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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	)	Chapter 11
RESIDENTIAL CAPITAL, LLC, et al.,	)	Case No. 12-12020 (MG)
Debtors.	)	Jointly Administered

OBJECTION OF THE NOTES TRUSTEE AND AD HOC COMMITTEE OF JUNIOR SECURED NOTEHOLDERS TO CONFIRMATION OF PLAN PROPONENTS' CHAPTER 11 PLAN

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TO THE HONORABLE MARTIN GLENN,
UNITED STATES BANKRUPTCY JUDGE:

UMB Bank, N.A., as successor Notes Trustee (in such capacity, the "Notes Trustee") under that certain Indenture dated as of June 6, 2008 (the "JSN Indenture") for 9.625% Junior Secured Guaranteed Notes due 2015 (the "Junior Secured Notes") of Residential Capital, LLC (the "Issuer") and the Ad Hoc Committee of Junior Secured Noteholders (the "Ad Hoc Committee"), by and through their undersigned counsel, hereby file this objection (the "Objection") to confirmation of the chapter 11 plan (the "Plan") filed on August 23, 2013, by the Plan Proponents[1] in the above-captioned chapter 11 cases.[2] In support of the Objection, the Notes Trustee, acting on behalf of the holders of the Junior Secured Notes (the "JSNs"), and the Ad Hoc Committee, respectfully state as follows:

PRELIMINARY STATEMENT

1. If the Court determines in connection with the Phase I portion of the JSN Adversary Proceeding that the JSNs are entitled to receive under the Plan all amounts owing under the JSN Indenture, including postpetition interest and fees, the objections raised herein will be moot and the JSNs will file appropriate supplemental pleadings with the Court.[3]

2. This Objection seeks to address the Plan Proponents' efforts to compromise the JSN's collateral without any compensation whatsoever. The JSNs object to the Plan Proponents' continued attempts to deprive the JSNs of their constitutionally protected property rights in specific collateral (primarily intercompany claims and claims against Ally)

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1 Capitalized terms not defined herein have the meaning ascribed to them in the Plan or the Disclosure Statement, as applicable.

2 Filed simultaneously with this Objection, and appending documents referenced in the Objection, is the Declaration of David S. Cohen, dated October 22, 2013 (the "Cohen Declaration").

3 The JSNs reserve their right to respond to any attempts by the Plan Proponents to impair or otherwise adversely impact the JSNs' rights notwithstanding a determination by the Court that the JSNs are entitled to all postpetition interest and fees.

securing the JSNs Claims. In that respect, the JSNs' objection to the Global Settlement is largely limited to how terms of the Global Settlement were manipulated to impair the JSNs' rights in the Subject Collateral.[4] Without ever attempting to prove, because they cannot, that the Subject Collateral is of no value, the Plan Proponents advance the proposition that the JSNs cannot realize upon the Subject Collateral for the purposes of satisfying their secured claims. In a nutshell, what they are saying is that "even though you, JSNs, are secured creditors who have the right to have the value of your collateral maximized for your benefit, we, the Plan Proponents, have decided to dispose of, in fact destroy, your collateral at a value that you are not satisfied with (*i.e.*, zero), because it is necessary to *maximize the value of other parties' recoveries*."

3. It is not, in fact, necessary to destroy the Subject Collateral for no value. After all, the Plan Proponents could just pay for it. The Consenting Claimants, however—who are the beneficiaries of the Plan Proponents' attempt to zero out the value of the Subject Collateral—just seek more money. But it is exactly this type of manipulation and risk of undervaluation that sections 362(d)(1) and (2), 363I and (f), and 1129(b) of the Bankruptcy Code prohibit and against which these provisions were designed to protect the secured creditor. The JSNs have constitutionally protected property rights that cannot be ignored under applicable law.

[4] The Plan Proponents have appropriately acknowledged that the Court can determine that JSNs are entitled to postpetition interest "for any reason" and the Plan will still be confirmable. It is on that basis and in reliance on that acknowledgement that the JSNs proceed. Contrary to prior representations to the Court, however, deposition testimony has since confirmed that the JSNs' concerns about the Plan Proponents' initial intentions on this subject were well founded. See Transcript of Deposition of Lewis Kruger, dated September 17, 2013, at 106-07 ("But you do understand there was a period of time in which particular legal theories, if accepted by the judge, would have impacted the global settlement and the ability to confirm the plan? A. I believe so. Q. Okay. And are you aware that those issues have now been resolved, in other words, that both the Debtors and the Committee have said that, no matter what findings the Court makes in the context of the adversary proceeding, the global settlement can proceed and the plan can be confirmed? A. I believe that that's where we stand today.")

4. The manner in which the Global Settlement was developed is plain from the terms of that compromise. The Consenting Claimants negotiated with target recoveries in mind. While there may have been some give-and-take among the Consenting Claimants with respect to achieving those target recoveries, none of the Consenting Claimants actually consented to anything until they each hit their target recovery.

5. The Global Settlement is not a case where the various constituencies decided to first make the pie as big as possible leaving for later a determination of stakeholder recoveries through a natural waterfall and claims allowance process based upon actual facts and legal principles. In fact, the Creditors' Committee completely surrendered on what had been the most contentious element of these cases up to that point—the RMBS settlement—once each of its members were satisfied with its own recoveries. Each constituency involved demanded to know the size of their putative recovery before agreeing to a compromise. The Consenting Claimants then simply *reverse engineered* a waterfall that permitted the Consenting Claimants to receive the recovery they had negotiated. In other words, there is nothing principled about the Global Settlement.

6. The Consenting Claimants' effort to reverse engineer the waterfall is reflected in a series of unprincipled and unjustified results arising from the Global Settlement. For example, the claims of FGIC and MBIA (asserted against RFC and GMACM) are being allowed *at ResCap* with no apparent legal or factual basis. The Plan Proponents *are not seeking* to subordinate under section 510(b) of the Bankruptcy Code the Securities-Related Claims, but *are seeking* to subordinate the claims of the FHFA, notwithstanding that both sets of claims are premised on the same legal theory. And this reverse engineering is why the Plan Proponents have made the remarkable decision to compromise the Intercompany Claims (as defined below)

for no value and not attribute any of the $2.1 billion in settlement consideration from Ally to the JSNs' collateral value.[5] Tellingly, these issues are all reserved if the Plan is not confirmed.

7. The JSNs would not be offended by the manner in which the Global Settlement was reached if not for the fact that the Consenting Claimants and the Plan Proponents simply went too far. They have even suggested that by conceding in the Plan that the JSNs will receive no less than their full prepetition claim that they somehow have done the JSNs a generous favor and have perhaps been too lenient with the JSNs. But no amount of creative waterfall engineering could ever result in the JSNs receiving less than their full prepetition claim, even if the Court determines that the JSNs are undersecured. This is true even in the absence of the Global Settlement because the claims against Ally identified by the Examiner still exist, and any reasonable allocation of those claims would result in the JSNs being paid no less than their full prepetition claim. At its core, this is simply an attempt by the Consenting Claimants to take the JSNs' rightful slice of the pie. The fact that there appears to be no principled justification for the components of the Global Settlement is not a concern of the JSNs—provided that those components are not used as a justification to deprive the JSNs of their constitutionally protected property rights.

8. The Plan Proponents' effort to reverse engineer the waterfall to deny a secured creditor its full recovery is both unique and unprecedented. And for that reason it should not be surprising to the Court that the Bankruptcy Code prohibits this conduct in a variety of ways.

5 The Plan Proponents even reserve for reverse engineering in the alternative. The JSNs understand that the Plan Proponents intend to argue that, if the Court determines that the Intercompany Claims should be respected for purposes of establishing the value of the JSN Liens, then the waterfall should be modified to prevent the Ally Contribution from running through the Debtors' capital structure, *i.e*,. the Intercompany Claims should not participate in the Ally Contribution.

9. The disposition of the Subject Collateral under the Global Settlement does not comply with sections 363(f) and 1129(b) of the Bankruptcy Code. These sections, together with others, were designed to protect secured creditors against exactly what is happening to the JSNs here—the undervaluation (in this case, a “zero-valuation”) of the creditor’s collateral being improperly imposed in the bankruptcy. The Subject Collateral is plainly worth more than zero, and the JSNs believe that the Subject Collateral has substantial value. Under such circumstances, the Debtors may either (a) discharge the JSN Liens by paying the JSNs all amounts owing under the JSN Indenture if it makes economic sense to do so or (b) relinquish the Subject Collateral to the JSNs to permit the JSNs to monetize it to their own satisfaction. In these cases, it of course makes economic sense for the Debtors to discharge the JSN Liens rather than relinquish control of the Subject Collateral. Thus, the Court need not even engage in a debate over the value of the Subject Collateral. The Debtors must discharge the JSN Liens through the payment of all amounts owing under the Indenture, including all postpetition interest and fees, as a consequence of their impairment of the Subject Collateral under the Global Settlement.

10. In the absence of a complete discharge of the JSN Liens, such liens attach to the proceeds of the Subject Collateral as a matter of law and, to the extent there are no proceeds, the JSNs must receive adequate protection as a *matter of right.* The protections of section 363I of the Bankruptcy Code are mandatory. Similarly, the protections of section 362(d)(1) of the Bankruptcy Code are mandatory. Thus, without adequate protection, the JSNs are also entitled to relief from the automatic stay to permit them to realize upon the Subject Collateral to satisfy their claims. The Plan Proponents cannot use the Plan or the Global Settlement and the terms thereof to deprive the JSNs of these fundamental property rights.

