Docket #0185 Date Filed: 11/1/2013

UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

In re:	
RESIDENTIAL CAPITAL, LLC, et al.,	Case No. 12-12020 (MG) Chapter 11 Jointly Administered
Debtors.	
RESIDENTIAL CAPITAL, LLC; et al.,	
Plaintiffs,	Adv. Pro. No. 13-01343 (MG)
v.	
UMB BANK, N.A., IN ITS CAPACITY AS INDENTURE TRUSTEE FOR THE 9.625% JUNIOR SECURED GUARANTEED NOTES, et al.,	
Defendants.	
OFFICIAL COMMITTEE OF UNSECURED CREDITORS, on behalf of the estate of the Debtors,	
Plaintiffs,	Adv. Pro. No. 13-01277 (MG)
v.	
UMB BANK, N.A., AS SUCCESSOR INDENTURE TRUSTEE UNDER THAT CERTAIN INDENTURE, dated as of June 6, 2008, et al.,	
Defendants.	

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PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW OF WELLS FARGO BANK, N.A., IN ITS CAPACITY AS THIRD PRIORITY COLLATERAL AGENT AND COLLATERAL CONTROL AGENT

FINDINGS OF FACT

A. The AFI Revolver and Related Security Agreement

1. On or about June 4, 2008, certain of the above-captioned debtors (the "Debtors") entered into a Loan Agreement (the "Original Loan Agreement") with Ally Financial, Inc. (f/k/a GMAC, LLC) ("AFI"), as agent and lender. *See* Plaintiffs' Ex. ("PX") 5.

2. In accordance with the Original Loan Agreement, certain Debtors, AFI, as agent and lender, and Wells Fargo Bank, N.A. (the "Collateral Agent"), in its capacity as first priority collateral agent and collateral control agent, entered into a First Priority Pledge and Security Agreement and Irrevocable Proxy (as amended, the "Original Revolver Security Agreement"). *See* PX 7.

3. On or about December 30, 2009, (i) the Original Loan Agreement was amended and restated in its entirety by the Amended and Restated Loan Agreement (the "AFI Revolver") (*see* PX 6), and (ii) the Original Revolver Security Agreement was amended and restated in its entirety by the Amended and Restated First Priority Pledge and Security Agreement and Irrevocable Proxy (the "Revolver Security Agreement") (*see* PX 8).

4. The Revolver Security Agreement granted the Collateral Agent liens on and security interests in certain collateral (the "Collateral") to secure the Debtors' obligations under the AFI Revolver. *See* PX 8 (Revolver Security Agreement, §§ 2-5).

B. The Junior Secured Notes

5. On or about June 6, 2008, Residential Capital, LLC ("ResCap"), as issuer, certain

of the Debtors, as guarantors, and U.S. Bank, National Association (the "Indenture Trustee")[1] entered into a certain Indenture, dated as of June 6, 2008 (the "Junior Secured Notes Indenture"). *See* PX 1.

6. In accordance with the Junior Secured Notes Indenture, ResCap issued approximately $4 billion of 9.625% Junior Secured Guaranteed Notes due 2015 (the "Junior Secured Notes"). *See* PX 1.

7. Pursuant to Section 8.01 of the Junior Secured Notes Indenture, on or about June 6, 2008, certain Debtors, the Indenture Trustee, and the Collateral Agent, in its capacity as third priority collateral agent and collateral control agent, entered into a Third Priority Pledge and Security Agreement and Irrevocable Proxy (the "Original Notes Security Agreement"). *See* PX 3.

8. On or about December 9, 2009, the Original Notes Security Agreement was amended and restated in its entirety by the Amended and Restated Third Priority Pledge and Security Agreement and Irrevocable Proxy (the "Notes Security Agreement"). *See* PX 4.

9. The Notes Security Agreement granted the Collateral Agent liens on and security interests in the Collateral to secure the payment of the Debtors' obligations under the Junior Secured Notes Indenture and the Junior Secured Notes. *See* PX 4 (Notes Security Agreement, §§ 2-5).

