state laws, but also because there is no substantive difference to the Investors or the Debtors between the resulting securities (as demonstrated by all parties' agreement to use an illustrative deal for purposes of describing the substantive rights), and because the legal test focuses on substance over form. *Eastern Airlines*, 38 F.3d at 89 (explaining that courts examine a trust's attributes and purpose, not its form).

[13] *General Growth Properties* distinguished *Eastern Airlines* on these very grounds. *See In re General Growth Properties, Inc.*, 409 B.R. at 70 ("the trust in [*Eastern Airlines*] was not created to run a business or generate a profit, but only to act as a vehicle to facilitate a secured financing . . . ."). The Investors' reliance on *In re Gurney's Inn Corp. Liquidating Trust*, 215 B.R. 659 (Bankr. E.D.N.Y. 1997) is misplaced for the same reason. The court's decision in *Gurney's Inn* relied on express provisions of the underlying trust stating that the trust was not a business trust. Specifically, the trust documents prohibited the trustee from engaging in any business, and provided that the sole purpose of the trust was "to receive by assignment all the assets and liabilities of Gurney's [Corp.] and to conserve and protect the Trust Estate and collect and distribute the income and proceeds to the Trust Certificate holders after the payment of or provision for, expenses and liabilities." *Id*. at 667. There are no similar provisions in the Trust documents here.

b) *Eastern Airlines* Is Inapposite

Eastern Airlines involved a secured financing lease-back transaction in which Eastern Airlines created a trust to facilitate a loan secured by a portion of its fleet of aircraft. *Eastern Airlines*, 38 F.3d at 87-88. Thus, the trust in *Eastern Airlines* was simply interposed between the lenders and the debtors who took out the loan. Rather than incur the significant transaction costs of entering into security agreements with multiple lenders, Eastern placed title to the aircraft in the trust, leased those same aircraft back from the trust, and made "rental" payments to the trust, which then passed the payments on to its certificateholders, the lenders. From the outset, it was agreed that upon payment in full of the certificates, title to the collateral pool was to be re-conveyed to Eastern, and thus, the Trust did not meaningfully own any property other than the right to rental payments until the certificates were paid in full. *Id.* at 88.

The Court of Appeals noted repeatedly that the trust at issue "was established merely to secure the repayment of the certificateholders' loans to Eastern." *Id.* at 90; *see also id.* at 91. Indeed, as the bankruptcy court's decision made clear, the trust in *Eastern Airlines* was formed (and its certificates issued) under an indenture agreement directly between Eastern and the lenders. *In re Secured Equip. Trust of Eastern Airlines, Inc.*, 153 B.R. 409, 410 (Bankr. S.D.N.Y. 1993). Accordingly, the certificateholders were "actually secured creditors of Eastern." *Eastern Airlines*, 38 F.3d at 91.

By contrast, here, the Debtors transferred all title in the mortgage loans to the Trusts, which loans became the Trust's property. (Ex. 1, § 2.01(f).) The Investors recognize this fundamental distinction and argue elsewhere that their securities "exclusively represent ownership interests only in the Trust, *and do not represent any interest in or obligation of the Debtors*." (Investor Mot. at 11 (emphasis added).) *Eastern Airlines* is therefore inapposite. As a result of the sale, it thus became the Trusts' business to ensure that their property was operated to

generate the profit necessary to make the scheduled payments to Certificateholders (a task that the Debtors operated under the PSAs).

2. The Debtors Operated the Trusts' Business

The Investors initially sought to avoid affiliate status for the Trusts under Section 510(b) by arguing that "the Trusts retained material responsibilities" and "the Trusts were still responsible for handling the pivotal relationships with investors, and overseeing the servicer itself." (Rule 3013 Mot. at 21-22.) In other words, the Investors argued that the Trustees, not the Debtors, managed the Trusts' business. But it is beyond dispute that the Debtors performed essentially all material functions involved in managing the mortgage loan pool, and in providing payments and information to the Certificateholders (Local Rule 7056-1 Statement ¶¶ 53, 55–57, 61), so the Investors now attempt an about-face and argue that the Trusts have no business.