11. Certain terms of the Plan and Global Settlement are highly prejudicial to the JSNs' rights and are not supportable as a matter of law and fact. The JSNs believe the Court should find that these Plan terms do not control the determination of the JSNs' rights. To the extent, however, that the Plan Proponents insist on using the terms of the Global Settlement to impair the JSNs' entitlements and adversely impact their recoveries under the Plan, the JSNs have no choice but to object wholesale to their approval. For instance, the Plan Proponents have made it an element of the Global Settlement that the Ally Contribution not be allocated to particular causes of action on the alleged premise that it is impossible to do so. The Plan Proponents then advance the theory that, based upon such impossibility, the JSN Liens should be ascribed no value. This approach fails as a matter of law and fact. The same holds true with respect to the purported "settlement" of the Intercompany Claims under the Global Settlement. As the evidence will demonstrate, there is no basis for disposing of the Intercompany Claims for no consideration. Additional prejudicial terms are set forth herein.[6]

12. While the Consenting Claimants are free to allocate distributions amongst themselves, they cannot prejudice the rights of non-consenting creditors in the process. The JSNs are prepared to limit these objections to the terms of the Plan and the Global Settlement to solely the extent that such issues impact the rights and economic entitlements of the JSNs; provided, however, that the Plan Proponents acknowledge by appropriate stipulation acceptable to the JSNs that such limitation is without any prejudice to the JSNs.[7]

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[6] The Global Settlement is complicated and the JSNs' concerns are set forth in detail herein. But to assist the Court, the JSNs do *not* object to the allowance (but do object to the priority) of the Consenting Claimants' claims as set forth in the Global Settlement or the sufficiency of the Ally Contribution as it relates to the release of estate causes of action. The JSNs do object to (i) the treatment and settlement of the Intercompany Claims; (ii) the failure to allocate appropriately the Ally Contribution; (iii) the priority of certain claims subject to mandatory subordination to the extent the failure to subordinate such claims affect the entitlements of the JSNs; and (iv) and the partial substantive consolidation contemplated by the Plan.

[7] The JSNs are prepared to work constructively with the Plan Proponents on an appropriate stipulation to the extent the Plan Proponents wish to narrow the issues in dispute.

13. Finally, the Third-Party Releases cannot be imposed on the JSNs or the Notes Trustee. The JSNs have claims against multiple Debtors and the Plan Proponents have treated the JSNs' claims against many of these Debtors as unimpaired. A third-party release cannot be imposed upon unimpaired creditors. Nor can the Third-Party Releases, as they relate to the JSNs, satisfy the stringent standard set forth in applicable case law and the "best interests of creditors" test. The JSNs are unlike other parties to be bound by these releases. The JSNs receive no consideration in exchange for the grant of the Third Party Releases. Moreover, the JSNs are in contractual privity with Ally under an intercreditor agreement and can potentially pursue Ally directly for their postpetition interest under that agreement.

14. When stripped of all of the legalese, hyperbole and rhetoric, this case is just about money. There are no jobs to preserve, no customer and vendor relationships to continue, and no greater good of the going concern to be realized anymore. The JSNs want their postpetition interest, and the Consenting Claimants do not want to pay it. Ally wants its third-party releases, but does not want to pay enough to make those releases fully consensual. In light of the JSNs' willingness to limit their objections as set forth herein, whether the Plan is confirmable lies mostly in the hands of the Plan Proponents, the Consenting Claimants, and Ally.

RELEVANT BACKGROUND

A. The Plan

15. On July 3, 2013, the Plan Proponents filed the Plan and related disclosure statement (the "Disclosure Statement"), and the Court approved the Disclosure Statement on August 23, 2013. The Plan is also supported by Ally Financial Inc. ("AFI" and, together with its direct and indirect subsidiaries, "Ally"), the Debtors' ultimate corporate parent, and certain other of the Debtors' creditors (the "Consenting Claimants").

16. The Global Settlement embodied in the Plan provides for, among other things, (a) the settlement of various claims against Ally and grant to Ally of broad estate and third-party releases (the "Third-Party Releases") in exchange for funding for the Plan from Ally in the amount of $2.1 billion (the "Ally Contribution"); (b) a purported "compromise" of intercompany claims among various Debtor and non-Debtor entities; (c) a settlement of issues relating to substantive consolidation by providing for "partial" consolidation of the Debtors; (d) a resolution of claims of (i) certain holders of residential mortgage-backed securities (the "RMBS Trust Claims"); (ii) certain monoline insurers (the "Monoline Insurer Claims"); and (iii) certain private securities litigation claimants (the "Private Securities Claims," and, together with the RMBS Claims and the Monoline Insurer Claims, the "Securities-Related Claims").

17. Through the guise of the Global Settlement, the Plan Proponents are attempting to deprive the JSNs of their rights and entitlements with respect to certain collateral. Specifically, the Plan Proponents seek to compromise the following collateral for no value: (i) intercompany claims on which the JSNs possess a direct lien (the "Direct Lien Intercompany Claims"); (ii) claims against Ally, such as breach of contract claims, on which the JSNs possess a direct lien (the "Direct Lien Ally Claims"); and (iii) intercompany claims (the "Indirect Lien Intercompany Claims, and together with the Direct Lien Intercompany Claims, the "Intercompany Claims") and/or claims against Ally (the "Indirect Lien Ally Claims," and, together with Direct Line Ally Claims, the "Ally Claims") in favor of the ResCap entities (the "Equity Pledgees") whose equity has been pledged to the JSNs (the "Equity Pledges") and against which there are no material third party claims (the Intercompany Claims and the Ally Claims, together, the "Subject Collateral"). The Subject Collateral is more specifically identified on Exhibit "A" hereto.

B. The JSN Claims

18. Under the JSN Indenture, the Issuer and certain other Debtors (the "Guarantor Debtors") obligated themselves to pay in full all principal, interest and fees under the JSN Indenture. (JSN Indenture §§ 4.01; 10.01.)[8]

19. **Security for the JSN Claims**. The JSN Claims are secured by liens and security interests (collectively, the "JSN Liens") on the various property and interests of the Debtors' estates, including the Subject Collateral. *First*, the JSN Claims are secured by an "all asset" lien on the assets of the Issuer and the Guarantor Debtors. (Junior Secured Notes Security Agreement § 2.).

20. *Second*, the JSNs have liens, security interests and pledges as to specific assets, including general intangibles (and payment intangibles) and the proceeds therefrom. The Junior Secured Notes Security Agreement defines general intangibles by reference to the Uniform Commercial Code as in effect in the State of New York (the "UCC").[9] (Junior Secured Notes Security Agreement § 1 (Definitions of "General Intangibles" and "UCC").) The UCC, in turn, defines "general intangibles" as including "all personal property, including things in action," with "things in action" being defined as a "right to recover money or other personal property by judicial proceeding." Black's Law Dictionary 1326 (5th ed. 1979). Here, such

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8 As of the Petition Date, the amount of principal and accrued but unpaid interest with respect to the Junior Secured Notes was $2.222 billion. Following paydowns of principal by the Debtors in the amounts of (i) $800 million authorized on June 13, 2013; and (ii) $300 million authorized on July 30, 2013, the outstanding amount of principal and prepetition interest with respect to the Junior Secured Notes now equals at least $1.122 billion. At an assumed effective date of December 15, 2013, the JSNs will have accrued total postpetition interest in the amount of $342 million assuming postpetition interest is calculated using the default rate (equal to the contract rate plus 1%).

9 Both the Junior Secured Notes Security Agreement and JSN Indenture are governed by New York law. (JSN Security Agreement ¶ 17; JSN Indenture § 12.08.)

"things in action" include the Direct Lien Intercompany Claims and the Direct Lien Ally Claims.[10]

21. *Finally*, the Collateral Agent also has a pledge of the equity interests of the Equity Pledgees, which are, in their own right, the beneficiaries of the Indirect Lien Intercompany Claims and the Indirect Lien Ally Claims. (Junior Secured Notes Security Agreement § 3(a)-(j).)

22. **Intercompany Claims**. The Debtors' Schedules of Assets and Liabilities and Statements of Financial Affairs (the "Schedules") list over $8.3 billion in Intercompany Claims, including both the Direct Lien and Indirect Lien Intercompany Claims. Value distributed to any of the grantors on account of the Direct Lien Intercompany Claims would flow directly to the JSNs in satisfaction of the JSNs' secured claims. Value distributed to the Equity Pledgees on account of the Indirect Lien Intercompany Claims would also flow directly to the JSNs, as equity distributions from each of the Equity Pledgees, which do not have any material obligations to satisfy under the Plan.