C. The Intercreditor Agreement

10. On or about June 6, 2008, the Indenture Trustee, the Collateral Agent, in its capacity as first priority collateral agent, second priority collateral agent, third priority collateral agent, and collateral control agent, AFI, as lender agent, and certain Debtors entered into an intercreditor agreement (as amended, the "Intercreditor Agreement"). *See* PX 2.

[1] UMB Bank, N.A. is the successor Indenture Trustee under the Junior Secured Notes Indenture.

11. Section 2.1(b) of the Intercreditor Agreement provides that the liens and security interests granted under the Revolver Security Agreement are first priority liens and security interests senior to the liens and security interests granted under the Notes Security Agreement.[2] *See* PX 2.

D. The Collateral Agent's Limited Duties

12. As set forth in the governing documents, the Collateral Agent undertook a strictly ministerial role with regard to the Collateral. *See* Transcript of Deposition of Michael Pinzon, p.97: 13-23 ("It means that whatever we sign to we should have a copy of and that when we are asked to release a document, that we review that document from administrative point of view and in conjunction with counsel to review that prior to any release of any collateral that was pledged to us prior to its release to make sure that the proper documentation was provided prior to its release.").

13. The governing documents expressly limit the Collateral Agent's duties and provide it with exculpation in connection therewith.

14. The AFI Revolver provides the Collateral Agent with full protection with respect to any action or inaction. *See* PX 6 (AFI Revolver, § 13.15).

15. The Revolver Security Agreement provides that the Collateral Agent has no duty to act unless directed, has only those duties set forth in the Revolver Security Agreement and related agreements, has no obligation to investigate any instruction received, is not liable for the misconduct of its agents, has no liability for any action taken (except for gross negligence or

[2] At the time the parties entered into the Intercreditor Agreement, certain other obligations of the Debtors were secured by second priority liens and security interests in the Collateral (the "Original Second Lien Obligations"). *See* Direct Testimony of Teresa Rae Farley, p.5 at ¶ 9 (Docket Nos. 78 and 131). The Original Second Lien Obligations were repaid and retired in full. *Id.* Upon the repayment and retirement of the Original Second Lien Obligations, the liens and security interests granted under the Notes Security Agreement became second priority liens and security interests. *Id.*

willful misconduct), and is entitled to rely conclusively on documents believed to be genuine. *See* PX 8 (Revolver Security Agreement, §§ 14(a), 14(d), 14(f), 14(g), 14(h), 14(o)).

16. The Intercreditor Agreement provides that the Collateral Agent is not liable for any action or inaction (except for gross negligence or willful misconduct) and has no liability with respect to the Collateral (except for gross negligence, bad faith, or willful misconduct). *See* PX 2 (Intercreditor Agreement, §§ 5.6(e), 5.6(j)).

17. The Junior Secured Notes Indenture provides that the Indenture Trustee and its agents (including the Collateral Agent) have no liability for the protection of the Collateral. *See* PX 1 (Junior Secured Notes Indenture, § 8.02).

18. The Notes Security Agreement provides that the Collateral Agent has only those duties set forth in the Notes Security Agreement and related agreements, is not liable for the misconduct of its agents, has no liability for any action taken (except for gross negligence or willful misconduct), and is entitled to rely conclusively on documents believed to be genuine. *See* PX 4 (Notes Security Agreement, §§ 15(d), 15(g), 15(h), 15(o)).

19. The Intercreditor Agreement and Notes Security Agreement further provide that the Collateral Agent is not responsible for perfecting or monitoring security interests in the Collateral. *See* PX 2 (Intercreditor Agreement, § 5.6(h)); PX 4 (Notes Security Agreement, §§ 15(k), 15(v)); *see also* PX 1 (Junior Secured Notes Indenture, § 8.01).

E. The Collateral Agent's Charging Lien, Right to Payments of its Fees and Expenses, and Indemnification

20. In furtherance of the foregoing provisions of the governing agreements, the Collateral Agent has rights to payment of its fees and expenses and complete indemnification.