The Investors' new argument hinges on the notion that servicing the mortgage loans is the Debtors' business, not the business of the Trusts that own the loans. (Investor Mot. at 20.) But the argument proves too much. Of course, the servicer Debtors were in the business of servicing loans. Presumably, most entities that retain another to operate their business choose an entity specifically in the business of performing that function. If that were an exception, it would swallow the rule.

The fallacy of the Investors' position is concisely explained in their own papers on the Rule 3013 Motion, where they were careful to point out that loan servicing was ultimately the business of the Trusts, even though the Debtors performed the day-to-day operations. (*See* Rule 3013 Mot. at 6 n.4 ("But if the servicer failed in its duties, the trustee is required to assume the servicing obligations. Thus, the trustee is ultimately responsible for ensuring the servicer performs its duties." (citation omitted)).) In the event of such termination, "all authority and power of the Master Servicer under this Agreement, whether with respect to the Certificates . . .

or the Mortgage Loans or otherwise, shall subject to Section 7.02 pass to and be vested in the Trustee or the Trustee's designee." (PSA § 7.01.) That is precisely the sort of relationship that one would expect where the Debtors are operating the business or property of the Trusts. *See In re Consol. Cos.*, 113 B.R. 269, 271–74 (Bankr. N.D. Tex. 1989) (observing "business reality" to find entities were affiliates where one operated the other's property management contracts).

The Investors also ignore tasks performed by the Debtors that can only reasonably be characterized as the Trusts' business. For example, Debtor RFC was designated as the REMIC Administrator for the sample Trust and, as such, was responsible for quintessential business tasks of the Trust such as preparing tax returns, "act[ing] on behalf of each REMIC in relation to any tax matter or controversy involving the Trust Fund and (ii) represent[ing] the Trust Fund in any administrative or judicial proceeding relating to an examination or audit by any governmental authority with respect thereto." (PSA § 10.01(c),(d).)

It is irrelevant that the Debtors' rights and obligations were often established as retained rights at the same time that the Trusts were formed as part of a set of interrelated agreements, rather than being transferred to the Trusts in the first instance. *See Assured Guar. Mun. Corp. v. Flagstar Bank*, No. 11-2375, 2011 U.S. Dist. LEXIS 102722, at *13–14 (S.D.N.Y. Sept. 7, 2011) ("[P]rovisions of a contract or a related set of contracts should be read as a whole and every effort should be made to give them consistent meaning . . . [and] give effect to all [their] provisions." (quotations omitted)); s*ee also In re Basin Resources Corp.*, 190 B.R. 824, 826–27 (Bankr. N.D. Tex. 1996). In *Basin Resources*, a debtor created joint ventures, provided them oil and gas properties, and simultaneously named itself as manager of those properties to continue doing the oil and gas exploration the debtor had always done. *Id.* The court found that the

ventures were affiliates even though the debtor managed a business that was, in effect, always its business. *Id.* at 827.

3. The Debtors Operated Substantially All of the Trusts' Property

Putting aside whether the Debtors operated the Trusts' "business," the Investors have no meaningful response to the fact that the Debtors operated substantially all the Trusts' property. The mortgage loans constitute substantially all of the Trusts' property. The Investors note that the Debtors do not operate the Trusts' right to "put back" mortgage loans to the Debtors (i.e. the Trust Claims), but that is beside the point. The put back rights are simply a contractual remedy in respect of the loans themselves and the fact that the Trusts have asserted claims with respect to their property does not change the fact that the Debtors operate that property. In any event, the Trust Claims — which the Investors note are the subject of an $8.7 billion potential settlement — relate to loans in 336 Trusts with an original issue balance of approximately $193 billion, all of which the Debtors serviced. (Debtors' Second Suppl. Mot. for Approval of the RMBS Trust Settlement Agreements at 5, *In re Residential Capital, LLC*, No. 12-12020 (Bankr. S.D.N.Y. Oct. 19, 2012) [ECF No. 1887].) Valued at less than five percent of the original principal balance of the loans operated by the Debtors at the time the claims arose, the put back claims are clearly not "the Trust's most significant property right." (Investor Mot. at 26.)[14]

The Investors assert without any support that mortgage loans are not "operable" because they are financial assets. (Investor Mot. at 25.) But Section 101(2)(C) does not include any limitation on what type of property is operable or limit what it means to operate property. The mortgage loans are not financial instruments that can be passively held while payments roll in.