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[10] The Plan Proponents have contended that the JSNs' liens do not attach to the Direct Intercompany Claims or the Direct Ally Claims (or any proceeds therefrom) because these liens are "inchoate." See Joint Pretrial Order (Proposed), Residential Capital, et al. v. UMB Bank, N.A., Case No. 13- 01343(MG) (Docket Nos. 86 & 102) (Bankr. S.D.N.Y. 2013), ¶¶ 69–71 & 78–79. Under the Cash Collateral Order, the Debtors stipulated to the validity of the JSN Liens, and the Committee was required to raise all challenges to such stipulations prior to the expiration of the challenge period. The Creditors' Committee only challenged the JSNs' liens on avoidance actions and commercial tort claims in the JSN Adversary Proceeding. Having failed to raise these arguments prior to the expiration of the challenge period, the Plan Proponents are estopped from raising them now. Furthermore, the Plan Proponents are simply wrong. The cases relied upon by the Plan Proponents—Capital Nat'l Bank of N.Y. v. McDonald's Corp., 625 F. Supp. 874, 879 (S.D.N.Y. 1986) and Gonzalez v. Profile Sanding Equip. Inc., 776 N.E. 2d 667, 680 (Ill. App. 2002)—involve readily distinguishable facts and/or are no longer good law. See, e.g., Roofing Co. v. Pacific First Federal Sav. Bank, 796 P.2d 732, 735 (Wash. App. 1990) (finding that McDonald's decision was wrongly decided because "[it] is an example of the reasoning the U.C.C. after-acquired property provisions rejected."). Additionally, in spite of the Plan Proponents' statements to the contrary, the UCC explicitly permits a grant of a lien on after acquired property. See N.Y. UCC 9-204 (permitting the grant of a lien in all collateral "in which debtor now has ***or hereafter acquires*** an interest.") (emphasis added).

23. Based upon the JSNs' analyses, the Intercompany Claims are worth hundreds of millions of dollars of distributable value to the JSNs, assuming, as shown below, that the Intercompany Claims share *pari passu* (as they must) with other general unsecured claims in distributions from the Debtors' estates, including the proceeds of the Ally Contribution. Under the Plan, however, the Plan Proponents provide that all Intercompany Claims "will be compromised as part of the Global Settlement, and ***waived, cancelled, and discharged*** on the Effective Date, and holders of Intercompany Balances will receive ***no recovery*** on account of such claims." (Disclosure Statement at 42 (emphasis added).)

24. **Claims Against Ally**. The JSNs are also entitled, either directly through their Direct Lien Ally Claims or indirectly through the Indirect Lien Ally Claims, to receive the proceeds of breach of contract claims, as well as other claims against Ally. (JSN Security Agreement §§ 1-2, 4.) The Examiner concluded that the majority of the Debtors' strongest claims against Ally were breach of contract claims with potential damages exceeding several billion dollars. (Examiner's Report at I-30-31.)

25. Nonetheless, the Plan Proponents refuse to allocate any portion of the Ally Contribution to the JSN Claims that are secured by the Subject Collateral. Without providing any evidence or legal authority to support such contention, the Debtors assert that "there is no basis for allocating the Ally Contribution to specific third party or estate causes of action—let alone allocating any portion of it to potential causes of action on which the JSNs have asserted liens." (Disclosure Statement Omnibus Reply at 16 [Docket No. 4723].) The Debtors argue that non-allocation of the Ally Contribution to specific claims and entities is an integral component of the Global Settlement. (Id.)

26. **Equity Pledges**. Finally, the JSNs have undisputed pledges of equity in the Equity Pledgees, which, among other things, have granted releases to Ally under the Plan and are the beneficiaries of material intercompany claims from Debtor and non-Debtor entities. (JSN Security Agreement § 2, 3, 4.) The value of the Equity Pledges as collateral is that, among other things, upon foreclosure, they would grant the JSNs the right to negotiate with, and receive payment from, Ally in exchange for releases of the Indirect Lien Ally Claims. Moreover, any distributions to the Equity Pledgees would directly benefit the JSNs because most of the Equity Pledgees have no material creditors. Nonetheless, the Plan Proponents have allocated none of the value of the Indirect Lien Intercompany Claims, the Indirect Lien Ally Claims, or any portion of the Ally Contribution to the Equity Pledgees. (Disclosure Statement at 40-42, 43.)

C. Junior Secured Notes Security Agreement

27. Under the Junior Secured Notes Security Agreement, the Direct Lien Intercompany Claims and the Direct Lien Ally Claims are considered "Non-Tangible Collateral."[11] The Junior Secured Notes Security Agreement provides that, upon occurrence of an Event of Default, control over "Non-Tangible Collateral" shifts from the Issuer to the Collateral Agent (for the benefit of the JSNs). Specifically, upon the occurrence of an Event of Default, the Collateral Agent may:

> notify any party obligated on any of the Non-Tangible Collateral to make payment or otherwise render performance to or for the benefit of the [Collateral Agent] and enforce, by suit or otherwise, the obligations of any such party obligated on any Non-Tangible Collateral. In connection therewith, the [Collateral Agent] may surrender, release or exchange all or any part thereof, or compromise or extend or renew for

[11] The Junior Secured Notes Security Agreement defines "Non-Tangible Collateral" to mean "with respect to any Grantor, collectively, such portion of such Grantors' Collateral that constitutes Accounts, Chattel Paper, Deposit Accounts, Documents, General Intangibles, Payment Intangibles, Letter-of-Credit Rights, Letters of Credit, and Supporting Obligations. JSN Security Agreement § 1(Definition of "Non-Tangible Collateral").

> any period (whether or not longer than the original period) any indebtedness thereunder or evidenced thereby.

(Junior Secured Notes Security Agreement § 9.)

28. The Junior Secured Notes Security Agreement further provides that the Collateral Agent is appointed as attorney-in-fact for each Grantor (as defined in the JSN Security Agreement) and, accordingly, has the authority, upon an event of default, "to ask, demand, collect, sue for, recover, compromise, receive and give acquittance and receipts for moneys due and to become due under or in respect of any of the Collateral" and "to file any claims or take any action or institute any proceedings which the [Collateral Agent] may request for the collection of any of the Collateral or otherwise to enforce the rights of the [Collateral Agent] and the other Secured Parties with respect to any of the Collateral." (Id. § 13(a).)

29. Upon the occurrence and continuance of an Event of Default, the Collateral Agent may also exercise "any rights and remedies available to it under the [Uniform Commercial Code]." Id. § 13(b). Under the UCC, in the event of a default, a secured lender may step into the shoes of the debtor and control the disposition of non-tangible collateral, like the Direct Lien Intercompany Claims and the Direct Lien Ally Claims. N.Y. UCC § 9-607(a).

D. Treatment of JSN Claims

30. The JSNs are not parties to the Global Settlement. The Plan provides that the JSNs will receive payment in full on account of their Allowed Claims (*i.e.*, the secured claims for outstanding principal and accrued pre-petition interest). The Plan also provides that the JSNs will receive postpetition interest[12] to the extent that the Court determines that the JSNs

[12] As reflected in the Plan Supplement, the Plan Proponents currently intend, if it is determined that the JSNs are entitled to postpetition interest, to pay such interest in full on the Effective Date. However, the Plan Proponents also reserved their right to pay any postpetition interest over time and on terms acceptable to

are entitled to postpetition interest.[13] The Plan Proponents contend that the JSNs are undersecured; the JSNs contend that they are oversecured. Whether the JSNs are oversecured is to be determined in the JSN Adversary Proceeding.

OBJECTION

I. THE PLAN PROPONENTS ARE REQUIRED TO DISCHARGE THE JSNs LIENS BECAUSE THEY CANNOT COMPROMISE THE SUBJECT COLLATERAL OVER THE OBJECTION OF THE JSNs

31. The Plan Proponents are attempting to use the Global Settlement to impermissibly compromise and impair the Subject Collateral over the objection of the JSNs. The Plan Proponents seek to compromise the Subject Collateral without ascribing any value to it and without allocating any value it may have to the JSNs' secured claims, thereby depriving the JSNs of their legal entitlements and the economic benefits of their bargain. Such attempts are in direct violation of protections afforded to secured creditors under the Bankruptcy Code as required by the United States Constitution. To compromise the Subject Collateral in a manner contemplated by the Global Settlement, the Debtors must discharge the JSN Liens through the payment of all amounts owing under the JSN Indenture, including postpetition interest and fees.

32. Significantly, a determination that the Debtors must, as part of the Global Settlement, discharge the JSN Liens through the payment in full of their claims, including all

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the Court. (Plan Supplement [Docket No. 5342] at Ex. 19.) To the extent that the Plan Proponents act on this reservation prior to or after confirmation, the JSNs reserve all their rights to challenge the Plan Proponents' change of position on this issue.

[13] As a matter of law and under the JSN Indenture, the Notes Trustee is also allowed to recover, among other things, all postpetition fees and expenses owing under the JSN Indenture as part of its prepetition claim. (JSN Indenture § 7.07(a)); see Ogle v. Fidelity & Deposit Co. of Md., 586 F.3d 143, 147 (2d Cir. 2009) ("[W]e hold that an unsecured claim for post-petition fees, authorized by a valid pre-petition contract, is allowable under Section 502(b) and is deemed to have arisen prepetition."). The treatment of the JSN Claims proposed under the Plan includes all amounts "determined by the Bankruptcy Court in Phase I of the JSN Adversary Proceeding or at the Confirmation Hearing," but does not specifically reference such fees and expenses. (Plan §III.D.1(c)(ii).) The JSNs do not believe that the omission of any reference to these additional amounts in the description of the JSN Claim treatment, whether oversecured or undersecured, under the Plan was intended to be limiting. However, to the extent that the Plan Proponents take such position, the JSNs object to such treatment.

accrued postpetition interest and fees owing under the JSN Indenture, does not mean that the Plan will not be confirmable. Such an outcome is consistent with the Plan as it already contemplates payment of postpetition interest and fees to the JSNs, and the Plan Proponents have appropriately acknowledged that the Court can determine that the JSNs are entitled to postpetition interest "for any reason" and the Plan can still be confirmed. (Plan § III.D.1I, 2I, 3I; Transcript of August 21, 2013 Hearing at 88-90.)