21. The AFI Revolver provides that the Debtors will pay all fees and expenses of the Collateral Agent and will indemnify the Collateral Agent against all liabilities (except for gross negligence, bad faith or willful misconduct). *See* PX 6 (AFI Revolver, §§ 3.03, 10.01).

22. The Revolver Security Agreement provides that the Debtors will pay all fees and expenses of the Collateral Agent and will indemnify the Collateral Agent against all liabilities (except for gross negligence or willful misconduct), and that the proceeds of the Collateral must be applied first to the payment of the Collateral Agent's fees and expenses. *See* PX 8 (Revolver Security Agreement, §§ 12(f), 14(r), 14(t)).

23. The Intercreditor Agreement provides that the Debtors will pay all fees and expenses of the Collateral Agent and will indemnify the Collateral Agent against all liabilities (except for gross negligence or willful misconduct). *See* PX 2 (Intercreditor Agreement, §§ 5.6(o), 5.6(q)).

24. The Notes Security Agreement provides that the Debtors will pay all fees and expenses of the Collateral Agent and indemnify the Collateral Agent against all liabilities (except for gross negligence or willful misconduct), and that the proceeds of the Collateral must be applied first to the payment of the Collateral Agent's fees and expenses. *See* PX 4 (Notes Security Agreement, §§ 13(f), 15(r), 15(t)).

25. The Junior Secured Notes Indenture provides that the Debtors will indemnify the Collateral Agent against all liabilities (except for negligence or bad faith), the Collateral Agent is empowered to collect funds, and money collected must be paid first pro rata to the Indenture Trustee and the Collateral Agent for outstanding amounts due. *See* PX 1 (Junior Secured Notes Indenture, §§ 6.10, 7.07(g), 8.03(b)).

F. Releases of Collateral under the AFI Revolver and the Junior Secured Notes Indenture

26. From time to time, in accordance with the terms prescribed by the Revolver Security Agreement, AFI Revolver, and the Intercreditor Agreement, the Collateral Agent was directed to execute releases of liens and security interests granted under the Revolver Security Agreement. *See* Direct Testimony of Teresa Rae Farley, p.17 at ¶ 44 (Docket Nos. 78 and 131) ("Precisely as anticipated by the governing documents, assets regularly were released from the Collateral securing the Revolver and the Junior Secured Notes."); Transcript of Deposition of Michael Pinzon, p.122:7-22 ("I reviewed the documentation and reviewed, I guess, the requirements under the intercreditor and the pledge agreement. And I think there's ancillary prohibitions [sic] under the indenture, which stated you need an officer's certificate and an opinion of counsel, and I think those were under the indenture and the intercreditor. Then under the loan agreement there would be a consent and direction to release, in reference to the first lien pledge agreements, and reviewed that they were in the same form as noted in those agreements, in reference to those three documents.").

27. More specifically, the Revolver Security Agreement provides, in relevant part, "Collateral shall from time to time be released from the security interest created by this Agreement pursuant to and in accordance with the provisions of the Loan Agreement." *See* PX 8 (Revolver Security Agreement, § 9).

28. The AFI Revolver authorizes the Collateral Agent to release certain Collateral. *See* PX 6 (AFI Revolver, § 12.11).

29. In executing such releases of liens and security interests, the Collateral Agent was entitled to rely conclusively on Collateral Release Certificates delivered to the Collateral Agent

and incurred no liability to any person in connection with acting in reliance thereon. *See* PX 6 (AFI Revolver, § 12.11).

30. A Collateral Release Certificate is a direction to the Collateral Agent to release Collateral. *See* PX 6 (AFI Revolver, § 12.11, Schedule 1.01-8, Exhibit 9.02).

31. A form of Collateral Release Certificate is included in Exhibit 9.02 to the AFI Revolver. *See* PX 5 (AFI Revolver, Exhibit 9.02).

32. The Intercreditor Agreement provides that the Collateral Agent is entitled to rely conclusively on documents believed to be genuine and any request or direction of a Relevant Directing Party. *See* PX 2 (Intercreditor Agreement, §§ 5.6(c), 5.6(l)).