[14] Here again, the inconsistencies in the Investors' arguments are glaring. At times, the Investors paint the Trusts as doing nothing at all. (*See* Investor Mot. at 23.) Elsewhere, the Investors tout the Trustees' management of billions of dollars of claims and its activities interfacing with Certificateholders. (*See* Investor Mot. at 26; Rule 3013 Mot. at 6 n.4, 22.) The Investors cannot have it both ways. The truth, of course, is in the middle of the two extremes between which the Investors vacillate: consistent with their REMIC status, the Trusts do conduct limited business operations while the vast majority of their business and property is operated by the Debtors.

Extensive servicing operations are necessary to maximize the value of the loans on an ongoing basis. This includes, among other things, borrower contact for collecting payments; modifying loans or otherwise engaging in loss mitigation programs; and processing foreclosures and preserving, restoring, protecting, managing, marketing, and conveying those foreclosed properties. (*See* Debtor Mot. at 15-16; Ex. 1 (PSA) §§ 3.01, 3.02, 3.07, 3.12, 3.14, 4.02, 4.05, 8.05.)[15]

Next, the Investors take liberties with legislative history to argue that Congress "sought not to inadvertently capture special purpose trusts" in the definition of affiliate. (Investor Mot. at 25.) For support, they cite a single statement from a witness supporting proposed statutory language that was not adopted. Specifically, the Senate Bill added a requirement to Section 101(2)(C) that to be an "affiliate" the person's business or property not only must be operated by the Debtor, but the debtor *also* must control over 50 percent of the beneficial ownership of the person.[16] In the passage quoted by the Investors, a witness supported this control limitation because "special purpose corporations or trusts [] established to hold legal title to equipment being leased" *or* "other types of special-purpose financing," would not count as "affiliates" under that proposal. Bankruptcy Reform Act of 1978: Hearing Before the Subcomm. On Improvements in Jud. Machinery of S. Comm. On the Judiciary (1977) (statement of E. Lowell

[15] It is because these assets must be actively serviced that the Debtors petitioned the Court to allow them to continue servicing the loans after these Chapter 11 proceedings were commenced, to "minimize adverse effects on existing mortgage loan securitizations for which the Debtors function as servicer." (*Debtors' Mot. for Interim and Final Orders under §§ 105(a), 362, 363, 1107(a) & 1108 (I) Auth'g Debtors to Continue in Ordinary Course of Bus. (A) Serv'g Non-Gov't Ass'n Loans, & (B) Sale Activities Related to Certain Loans in Foreclosure & Real Estate Owned Prop., & (II) Granting Limited Stay Relief to Enable Borrowers to Assert Related Countercl. in Foreclosure & Eviction Proceedings*, filed on May 14, 2012 [ECF No. 46], at 20.)

[16] *Id.* (comparison of H.R. 8200, as reported, and S. 2266, as introduced, § 101(2), italics showing Senate additions to H.R. 8200: "'affiliate' means- . . . (C) person whose business or substantially all of whose property is operated under a lease or operating agreement by a debtor, *and more than 50 percent of the beneficial ownership of which is under the control of the debtor or persons who control the debtor*"). The witness specifically stated that this additional language "clarifies what is a definitional defect in the House Bill." Bankruptcy Reform Act of 1978: Hearing Before the Subcomm. On Improvements in Jud. Machinery of S. Comm. On the Judiciary (1977) (statement of E. Lowell Dinius, Vice President, American Fletcher Leasing Association), Arnold & Porter Legis. Hist: P.L. 95-598, BANKR-78-LH 7 (Westlaw).

Dinius, Vice President, American Fletcher Leasing Association), Arnold & Porter Legis. Hist: P.L. 95-598, BANKR-78-LH 7 (Westlaw). Thus advised that it was necessary to include such a control limitation to prevent the term "affiliate" from reaching special purpose trusts, Congress declined to include any such requirement.[17] If anything, this history demonstrates that Congress *did* intend to capture special purpose trusts.