33. Secured creditors are entitled to special protections under the Bankruptcy Code due to the broad Fifth Amendment-derived property rights that secured creditors have long been recognized as holding in their collateral. See U.S. v. Security Indus. Bank, 459 U.S. 70, 75 (1982) ("The bankruptcy power is subject to the Fifth Amendment's prohibition against taking private property without compensation."); Wright v. Vinton Branch of Mountain Trust Bank of Roanoke, Va., 300 U.S. 440, 456-57 ("[T]he bankruptcy power of Congress, like its other great powers, is subject to the Fifth Amendment."). These protections include the rights granted to secured creditors under sections 363(f) and 1129(b)(2)(A) of the Bankruptcy Code, which are designed to protect the secured creditor against the risk of undervaluation of its collateral. See generally Hollace T. Cohen, The Continuing Search for Indubitable Equivalence, 2013 Ann. Surv. Of Bankr. Law 2 (2013).

34. Furthermore, as a threshold matter, Bankruptcy Rule 9019 is only "a rule of procedure, [that] cannot, by itself, create a substantive requirement of judicial approval" for a settlement of claims. Northview Motors, Inc. v. Chrysler Motors Corp., 186 F.3d 346, 351 n.4 (3d Cir. 1999). Instead, section 363 of the Bankruptcy Code is the substantive provision on which approval of a settlement must be predicated. See id. ("Section 363 of the Code is the substantive provision requiring court approval."); Myers v. Martin (In re Martin), 91 F.3d 389,

394 n.2 (3d Cir. 1996) ("Section 363 of the Code is the substantive provision requiring a hearing and court approval; Bankruptcy Rule 9019 sets forth the procedure for approving an agreement to settle or compromise a controversy.")

35. The disposition of the Subject Collateral contemplated by the Global Settlement is a "use" and "sale" of property subject to existing liens. As such, the treatment of the Subject Collateral under the Global Settlement must comply with the various protections afforded to secured creditors by section 363 of the Bankruptcy Code. See, e.g., In re Dow Corning Corp., 198 B.R. 214, 245 (Bankr. E. D. Mich. 1996) (stating that a compromise of a claim in a settlement "does not obviate the applicability of § 363(f)"); In re Telesphere Commc'ns, Inc., 179 B.R. 544, 552 n.7 (Bankr. N.D. Ill. 1994) (finding that "settlement of a cause of action held by the estate is plainly the equivalent of a sale of that claim."); In re Martin, 91 F.3d at 395 (finding that proposed settlement of estate causes of action "compromised an asset of the debtors' estate" outside the ordinary course, thereby "implicating Section 363").

36. Under section 363(f) of the Bankruptcy Code, the Debtors can only compromise the Subject Collateral free and clear of the JSN Liens upon a showing that:

(1) applicable nonbankruptcy law permits disposition of the Subject Collateral free and clear of the JSNs' interest;

(2) the JSNs consent;

(3) the price at which the Subject Collateral is being "sold" is greater than the aggregate value of all liens on the Subject Collateral;

(4) the JSNs' interest is in bona fide dispute; or

(5) the JSNs could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of their interest.

See 11 U.S.C. § 363(f).

37. The Plan Proponents cannot satisfy a single prong of this standard. Allowing the Plan Proponents to bypass the requirements of section 363(f) would result in the

total destruction of the JSNs' constitutionally protected property interest in the Subject Collateral (*i.e.*, the collateral would be extinguished for no value). See In re Nichols, 440 F.3d 850, 854 (6th Cir. 2006) ("[T]he bankruptcy laws allow interference with contractual arrangements and some diminution of property rights," but "if the interference goes so far as to constitute 'total destruction' of the value in the property held by a creditor, it violates the Fifth Amendment and may not stand").

38. More fundamentally, each of the JSN impaired classes have rejected the Plan. Accordingly, the Plan Proponents, to confirm their Plan, must prove, *inter alia*, that the Plan is fair and equitable with respect to such JSN impaired classes. 11 U.S.C. § 1129(b)(1). The Plan Proponents bear the burden of proof to show that the requirements of section 1129(b) have been satisfied. See In re Texaco Inc., 84 B.R. 889, 891 (Bankr. S.D.N.Y. 1988); In re Prudential Energy Co., 58 B.R. 857, 862 (Bankr. S.D.N.Y. 1986)(same).[14] The Plan Proponents cannot meet this burden.

39. Section 1129(b)(2)(A) mandates that a plan proponent satisfy one of three essential requirements enumerated in subclauses (i), (ii) and (iii) to establish that a plan is "fair and equitable" with respect to a dissenting class of secured claims.[15] Here, subclause (i) is not

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14 For a plan to be "crammed down" on a dissenting class, section 1129(a)(10) also requires that the plan be accepted by "at least one class of claims that is impaired under the plan." 11 U.S.C. § 1129(a)(10). The JSNs have objected to the voting procedures proposed in the Order approving the Disclosure Statement to the extent that the Plan Proponents attempt to use a deemed acceptance by an empty class (*i.e.*, a class in which no creditor casts a ballot) to satisfy section 1129(a)(10). The parties agreed that such objection was preserved for confirmation to the extent relevant. The JSNs incorporate by reference the relevant portions of their Disclosure Statement Objection. (Disclosure Statement Objection [Docket No. 4590], at 22-24.)

15 Specifically, section 1129(b)(2)(A) provides that a plan is "fair and equitable" with respect to a class of secured claims if the plan provides (i) that (a) the holders of such secured claims retain the liens securing their claim to the extent of the allowed amount of such claims and (b) each holder of such class receives deferred cash payments totaling at least the allowed amount of such claim, of a present value of at least the value of its collateral; (ii) for the secured creditor's collateral to be sold free and clear of the secured creditor's liens, subject to the secured creditor's right to credit bid its claim, with the creditor's liens attaching to the proceeds of the sale; or (iii) for the realization by such holders of the indubitable equivalent of such claims. 11 U.S.C. § 1129(b)(2)(A).

applicable as the Plan does not contemplate that the JSNs will retain their liens on the Subject Collateral. To the contrary, the Plan and the Global Settlement purport to extinguish the Subject Collateral and strip the JSNs of their interests in the Subject Collateral without consideration.

40. The Plan Proponents cannot satisfy subclause (ii). When the disposition of a secured creditor's collateral is to be effectuated under a chapter 11 plan, a debtor must provide the secured creditor with the right to credit bid its debt in connection with such disposition in accordance with section 363(k). 11 U.S.C. § 1129(b)(2)(A)(ii). This is a right that was recently reaffirmed by the Supreme Court. See RadLAX Gateway Hotel, LLC v. Amalgamated Bank, 132 S.Ct. 2065, 2070 n.2 (2012) (affirming secured creditor's right to credit bid when its collateral is being sold under plan, stating that "[t]he ability to credit-bid helps to protect a creditor against the risk that its collateral will be sold at a depressed price"); see 7 Collier on Bankruptcy ¶ 1129.04[2][b][ii] (16^{th} ed. 2012) ("[I]f the secured party thinks the collateral is worth more than the debtor is selling it for, it may effectively bid its debt and take title to the property."). Here, the Plan Proponents have not provided the JSNs with the opportunity to credit bid for any of the collateral being disposed of under the Global Settlement. The Plan, if confirmed, would produce the very outcome subsection (ii) was designed to avoid—exposing the secured creditor to the risk of undervaluation of its collateral (or, under the Global Settlement, the *complete absence of value* being unilaterally ascribed to a secured creditor's collateral over its objection).

41. Nor can the Plan Proponents satisfy the "indubitable equivalent" requirement contained in subclause (iii), which was designed to allow a secured creditor to "receive the full value of what it bargained for when it made its contract with [the debtor]." F.H. Partners, L.P. v. Investment Co. of the Southwest (In re Investment. Co. of the Southwest),

341 B.R. 298, 302 (10^{th} Cir. BAP 2006); see also In re Murel Holdings Corp., 75 F.2d 941, 942 (2d Cir. 1935) ("We see no reason to suppose that the statute was intended to deprive [the lender] of [his money or property] unless by a substitute of indubitable equivalence."). The legislative history of section 1129(b)(2)(A)(iii) suggests that Congress believed the easiest and most logical method of providing a secured creditor with the indubitable equivalent of its claim was a turnover of the collateral itself:

> ***Abandonment of the collateral to the creditor would clearly satisfy indubitable equivalence,*** as would a lien on similar collateral. However, permanent cash payments less than the secured claim would not satisfy the standard because the creditor is deprived of an opportunity to gain from a future increase in value of the collateral. Unsecured notes as to the secured claim or equity securities of the debtor would not be the indubitable equivalent.