33. "Relevant Directing Party" is defined as "the following Person(s) who are entitled to instruct or direct the Collateral Control Agent: (a) (i) until the Discharge of First Priority Claims has occurred, the Lender Agent . . . ." *See* PX 2 (Intercreditor Agreement, § 1).

34. From time to time, in accordance with the terms prescribed by the Intercreditor Agreement, the Junior Secured Notes Indenture, and the Notes Security Agreement, the Collateral Agent was directed to execute releases of liens and security interests granted under the Notes Security Agreement. *See* Direct Testimony of Teresa Rae Farley, p.17 at ¶ 44 (Docket Nos. 78 and 131).

35. The Intercreditor Agreement further provides that, if liens under the Revolver Security Agreement are released, the associated liens under the Notes Security Agreement automatically are released. *See* PX 2 (Intercreditor Agreement, § 5.1); Direct Testimony of Teresa Rae Farley, p.8 at ¶ 17 (Docket Nos. 78 and 131).

36. The Junior Secured Notes Indenture provides that the liens and security interests under the Notes Security Agreement may be released in accordance with the Intercreditor

Agreement and also under the enumerated circumstances. *See* PX 1 (Junior Secured Notes Indenture, § 8.04); Direct Testimony of Teresa Rae Farley, p.8 at ¶ 16 (Docket Nos. 78 and 131).

37. In executing releases of liens and security interests granted under the Notes Security Agreement, the Collateral Agent was entitled to rely conclusively on Officer's Certificates and Opinions of Counsel delivered to the Collateral Agent. *See* PX 4 (Notes Security Agreement, § 10); Transcript of Deposition of Michael Pinzon, p.120:19-24 ("Q. Did Wells understand that it was allowed to conclusively rely upon an officer's certificate and an opinion of counsel delivered in connection with releases? A. Yes.").

38. The form of Officer's Certificate is Exhibit F to the Junior Secured Notes Indenture and Attachment III to the Notes Security Agreement. *See* PX 1 (Junior Secured Notes Indenture, Exhibit F); PX 4 (Notes Security Agreement, Attachment III).

39. The form of Opinion of Counsel is Exhibit G to the Junior Secured Notes Indenture and Attachment IV to the Notes Security Agreement. *See* PX 1 (Junior Secured Notes Indenture, Exhibit G); PX 4 (Notes Security Agreement, Attachment IV).

40. One release that has been at issue is the release dated May 14, 2010 (the "LOC Release"). *See* PX 134 (ALLY_0070276-462).

41. In connection with the LOC Release, the Collateral Agent received a Collateral Release Certificate. *See* PX 134 (ALLY_0070279-438).

42. The Collateral Agent received an Officer's Certificate and Opinion of Counsel. *See* PX 134 (ALLY_0070384-438, ALLY_0070450-462).

43. The Indenture Trustee also received the Officer's Certificate and Opinion of Counsel. *See* PX 134 (ALLY_0070384-438, ALLY_0070450-462); Transcript of October 16, 2013 (Cross Examination of Teresa Rae Farley), p.202:23-p.203:9 ("For every lien release, there

was an officer certificate prepared, executed by a manager within the Treasury group that certified that the necessary requirements were met. There was an asset list attached which included both primary collateral and all collateral that was being transferred that had a label of unpledged, so that would have covered blanket lien, and it would have covered – again, in an abundance of caution, it would have probably picked up some things that might not have been subject to the blanket lien. These were then attached to an officer certificate, and in accordance with the terms of the indentures for the second and third bondholders, they were sent off to Wells Fargo and to the trustee.").

44. Another release that has been at issue is the released dated May 17, 2010 (the "Mortgage Loan Release"). *See* PX 135 (ALLY_0070767-875).

45. In connection with the Mortgage Loan Release, the Collateral Agent received a Collateral Release Certificate. *See* PX 135 (ALLY_0070770-815).

46. The Collateral Agent also received an Officer's Certificate and Opinion of Counsel. *See* PX 135 (ALLY_0070833-848, ALLY_0070862-875).