4. The PSAs and Servicing Agreements Are Operating Agreements

The Debtors operated the Trusts' business and substantially all the Trusts' property as set forth above, and the agreements under which the Debtors did so — the PSAs and Servicing Agreements — are therefore "operating agreements." The Investors concede that an "operating agreement" can include any agreement "whereby a business or property is operated." (Investor Mot. at 26.) This broad definition encompasses many types of agreements not explicitly styled as "operating agreements." *See, e.g.*, *In re Basin Resources Corp.*, 190 B.R. at 827 (joint venture agreement); *In re Minton Grp., Inc.*, 27 B.R. 385, 389 (Bankr. S.D.N.Y. 1983) *aff'd*, 46 B.R. 222 (S.D.N.Y. 1995) (limited partnership agreement); *In re Reynolds*, 13 B.R. 658, 659 (Bankr. N.D. Ga. 1981) (employment agreement).

The Investors nevertheless suggest that an agreement is only an "operating agreement" "in unique circumstances where the debtor [is] effectively running the business as if it were the owner." (Investor Mot. at 27.) Again, the Investors offer no support for their restrictive reading. Moreover, that interpretation is at odds with the text of Section 101(2)(C), which includes not only an agreement to operate the business, but also to operate substantially all of the property, and thus cannot reasonably be limited to agreements to "effectively run[] the business as if it were the owner." The Investors' restrictive reading is also at odds with case law. *See, e.g.*, *In re*

[17] Congress did address the witness's concern about lessee-debtors, by making clear in the definition that while operating a person's business under a lease is still included in the definition, operating property under a lease is not. *See* 11 U.S.C. § 101(2)(C).

Consol. Cos., 113 B.R. at 271-73 (agreement was operating agreement even where affiliate maintained its own corporate offices, officers, and employees, and agreement claimed debtor had no right to own or manage affiliate); *In re Reynolds*, 13 B.R. at 659 (employment agreement was operating agreement where it appointed debtor as chief operating officer).

* * *

The Certificates are securities "of" the Debtors because Congress clearly intended that Section 510(b) have a broad scope beyond the Debtors' "own" securities, and there is no basis to conclude that Congress would have intended to exclude the issuer of the securities from the broad general language. Moreover, even if Section 510(b) had been drafted to cover only securities representing a beneficial ownership in the Debtors, or such ownership in an affiliate, the Investor Claims would still be subordinated. The Trusts own pools of mortgage loans that are actively managed to generate a profit for Investors, and the Debtors conducted all the operations to actively manage those loans on behalf of the Trusts pursuant to the PSAs. The Trusts were therefore business trusts and affiliates of the Debtors within the meaning of Section 510(b) at the time the claims arose, and the Investor Claims must be subordinated regardless of whether the Certificates are understood to be "of" the Debtors.

II. SECTION 510(A) REQUIRES SUBORDINATION OF THE INVESTOR CLAIMS

The Investors do not deny that the agreed-to "waterfall" structure of payments to the various tranches of Certificates constitutes an enforceable subordination agreement, which requires that the more senior Certificateholders recover before the more junior Certificateholders, nor that the Certificates they sold included the right to receive subsequent recoveries for past losses. (*See* Debtor Mot. at 24-25.) The Investors also do not deny that, if they are allowed to recover *pari passu* with the Trust Claims as general unsecured creditors of the Debtors' estate, it will enlarge their recovery at the expense of other Certificateholders whose recovery will be

diluted by the Investor Claims. (*See* Debtor Mot. at 25-26; Local Rule 7056-1 Statement ¶¶ 68, 70.) The Investors purchased their securities knowing their priorities of payment and the associated risks. They agreed to accept those risks in return for the opportunity to receive an enhanced payout. (*See* Local Rule 7056-1 Statement ¶ 27.) However, they now seek to shed the disadvantages of that bargain by requesting the *non*-enforcement of their contractual allocation of recoveries.

A. The Bankruptcy Code Does Not Permit the Investors To Evade Their Contractual Subordination Agreements Through Assertions of Fraud