124 Cong. Rec. H11, 104 (daily. Ed. Sept 28, 1977) (statement of Rep. Edwards) (emphasis added); see, e.g., Matter of Sandy Ridge Development Corp., 881 F.2d 1346, 1350 (5^{th} Cir. 1989). Here, the Plan Proponents seek to extinguish the Subject Collateral and deprive the JSNs of the opportunity to realize payment of their full claim and the benefit of their bargain through the JSNs' own efforts to monetize the Subject Collateral. Such an outcome could not be further from the indubitable equivalent of the JSN Claims.

42. The Plan Proponents have contended that it is impossible to ascertain which portion of the Ally Contribution is attributable to claims or causes of action to which the JSN Liens attach. While, as discussed *infra* ¶¶ 56-59, the JSNs dispute that notion, what is clearly possible is the turnover of the Subject Collateral to the JSNs. Under such scenario, the JSNs would be permitted to monetize the Subject Collateral to their own satisfaction, providing the JSNs with the indubitable equivalent of their claims. Any treatment that fails to recognize these important rights fails to satisfy subclause (iii). Accordingly, the only way the Plan

Proponents can carry *their* burden to establish that section 1129(b) has been satisfied is by discharging the JSN Liens through payment of all amounts owing under the JSN Indenture, including postpetition interest and fees.

II. IF THE PLAN PROPONENTS ARE PERMITTED TO COMPROMISE THE SUBJECT COLLATERAL, THE JSN LIENS MUST ATTACH TO THE PROCEEDS OF THE SUBJECT COLLATERAL AND/OR THE DEBTORS MUST PROVIDE ADEQUATE PROTECTION TO THE JSNs FOR ANY RESULTING DIMINUTION IN THE VALUE OF THE SUBJECT COLLATERAL

43. Even if the Plan Proponents are permitted to dispose of the Subject Collateral, the JSN Liens must attach to any proceeds of such disposition, including the Ally Contribution. *First*, pursuant to the JSN Security Agreement, the security interests granted to the Collateral Agent in the Subject Collateral explicitly includes all "[p]roceeds, products, offspring, rents, issues, profits and returns of and from, and all distributions on and rights arising" therefrom. (Junior Secured Notes Security Agreement ¶ 2.)

44. *Second*, section 552(b)(1) of the Bankruptcy Code recognizes as valid the grant to the Collateral Agent of the proceeds of the Subject Collateral. See 11 U.S.C. § 552(b)(1). This is true even where the underlying property subject to the security interest (*e.g.*, rights to enforce the Ally Claims) is transformed into something else (*e.g.*, the Ally Contribution). See Bradt v. Woodlawn Auto Workers F.C.U. (In re Bradt), 757 F.2d 512, 515 (2d Cir. 1985) (stating that "[p]roceeds is intended to be a broad term to encompass all proceeds of property of the estate. The conversion in form of property of the estate does not change its character . . .").[16]

[16] Pursuant to the terms of the Cash Collateral Order, the "equities of the case" exception to section 552(b) has been waived. (Cash Collateral Order ¶ 18(c).) In any event, it is not relevant here.

45. *Third*, applicable non-bankruptcy law, *i.e.*, the UCC, provides that "collateral" includes "proceeds to which a security interest attaches . . ." N.Y. UCC § 9-102 (definition of "collateral"). The term "proceeds" is, in turn, defined to include the "I rights arising out of collateral" and "(D) claims arising out of the loss, nonconformity, or interference with the use of, defects or infringement of rights in, or damage to, the collateral . . ." N.Y. UCC § 9-102 (definition of "proceeds"). Thus, the JSN Liens attach to the proceeds of any compromise to the extent that there are proceeds and, if there are no proceeds, the Debtors would be required to provide adequate protection to the JSNs pursuant to section 363I of the Bankruptcy Code.

46. Section 363I requires the provision of adequate protection to secured creditors to compensate such creditors for the "use, sale, or lease" of their collateral. 11 U.S.C. § 363I. Relief under section 363I is not discretionary—the court "shall" grant adequate protection, on request of the secured party ***whenever*** a debtor seeks to use, sell or lease that party's collateral. See In re Metromedia Fiber Network, Inc., 290 B.R. 487, 492 (Bankr. S.D.N.Y. 2003); 3 Collier on Bankruptcy ¶ 363.05[3] (16th ed. 2012). For avoidance of doubt, the Notes Trustee hereby demands adequate protection.[17]

47. The availability of adequate protection is in no way dependent on satisfaction of the requirements of any other provision of the Bankruptcy Code, including sections 363(a), 363(b) or 363(f). This protection is provided both as a matter of policy and as a matter of constitutional law. See LNC Invs., Inc. v. First Fid. Bank N.A., 247 B.R. 38, 44

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[17] The JSNs have been granted adequate protection pursuant to the Cash Collateral Order. (Cash Collateral Order ¶ 16(c).) The Cash Collateral Order permits the JSNs to seek additional adequate protection. (Id. ¶ 23.) The Plan Proponents have advanced the proposition that notwithstanding the Cash Collateral Order, the JSNs are not entitled to any adequate protection. The adequate protection sought herein is in addition to the adequate protection granted and existing under the Cash Collateral Order and all rights thereunder are preserved

(S.D.N.Y. 2000) (adequate protection is derived from the Fifth Amendment protection of property interests). The relevant date for purposes of assessing the secured creditor's entitlement to adequate protection is the date the demand is made. See In re Best Prods. Co., 138 B.R. 155, 158 (Bankr. S.D.N.Y. 1992).

48. Furthermore, section 362(d)(1) of the Bankruptcy Code provides that "lack of adequate protection" is a specifically enumerated form of "cause" for lifting of the automatic stay, and bankruptcy courts have routinely ordered the termination of the automatic stay where a debtor has failed to adequately protect a secured creditor's interest in its collateral. See, e.g., In re 51-53 West 129th Street HDFC, Inc., 475 B.R. 391, 398 (Bankr. S.D.N.Y. 2012) (granting stay relief for cause where, among other things, city's tax liens on real property were not adequately protected); In re Inwood Heights Housing Development Fund Corp., 2011 WL 3793324, at * 9 (Bankr. S.D.N.Y. 2011) (granting stay relief for cause where there debtor was unwilling or unable to provide adequate protection to city with respect to secured tax and loan claims).[18] Thus, the Debtors must provide adequate protection to the JSNs consistent with the Bankruptcy Code; otherwise, relief from the automatic stay must be granted. [19]

49. As of the date of this Objection, the Subject Collateral clearly has worth—something even the Plan Proponents concede. (Transcript of July 30, 2013 Hearing at 33, 47; Disclosure Statement at 36.) The Plan Proponents have been clear that they intend to extinguish the Intercompany Claims and allocate none of the value of the Ally Claims to the JSNs, thereby triggering a diminution in the value of the Subject Collateral and, thus, requiring the provision of

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18 The burden of proof as to the "adequacy" of adequate protection, under both sections 362(d)(1) and 363(e), is on the debtor. 11 U.S.C. §§ 362(g)(2) and 363(p)(1).

19 The Notes Trustee has not brought a protective motion demanding adequate protection or seeking relief from the automatic stay, so as not to burden the Court with unnecessary filings. However, the Notes Trustee is prepared to file immediately such a motion to the extent that the Plan Proponents take the position that the failure to burden the Court with additional pleadings should somehow prejudice the JSNs' rights.

adequate protection. The Plan Proponents have provided no evidence to satisfy their burden that the JSNs are adequately protected. The exact value of the JSN Liens or the quantum of adequate protection owing to the JSNs is to be more fully addressed and determined in connection with Phase II of the JSN Adversary Proceeding.

III. THE GLOBAL SETTLEMENT CANNOT BE APPROVED TO THE EXTENT THAT THE PLAN PROPONENTS SEEK TO USE ITS TERMS TO ESTABLISH THE VALUE OF THE JSNS' COLLATERAL OR THE JSNS' ENTITLEMENT TO ADEQUATE PROTECTION

50. Estate claims can only be settled if the debtor has shown that the proposed settlement is (i) "fair and equitable," (ii) in the best interests of creditors; and (iii) within the "range of reasonableness." Motorola, Inc. v. Official Comm. of Unsecured Creditors (In re Iridium Operating LLC), 478 F.3d 452, 462 (2d Cir. 2007); HSBC Bank USA, Nat'l Ass'n v. Fane (In re MF Global Inc.), 466 B.R. 244, 247 (Bankr. S.D.N.Y. 2012). In assessing whether a settlement is "fair and equitable" and in the best interests of creditors, bankruptcy courts generally consider a number of factors, including, among others: (i) the balance between the litigation's possibility of success and the settlement's future benefits; (ii) the paramount interests of creditors, including the benefit to each affected class of the settlement; and (iii) the extent to which the settlement is the product of arm's-length bargaining. See In re Iridium Operating, 478 F.3d at 462.

51. Finally, a settlement also cannot be approved if its terms would violate another provision of the Bankruptcy Code, including, among others, the absolute priority rule embodied in section 1129(b). See id. At 464 ("[T]he ***most important factor*** for the bankruptcy court to consider when determining whether a settlement is 'fair and equitable' under Rule 9019"

is "whether a particular settlement's distribution scheme complies with the Code's priority scheme.") (emphasis added)).