47. The Indenture Trustee also received the Officer's Certificate and Opinion of Counsel. *See* PX 135 (ALLY_0070833-848, ALLY_0070862-875); Transcript of October 16, 2013 (Cross Examination of Teresa Rae Farley), p.202:23-p.203:9.

48. Another release that has been at issue is the release dated May 27, 2011 (the "Servicing Advance Release"). *See* PX 130 (ALLY_0075025-154).

49. In connection with the Servicing Advance Release, the Collateral Agent received a Collateral Release Certificate. *See* PX 130 (ALLY_0075028-123).

50. The Collateral Agent also received an Officer's Certificate and Opinion of Counsel. *See* PX 130 (ALLY_0075124-147, ALLY_0075149-154).

51. The Indenture Trustee also received the Officer's Certificate and Opinion of Counsel. *See* PX 130 (ALLY_0075124-147, ALLY_0075149-154); Transcript of October 16, 2013 (Cross Examination of Teresa Rae Farley), p.202:23-p.203:9.

52. Each of the Collateral Release Certificates delivered to the Collateral Agent in connection with the LOC Release, Mortgage Loan Release, and Servicing Advance Release directed the release of certain Collateral. *See* PX 134 (ALLY_0070279-462); PX 135 (ALLY_0070770-815); PX 130 (ALLY_0075028-123).

53. Each of the Officer's Certificates delivered to the Collateral Agent in connection with the LOC Release, Mortgage Loan Release, and Servicing Advance Release (i) stated the authorization of the signatory to execute and deliver the Officer's Certificate, (ii) requested the release of liens and security interests on certain Collateral, and (iii) stated that the conditions specified in Section 8.04 of the Junior Secured Notes Indenture applicable to the release of liens and security interests on the Collateral had been satisfied. *See* PX 134 (ALLY_0070384-438); PX 135 (ALLY_0070833-848); PX 130 (ALLY_0075124-147).

54. Each of the Opinions of Counsel delivered to the Collateral Agent in connection with the LOC Release, Mortgage Loan Release, and Servicing Advance Release (i) stated that the signatory was counsel, (ii) stated that the signatory examined the Security Agreement, Indenture, and the Officer's Certificate, and (iii) opined that the Officer's Certificate was in the form required by Section 8.04 of the Junior Secured Notes Indenture and that no other documents were required to be delivered to the Collateral Agent or the Indenture Trustee as a condition to the requested release of liens and security interests on the collateral. *See* PX 134 (ALLY_0070450-462); PX 135 (ALLY_0070862-875); PX 130 (ALLY_0075149-154).

CONCLUSIONS OF LAW

1. The Collateral Release Certificates delivered to the Collateral Agent in connection with the LOC Release, Mortgage Loan Release, and Servicing Advance Release were in the form required by the Revolver Security Agreement, AFI Revolver, and Intercreditor Agreement.

2. The Officer's Certificates and Opinions of Counsel delivered to the Collateral Agent in connection with the LOC Release, Mortgage Loan Release, and Servicing Advance Release were in the form required by the Junior Secured Notes Indenture, the Notes Security Agreement, and the Intercreditor Agreement.

3. The Collateral Agent was entitled to and did rely conclusively on the Collateral Release Certificates, Officer's Certificates, and Opinions of Counsel, including the representations made therein, which were delivered to the Collateral Agent in connection with the LOC Release, Mortgage Loan Release, and Servicing Advance Release. *See OFSI Fund II, LLC v. Canadian Imperial Bank of Commerce*, 82 A.D.3d 537, 920 N.Y.S.2d 8 (1st Dep't 2011), leave to appeal denied, 2011 WL 2183850 (N.Y. 2011) (holding that the administrative and collateral agent did not breach the unambiguous terms of the credit and note agreements by releasing a lien on collateral in accordance with the governing documents).

4. The Debtors are required to indemnify the Collateral Agent from any and all liability and expenses in connection with releases of liens on the Collateral, including the LOC Release, Mortgage Loan Release, and Servicing Advance Release.

SO ORDERED

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U.S.B.J