The Investors' sole justification for trying to evade their contractual subordination agreements — namely, that they were induced to enter the agreements by fraud and the terms of the governing documents do not directly subordinate such fraud claims — fails as a matter of law. One of the recognized purposes of Section 510(a) is to prevent claimants in a bankruptcy from asserting claims for securities fraud to subvert their contractual subordination agreements. *See Levine v. Resolution Trust Corp (In re Coronet Capital)*, No. 90 B 13646 (FGC), No. 94 Civ. 1187 (LAP), 1995 U.S. Dist. LEXIS 10175, at *23 (S.D.N.Y. July 20, 1995). In *In re Coronet Capital*, the court invoked Section 510(a) to reject an attempt by subordinated debentureholders to use a fraud claim to recover on par with general unsecured creditors. "[E]ven when a subordinated lender was defrauded by the debtor, the subordination clause must still be enforced." *Id.* at *16. The Investors agreed to be subordinated and even if they were defrauded, "there is no reason why their risk of loss from their subordinated Notes should be shifted to" senior Certificateholders and general creditors. *Id.* at *21; *see also id.* at *23 ("Even if [the subordinated debenture holders] were defrauded by [the debtor], that is no reason to improve

their position vis-à-vis" the general unsecured creditors) (quoting *In re Holiday Mart*, 715 F.2d 430, 433-34 (9th Cir. 1983)).[18]

B. New York Law Precludes the Investors from Depriving Current Certificateholders of the Benefit of the Bargain Reflected in the PSAs

The Investors' back-door attempt to recover at the expense of the other Certificateholders is also contrary to the basic tenets of contract law. Under New York law, which governs the PSAs, "[i]n every contract there is an implied covenant [of good faith and fair dealing] that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." *Kirke La Shelle Co. v. Paul Armstrong Co.*, 188 N.E. 163, 167 (N.Y. 1933); *see also* Ex. 1 (PSA) § 11.04 (electing New York law).

Non-subordination of the Investor Claims would deprive other Certificateholders of the benefit of their bargain in two ways. First, for the Certificates that the Investors still hold, recovery on Investor Claims *pari passu* with the Trust Claims undermines the protection afforded to their fellow Certificateholders by the PSAs' express subordination structure. Second, for the Certificates they sold, recovery on Investor Claims *pari passu* with the Trust Claims undermines the value of the Certificates — and the right to recovery embedded therein — to the very parties to whom they sold their certificates. (*See* Debtor Mot. at 26-28.)

Granting the Investor Claims would therefore undermine the Investors' express agreement in the PSAs, including the waterfall payments structure and the promise that:

[18] It is entirely beside the point whether representation and warranty claims are the sole remedy for an investor in RMBS who claims to have been defrauded. (*See* Investor Mot. at 10.) The question currently before the Court is not whether the Investor Claims should be *disallowed* because representation and warranty claims are their sole remedy. What is at issue *now* is whether the Investor Claims would be subject to subordination if they are ever allowed in any amount. Whether this Court should follow the Fifth Circuit Court of Appeals to find that the Investor Claims should be disallowed in their entirety is an issue for another day. *See Lone Star Fund V (US), LP v. Barclays Bank PLC*, 594 F.3d 383, 389 (5th Cir. 2010). The Debtors are expressly preserving and not waiving their ability to object to the allowance of the Investor Claims on any and all grounds in the future.

> no one or more Holders of Certificates of any Class shall have any right in any manner whatever by virtue of any provision of this Agreement to affect, disturb or prejudice the rights of the Holders of any other of such Certificates . . . or to obtain or seek to obtain priority over or preference to any other such Holder. . . .

(Ex. 1 (PSA) § 11.03(c).) To be sure, as the Investors point out, the governing documents do not explicitly state that fraud claims are subject to the subordination "waterfall." (Investor Mot. at 8-9.) Nevertheless — because of the estates' limited resources — recovery by the Investors for their securities and tort claims *pari passu* with the Trust Claims will accomplish indirectly what the RMBS trust structures were designed to prevent.

The Investors essentially argue that the Court should ignore the substantive effect of the relief they seek. (*See* Investor Mot. at 8-10.) Under the Investors' theory, enforcement of their contractual promise to be subordinated in the distribution of the "Available Distribution Amount" by the Trusts does not preclude them from actively reducing the recovery that will form part of the "Available Distribution Amount." The equitable principles that underlie Section 510 of the Bankruptcy Code do not countenance such gamesmanship.