52. The JSNs believe that the Court should find that certain elements of the Global Settlement—including, most notably, the settlement of the Intercompany Claims and the proposed allocation (or perhaps more precisely, the non-allocation) of the Ally Contribution—that are highly prejudicial to the JSNs when determining the value of the JSN Liens and entitlement to adequate protection should not control the determination of the JSNs' rights. To the extent that the Plan Proponents insist on using the terms of the Global Settlement to impair the JSNs' entitlements and adversely impact their recoveries under the Plan, the JSNs have no choice but to object to the Global Settlement, for the following reasons: (a) settlement of the Ally Claims without allocation of any of the proceeds of the Ally Contribution to the JSNs is both "unreasonable" and not "fair and equitable;" (b) compromise of the Intercompany Claims for zero consideration is "unreasonable" for purposes of Bankruptcy Rule 9019; (c) the Plan "unfairly discriminates" against and is not "fair and equitable" to the various debtors that hold the Intercompany Claims (the "Intercompany Claimants"); (d) the Plan and Global Settlement fail to recognize the mandatory subordination of certain claims as required by section 510(b) of the Bankruptcy Code, thereby violating the absolute priority rule; and I the Plan's "partial consolidation" is an inappropriate substantive consolidation.

A. The Failure to Allocate the Ally Contribution as a Term of the Global Settlement Does Not Provide the JSNs With the "Indubitable Equivalent" of the JSN Claims and Is Inconsistent With the JSNs' Rights As Non-Settling Parties

53. The JSNs have liens on certain claims against Ally underlying the Ally Contribution, as well as the Ally Contribution itself, as proceeds of those claims. As part of the Global Settlement, the Plan Proponents have not allocated the Ally Contribution to any specific

causes of action, whether or not the JSN Liens attach thereto. Nor have they allocated any of the Ally Contribution to the Equity Pledgees, through whose equity the JSNs could also have shared in the Ally Contribution. In fact, the Plan Proponents have advanced the proposition that it is not possible to allocate the Ally Contribution to specific causes of action being settled or any Debtors other than ResCap, GMACM, and RFC, and as a consequence no value should be allocated to the JSN Liens or the Equity Pledges in an attempt to strip these liens and pledges for no value in clear violation of section 1129(b) of the Bankruptcy Code.

54. As discussed above, to confirm their Plan over the objection of the JSNs, the Plan Proponents must demonstrate that the treatment of those creditors proposed in the Plan permits them to "realize the indubitable equivalent" of their claims. 11 U.S.C. § 1129(b)(2)(A)(iii). Typically, plan proponents satisfy the indubitable equivalence requirement by surrendering the collateral to the secured creditor. Certainly, a plan proponent cannot satisfy such standard by providing value to the secured creditor that is *less* than what the creditor could realize if such collateral were turned over to it.

55. Furthermore, in determining whether the requirements of Bankruptcy Rule 9019(a) have been met, courts have held that settlements must be fair to non-settling parties, such as the JSNs. See, e.g., Drexel Burnham Lambert Group, Inc. v. Claimants (In re Drexel Burnham Lambert Group, Inc.), 995 F.2d 1138, 1146-47 (2d Cir. 1993) (noting that, before endorsing a settlement, the "court is obligated to make an examination of how the accord affects the rights of third parties") (citing In re Masters Mates & Pilots Pension Plan and IRAP Litigation, 957 F.2d 1020, 1026 (2d Cir. 1992) (holding that "where the rights of one who is not a party to a settlement are at stake, the fairness of the settlement to the settling parties is not enough to earn the judicial stamp of approval.")). Indeed, "'looking only to the fairness of the

settlement as between the debtor and the settling claimant contravenes a basic notion of fairness.'" In re Iridium Operating, LLC, 478 F.3d 452, 464 (quoting United States v. AWECO, Inc. (In re AWECO, Inc.), 725 F.2d 293, 298 (5th Cir. 1984)). Vitiating the interests of the JSNs—a group of oversecured creditors that are not parties to the Global Settlement—cannot produce a settlement that is fair and reasonable.

56. The Plan Proponents have provided no support, either factually or legally, to establish that it is not possible to allocate the Ally Contribution to specific causes of action. And that is because it is possible. The Examiner has prepared a detailed analysis of the Debtors' causes of action against Ally. Included in such analysis is not only the identification of specific causes of action, but also an estimate of potential damages. Moreover, the JSNs have submitted an expert report prepared by the Honorable Raymond T. Lyons that does exactly what the Plan Proponents claim is impossible. (Expert Report of Raymond T. Lyons, Esquire (the "Lyons Report"), a copy of which is annexed to Cohen Declaration as Exhibit "C," at 4-5.) Thus, it is not that it is factually or legally impossible to allocate the Ally Contribution in any respect, it is simply factually and legally impossible to *credibly* allocate the Ally Contribution in a manner that supports the Plan Proponents contentions that the JSNs are undersecured. Both the Examiner and Judge Lyons concluded that there were substantial claims against Ally that are contract claims upon which the JSNs possess a lien.

57. The Plan Proponents' failure to allocate the Ally Contribution to specific causes of action or for the benefit of the Equity Pledgees should be viewed by the Court with extreme suspicion. Since the JSNs (*i.e.*, the non-settling parties) are the only constituents prejudiced by such lack of allocation, the Court should not simply defer to the Plan Proponents' and other settling parties' assertion that allocation is not feasible. Indeed, when considering how

to properly allocate settlement proceeds, courts have stated that the allocations (or the complete lack of allocation) proposed by the settlement parties must be viewed with "considerable suspicion because of the risk that [the allocation was effectuated] for strategic reasons." Slottow v. American Cas. Co. of Reading, Pennsylvania, 10 F.3d 1355, 1359 (9th Cir. 1993). This is because delegating to the settling parties the right to allocate to the exclusion of all other parties may be "inherently prejudicial to the interests of non-settling parties." Lendvest Mortgage, Inc. v. DeArmond (In re Lendvest Mortg., Inc.), 42 F.3d 1181, 1184-1185 (9th Cir. 1994). Even if one were to accept the Plan Proponents' assertion that attributing the Ally Contribution to specific causes of action would be an imprecise exercise,"[t]he Code sometimes demands that bankruptcy judges decide questions involving approximation and conjecture, including the valuation of legal claims." In re Prudential of Florida Leasing, Inc., 478 F.3d 1291, 1303 (11th Cir. 2007). Judicial oversight of the allocation methodology would both ensure that the Ally Contribution is allocated equitably and prevent the Plan Proponents from using their purported non-allocation for strategic purposes (*i.e.*, to deprive the JSNs of the benefit of their collateral).

58. In reality, by failing to allocate the Ally Contribution and then asserting that such failure should deprive the JSNs of any entitlements to the Ally Contribution, the Plan Proponents have effectively allocated all of the Ally Contribution to those claims on which the JSNs do not have liens. If it were truly impossible to allocate the settlement proceeds, how could the Plan Proponents have determined that $2.1 billion was sufficient to settle the claims against Ally? Moreover, the Plan Proponents could have just as easily and more equitably allocated all of the Ally Contribution to the JSN Liens to first discharge the JSN Liens, with the residual value to be distributed in accordance with the Global Settlement. Instead, the Consenting Claimants conspired to under-allocate to the JSNs and strip the JSNs of their rights to unjustifiably inflate

their own parochial recoveries. This is precisely the type of prejudicial treatment of non-settling parties against which the Second Circuit has warned and that clearly fails to provide the JSNs with the indubitable equivalent of their claims.

59. The JSNs submit that the Court should not let the Global Settlement control for the purposes of determining the value of the JSN Liens that attach to, and the Equity Pledges that benefit from, the Ally Contribution or the amount of adequate protection that the JSNs are entitled to. If, however, the Plan Proponents insist that the alleged impossibility to allocate the Ally Contribution to specific causes of action should in any way adversely influence the determination of the value of the JSNs' collateral, the Court must deny approval of the Global Settlement.

B. Compromise of the Intercompany Claims for Zero Consideration Is "Unreasonable" And Falls Below the "Range of Reasonableness" For Purposes of the Bankruptcy Rule 9019

60. Under the Global Settlement, the Debtors seek to extinguish the Intercompany Claims, agreeing to settle these claims for zero consideration to the affected estates. Settlement of a meritorious cause of action for zero consideration clearly falls below the lowest point in the range of reasonableness. It is *per se* "unreasonable," and provides a basis, in and of itself, for declining approval of the Global Settlement.

61. One factor that has uniformly tipped the balance against approval of settlements is the absence of measurable consideration to the debtor's estate. See, e.g., In re Allied Properties, LLC, 2007 WL 1849017, at * 10 (Bankr. S.D. Tex. 2007) ("It is neither fair nor equitable to give a single unsecured creditor the rights to a[n] [estate] cause of action without requiring consideration to the estate in return."); In re Cincinnati Microwave, Inc., 210 B.R. 130 (S.D. Ohio 1997) (denying Bankruptcy Rule 9019 approval "[b]ecause the allowance of an

unsecured claim to the Plaintiffs by debtors for which the debtor would receive no consideration, cannot be said to be in the best interest of the estate.”).

62. Here, the Plan Proponents propose to “waive, cancel, and discharge” the Intercompany Claims without any value ascribed to these claims. This is true despite the Plan Proponents’ admission and acknowledgement that the value of the Intercompany Claims is not zero. (Transcript of July 30, 2013 Hearing at 33, 47; Disclosure Statement at 36 (Plan Proponents conceding that the Intercompany Claims are not “worthless” and may have “some value”).)