These are precisely the types of actions to which the covenant of good faith and fair dealing applies. The absence of a particular promise from the express terms of a contract "does not always mean that it was not intended." *Havel v. Kelsey-Hayes Co.*, 83 A.D.2d 380, 382 (N.Y. App. Div. 4th Dep't 1981). The duty of good faith includes "any promises which a reasonable person in the position of the promisee would be justified in understanding were included." *Dalton v. Educ. Testing Serv.*, 663 N.E.2d 289, 291 (N.Y. 1995) (citing *Rowe v. Great Atl. & Pac. Tea Co.*, 385 N.E.2d 566, 569 (N.Y. 1978)). A reasonable Certificateholder would expect that the explicit subordination of junior classes of Certificates and pro rata distribution within classes includes an implicit promise not to circumvent that structure to secure a superior claim at the expense of other Certificateholders.

III. THE INVESTOR CLAIMS SHOULD BE EQUITABLY SUBORDINATED PURSUANT TO SECTION 510(C)

There is little doubt that subordination of the Investor Claims is appropriate under both Sections 510(a) and 510(b) of the Bankruptcy Code. However, if the Court declines to do so for any reason, the Court should, in keeping with the spirit and intention of Section 510, subordinate the Investor Claims pursuant to Section 510(c) of the Bankruptcy Code.

First, the Investors' rhetoric characterizing the argument here for the application of Section 510(c) as "borderline frivolous" is belied by their own admission, just two pages later, that the Supreme Court "arguably left open" room for no-fault subordination (Investor Mot. at 35-37) and that the cases cited in the Debtors' opening brief do exactly that. *See, e.g.*, *SPC Plastics Corp. v. Griffith (In re Stucturlite Plastics Corp.)*, 224 B.R. 27, 35-36 (B.A.P. 6th Cir. 1998); *Shearer v. Tepsic (In re Emergency Monitoring Techs.)*, 366 B.R. 476, 506-09 (Bankr. W.D. Pa. 2007).[19] There is no controlling law on the issue in this Circuit, and the Investors would simply prefer that the Court not follow the cases cited by the Debtors.

Stripped of baseless accusations, the Investors' substantive response is to construe the Debtors' request as impermissibly "categorical." (Investor Mot. at 35.) But the Debtors do not seek "categorical" subordination. Rather, the Debtors seek to subordinate specific claims by parties that entered into detailed contracts expressly contemplating recovery from the Debtors, providing an alternative mechanism for such recovery that is simultaneously being pursued, and expressly addressing the allocation of such recovery among Certificateholders that would be frustrated if the Investor Claims are classified as general unsecured claims.

[19] It is true that most courts address Section 510(c) in the context of creditor misconduct, but the Investors do not contest that that is not the only context in which Section 510(c) is employed.

No-fault equitable subordination based on such factors comports with the Supreme Court's guidance in *United States v. Noland*, 517 U.S. 535, 543 (1996). *Noland* held only that Section 510(c) cannot be used to abrogate Congressional determinations regarding priority and that "equitable subordination must not occur at the level of policy choice at which Congress itself operated in drafting the Code." *Id*. at 543 (Congress provided that tax penalties were to be treated as administrative claims and Section 510(c) could not be used to reach precisely the opposite result).

The Debtors here seek to do the very opposite: to ensure a result consistent with the purposes underlying Section 510 to prevent the Investors from using securities claims to increase their recovery at the expense of other creditors, including those to whom they agreed to be subordinated.[20] The Debtors do *not* request subordination based on "nothing more than the very characteristic" that, absent subordination, entitles the Investors to a certain priority. *United States v. Reorganized CF&I Fabricators of Utah, Inc.*, 518 U.S. 213, 228-29 (1996) (discussing the holding in *Noland*). Rather, the Debtors are seeking a limited holding that *these* Investor Claims, beset with the inequities that result from the Investors' particular contractual agreements and overlapping claims, should be subordinated to the claims of general unsecured creditors to prevent a result at odds with the Investors' agreements, other creditors' expectations, and common sense.

[20] While Congress might not have envisioned the complex securitization structure employed by the Debtors here, Congress nevertheless intended for courts to retain the power to subordinate claims arising from such structures where, based on the specific facts and circumstances, it would be equitable to do so. *See, e.g., Montgomery Ward Holding Corp. v. Schoeberl (In re Montgomery Ward)*, 272 B.R. 836, 845 (Bankr. D. Del. 2001) (allowing for equitable subordination under Section 510(c) where claims arising from stock redemption plan could not be equitably subordinated under Section 510(b)).

CONCLUSION

For the foregoing reasons, the Court should deny the Investor Motion.

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