63. Robert S. Bingham, the JSNs’ expert on intercompany claim issues, concluded that the Debtors have consistently treated and reported intercompany balances as either intercompany receivables, payables or borrowings in their internal accounting records and external financial reports, including public filings with the SEC. (Expert Report of Robert S. Bingham (the “Bingham Report”), a copy of which is annexed to Cohen Declaration as Exhibit “A,” at 5-6.) The Debtors also relied on these financial records for determining and certifying compliance with certain regulatory and licensing requirements. (Id.) Such accounting and reporting is an indication that the ResCap entities expected the intercompany balances would be repaid, and/or that repayment could be demanded. (Id.)

64. As also stated in the Bingham Report, the Debtors’ own internal memoranda and correspondence show that they consistently treated intercompany balances as valid assets and liabilities. For example, in a pre-Petition Date email between Debtors and their financial advisors, Debtors explained, “[t]o the extent we have deemed a collateralized affiliate balance impaired we have impaired it through earnings. Otherwise we have concluded for

GAAP financial statement purposes the balances were expected to be repaid."[20] The Debtors also produced a memorandum that "support[ed] the appropriate accounting treatment for intercompany balances between RFC and ResCap," finding that "[a]s of 12/31/11, RFC has an intercompany receivable balance from ResCap. This receivable is carried at its full value."[21] In light of this evidence of the validity of the Intercompany Claims, there can be no "just reason to simply give away" these claims, and, on this basis alone, approval of the Global Settlement should be denied. In re Allied Properties, LLC, 2007 WL 1849017, at * 10.

65. The proposed settlement of the Intercompany Claims was not the product of arm's-length bargaining. The Consenting Claimants may have bargained with one another for purposes of dividing the residual value of the estates among each other, as it relates to the Intercompany Claims; however, they bargained only with themselves in a one-sided transaction when they determined to settle the Intercompany Claims for no value.

66. In fact, the so-called "settlement" of the Intercompany Claims is no settlement at all—rather, it is a convenient mechanic for implementing distributions to certain creditor classes agreed upon as part of the Global Settlement. The Intercompany Claims are not being "allowed" or "disallowed" in any specific amount, on any specific basis, or with reference to any particular set of priority or legal entitlements. The treatment of the Intercompany Claims is an *ad hoc*, after-the-fact construct that was, at best, implemented to accommodate the allocations to unsecured creditors under the Global Settlement or, at worst, engineered specifically to siphon value away from the JSNs. Either way, the Court should not permit the Global Settlement to control for purposes of determining the value of the JSNs' collateral. If,

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[20] See, e.g., RCUCCJSN30023149-55, April 22, 2012 email from Cathy Dondzila (Ally) to Mark Renzi (FTI Consulting) and Barbara Westman (GMACM), including others from FTI Consulting on the cc line, re: Bounce – Intercompany Follow Up.

[21] RCUCCJSN20051023, GMAC ResCap internal memo prepared by Barbara Westman on 3/20/2012.

however, the Plan Proponents insist that the settlement of the Intercompany Claims for no value should in any way influence the determination of the value of the JSN Collateral, the Court must deny approval of the settlement of the Intercompany Claims.

C. The Plan "Unfairly Discriminates" Against and Is Not "Fair and Equitable" to the Intercompany Balance Claimants

67. The Plan provides that "[h]olders of Intercompany Balances shall receive no recovery on account of their Claims," and that their claims "shall be waived, cancelled, and discharged." (Plan §§ III.D.1(i), 2(i), 3(i).) Since the Intercompany Balance Claimants will not "receive or retain any property under the plan," each of the Intercompany Balance Claim classes has been appropriately deemed by the Plan Proponents to be a "dissenting class" for purposes of section 1129(b)(1), and, as a result, deemed to reject Plan. See 11 U.S.C. §§ 1126(g), 1129(b)(1); Disclosure Statement at 11-14.) As a consequence, the Debtors must satisfy the elements of section 1129(b) with respect to the Intercompany Claims.

(i) Unfair Discrimination

68. Section 1129(b) of the Bankruptcy Code provides, among other things, that a plan may not "unfairly discriminate" against a class of dissenting claimants. "Generally speaking, this standard ensures that a dissenting class will receive relative value equal to the value given to all other similarly situated classes . . . Thus a plan proponent may not segregate two similar claims or groups of claims into separate classes and provide disparate treatment for those classes." In re Johns-Manville Corp., 68 B.R. 618, 636 (Bankr. S.D.N.Y. 1986), aff'd in part, rev'd in part on other grounds, 78 B.R. 407 (S.D.N.Y. 1987), aff'd, Kane v. Johns-Manville Corp., 843 F.2d 636 (2d Cir. 1988). The burden is upon the Debtors to prove that the Plan does not discriminate unfairly. In re Armstrong World Indus., Inc., 348 B.R. 111, 122 (D. Del. 2006).

69. Traditionally, courts applied a four-factor test to determine unfair discrimination (the "Four Factor Test"). See Armstrong, 348 B.R. at 121. The factors considered are:

> (1) whether the discrimination is supported by a reasonable basis;
>
> (2) whether the debtor could consummate the plan without the discrimination;
>
> (3) whether the discrimination is proposed in good faith; and
>
> (4) whether the degree of discrimination is in direct proportion to its rationale.

Id.; In re Buttonwood Partners, Ltd., 111 B.R. 57, 63 (Bankr. S.D.N.Y. 1990).

70. More recently, many courts have replaced the Four-Factor Test with a "rebuttable presumption" first adopted in the Dow Corning case (the "Dow Corning Test"). See In re Dow Corning, 244 B.R. 696, 701 (E.D. Mich. 1999). Under the Dow Corning Test, a rebuttable presumption of unfair discrimination arises when there is:

> (1) a dissenting class; (2) another class of the same priority; and (3) a difference in the plan's treatment of the two classes that results in either (a) a materially lower percentage recovery for the dissenting class (measured in terms of the net present value of all payments), or (b) regardless of percentage recovery, an allocation under the plan of materially greater risk to the dissenting class in connection with its proposed distribution.

Dow Corning, 244 B.R. at 702; Armstrong, 348 B.R. at 121. If there is an allegation of a materially lower percentage recovery, the presumption can be rebutted only "by showing that, outside of bankruptcy, the dissenting class would similarly receive less than the class receiving a greater recovery, or that the alleged preferred class had infused new value into the reorganization which offset its gain." Dow Corning, 244 B.R. at 702; see also In re Lernout & Hauspie Speech Prods., N.V., 301 B.R. 651, 661 (Bankr. D. Del. 2003) (applying Dow Corning Test).

71. Under either test, relatively minor differences in the recovery of different classes may be upheld if reasonable, but courts have consistently rejected "grossly disparate" discrepancies in the treatment of classes of equal priority of the sort proposed in this case. See, e.g., Oxford Life Ins. Co. v. Tucson Self-Storage, Inc. (In re Tucson Self-Storage, Inc.), 166 B.R. 892, 898 (B.A.P. 9th Cir. 1994) (finding that a plan providing unsecured trade creditors with a 100% recovery while providing unsecured deficiency claims with only a 10% recovery was improperly confirmed because it discriminated unfairly).

72. The Intercompany Claims have the "same priority" as other general unsecured claims, none of which are entitled to security or priority. The only difference between these two categories of claims is the identity of their holders: third parties vs. Debtors. In determining the relative priority of claims, however, only the legal nature of the claims is relevant, not the identity of the holder. See, e.g., In re Frascella Enterprises, Inc., 360 B.R. 435, 442 (Bankr. E.D. Pa. 2007). Thus, the Intercompany Claims and the Unsecured Claims are "of the same priority" for purposes of the "unfair discrimination" analysis.

73. Here, the Plan provides zero recoveries to the Intercompany Claims while providing substantial recoveries to the Unsecured Claim classes. Thus, the recoveries of the Intercompany Claimants and the holders of the Unsecured Claims could not be more "grossly disparate." The fact that the proposed treatment is the product of a settlement does not change the outcome. As the Second Circuit has mandated in Iridium, a settlement cannot circumvent the protections of section 1129(b). See In re Iridium Operating, LLC, 478 F.3d at 460 ("The court must be certain that parties to a settlement have not employed a settlement as a means to avoid the priority strictures of the Bankruptcy Code.").

74. Importantly, for purposes of determining the value of the Intercompany Claims and of the JSNs' liens and entitlement to adequate protection, the Intercompany Claims must be valued based upon their entitlement to share in all distributions to general unsecured creditors, including any consideration paid by Ally under the Global Settlement. Any attempt to divert such consideration away from the Intercompany Claims would unfairly discriminate against such claims under section 1129(b) in violation of the requirements of Iridium.[22]

(ii) Not "Fair and Equitable"

75. The Plan provides that the holders of the Securities-Related Claims, all of which are subject to mandatory subordination under section 510(b) of the Bankruptcy Code, will receive substantial distributions on account of their claims, while the Intercompany Balance Claimants are not being paid in full, thus violating the absolute priority rule.

76. Although all of the Securities-Related Claims are potentially subject to subordination under section 510(b), the Court need not find that all of these claims are, in fact, subject to subordination. The Plan would still fail to comply with section 1129(b)'s "fair and equitable" requirement if any subset of these claims are found to be subject to section 510(b) subordination and are receiving a distribution under the Plan that is denied to the JSNs.

77. That the Plan Proponents purport to settle these issues is not sufficient justification to overcome a violation of the absolute priority rule. See In re Iridium Operating,

[22] Sections 502(e) and 509 of the Bankruptcy Code provide that to the extent one Debtor has a claim against another Debtor for reimbursement, contribution or subrogation, such claims shall be satisfied after the applicable creditor whose claim is at issue has been paid in full. 11 U.S.C. §§ 502(e) and 509. In these cases, the satisfaction of the JSNs' claims give rise to allowed claims for reimbursement, contribution or subrogation in favor of numerous Debtors. Here, when aggregating the secured and unsecured recoveries that the JSNs are to receive, the Plan Proponents assert that the JSNs are paid in full. Additional value remains at numerous Debtors after accounting for the allocable recoveries to unsecured creditors. Under the Bankruptcy Code, this value must be used to satisfy the reimbursement, contribution or subrogation claims of those Debtors that satisfied the claims of the JSNs. These reimbursement, contribution and subrogation claims among the Debtors are subject to the JSNs' liens and, therefore, this excess value must be available to satisfy the JSNs secured claim, including postpetition interest and fees.

LLC, 478 F.3d at 464; see also Anchorage Police & Fire Ret. Sys. V. Official Comm. Of Unsecured Creditors of the Holding Co. Debtors (In re Conseco, Inc.), 2004 WL 1459270, at * 3 (N.D. Ill. June 25, 2004) (finding that "[t]here is no rational explanation why a settlement agreement . . . should dramatically alter the nature, let alone the treatment, of the underlying claim, particularly given the plain terms and purpose of §510(b)"); In re Cincinnati Microwave, Inc., 210 B.R. 130, 132-33 (Bankr. S.D. Oh. 1997) (holding that settlement was not in the best interests of the estate where it failed to recognize that claims should have been subordinated under Section 510(b)).

78. Although the Plan is, as a technical matter, fatally flawed because the Intercompany Claims, a dissenting class, are not paid in full, the JSNs through this Objection seek merely to ensure that the Intercompany Claims are valued for the purposes of the JSN Liens and entitlement to adequate protection as if they received the value that is being improperly diverted to other creditors because the Securities-Related Claims are not subject to subordination under section 510(b).

79. **Applicability of Section 510(b)**. Section 510(b) requires that a court subordinate, among other claims, "a claim arising from rescission of a purchase or sale of a security of the debtor or of an affiliate of the debtor, [or] for damages arising from the purchase or sale of such a security . . . ." 11 U.S.C. § 510(b). The Securities-Related Claims plainly fall within the ambit of section 510(b), as they are the direct result of, and intended to seek compensation for, damages sustained on account of the purchase of "securities" of one or more Debtors.

80. ***Private Securities Claims***. According to the Disclosure Statement, the Private Securities Claims "comprise securities litigation claims against the Debtors and Ally,

arising from the purchase or sale of the residential mortgage-backed securities, asserted by parties that have filed" lawsuits against the Debtors and/or Ally. (Disclosure Statement at 34.).

81. The Private Securities Claimants have conceded that their claims seek "damages arising from the purchase or sale of a security," and would, in fact, be subject to subordination under section 510(b) if those securities were "securities" "of a debtor" or "of an affiliate" of a debtor.[23] The Private Securities Claimants' sole argument against such subordination is that the RMBS they purchased are not "securities" of a debtor or an "affiliate" of a debtor. (Id.)

82. The Private Securities Claimants' argument fails because the securities at issue were created by the Debtors, marketed by the Debtors, and backed by assets originated or purchased and serviced by the Debtors. Thus, the Debtors were the "issuers" in every relevant sense, and they are recognized as such under the securities laws and relevant section 510(b) precedent. See Allen v. Geneva Steel Co. (In re Geneva Steel Co.), 281 F.3d 1173, 1177 (10th Cir. 2002) (for purposes of Section 510(b), securities are securities "of a debtor" if the securities were "issued by the debtor").[24]

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[23] Memorandum of Law in Support of Debtors' Motion for Summary Judgment, Adv. Case No. 13-01262 (April 2, 2013) (the "Section 510(b) Memorandum") [Docket No. 26], at 2.

[24] In the context of mortgage-backed securities, the Securities Act of 1933 (the "Securities Act") and the Securities Exchange Act of 1934 (the "Exchange Act") both provide that the "'issuer' means the person or persons performing the acts and assuming the duties of depositor or manager pursuant to the provisions of the trust or other agreement or instrument under which such securities are issued." Securities Act § 2(a), 15 U.S.C. § 77b(a)(4); Exchange Act § 3(a)(8), 15 U.S.C. § 78c(a)(8) (verbatim). The federal regulations promulgated under both the Securities Act and the Exchange Act, SEC Rules 191 and 3b-19, respectively, similarly provide that "[t]he depositor for the asset-backed securities acting solely in its capacity as depositor to the issuing entity is the 'issuer' for purposes of the asset-backed securities of that issuing entity." 17 C.F.R. § 230.191(a); 17 C.F.R. § 240.3b-19(a) (verbatim). Under this authority, the RMBS are plainly securities "of a debtor." (Section 510(b) Memorandum at 8-14.) As to whether the RMBS were securities "of an affiliate" of a debtor, the RMBS Trusts, which issued the RMBS, are plainly "affiliates" of the Debtors as defined in Section 101(2)(C) of the Bankruptcy Code, because at the time that the Private Securities Claims arose, the Debtors operated the business or substantially all of the property of the Trusts as servicers of the mortgage loans in the Trusts pursuant to Pooling and Servicing Agreements. (Id. at 14-19.)

83. Thus, there can be no doubt that the Private Securities Claims are the type of claims at which section 510(b) is targeted and with respect to which it is routinely invoked. Most tellingly, the Plan Proponents have acknowledged, both in the past and in the Plan, that the Private Securities Claims are subject to section 510(b) subordination. Prior to the agreement on the Global Settlement, the Debtors filed a motion seeking to have the Private Securities Claims subordinated pursuant to section 510(b), which remained unadjudicated at the time that settlement was reached. (Section 510(b) Memorandum at 1-4.) In the Plan context, one of the scenarios contemplated by the Debtors' Liquidation Analysis includes the subordination of all securities claims, including the Private Securities Claims. (Disclosure Statement, Ex. 8, at 8.) Moreover, the Debtors seek to subordinate pursuant to section 510(b) the claims of FHFA, which, in terms of legal theory, are virtually identical to the Private Securities Claims. (Plan § III.D.1(k).)

84. ***Monoline Insurer Claims***. The Monoline Insurer Claims, asserted by insurers MBIA, Assured, AMBAC, and FGIG,[25] "generally relate to alleged breaches of representations and warranties and fraud" by the RMBS Trusts (*i.e.*, the Debtors) in connection with the issuance of securities insured by the Monoline Insurers. (Disclosure Statement at 30.)

85. In agreeing to insure these securities, as an inextricable component of the securitization process, the Monoline Insurers assumed the same risk of loss as the ultimate purchasers of the RMBS and, thus, have asserted fraud and breach of contract claims with

[25] The Court recently approved a settlement with FGIC pursuant to a separate Bankruptcy Rule 9019 motion of, among other things, the claims the Debtors might have against FGIC under section 510(b). In re Residential Capital, LLC, 2013 WL 4874346, at *23 (Bankr. S.D.N.Y. Sept. 13, 2013). In so doing, the Court acknowledged that the question of whether the claims at issue could be subject to 510(b) subordination might be "hotly contested" and did not confront the more problematic issue of whether the Plan itself could provide for the Securities-Related Claimants to recover ahead of the Intercompany Balance Claimants without violating the absolute priority rule—which the Court must now address and determine under section 1129(b) of the Bankruptcy Code and the Second Circuit's decision in Iridium. The JSNs are not challenging the FGIC decision in this Objection; that decision is subject to a pending appeal (Docket No. 5286).

respect to the underlying securities. Indeed, at least one of the Monoline Insurers has described its insurance policies as being inextricably linked with, and playing a crucial role in, the sale of the Debtors' securities. (Limited Objection of Financial Guaranty Insurance Company to the Debtors' Sale Motion and Assumption Notice [Docket No. 1746] at ¶ 4.) These are unequivocally claims arising out of the purchase of Debtor securities.

86. The fact that these claims arise out of post-RMBS purchase breaches of representations and warranties contained in contracts between the trusts issuing the RMBS and entities "depositing" mortgage loans into those trusts does not change the outcome. Contractual claims can be subordinated under section 510(b). See, e.g., Rombro v. Dufrayne (In re Med Diversified, Inc.), 461 F.3d 251, 254-59 (2d Cir. 2006); Am. Broad. Sys. Inc. v. Nugent (In re Betacom of Phoenix, Inc.), 240 F.3d 823, 829 (9th Cir. 2001) (claim for failure to convey stock in breach of merger agreement); Aristeia Capital, L.L.C. v. Calpine Corp. (In re Calpine Corp.), 2007 WL 4326738, at *13 (S.D.N.Y. Nov. 21, 2007) (claim for loss of conversion rights based on breach of indenture); In re Enron Corp., 341 B.R. 141, 161 (Bankr. S.D.N.Y. 2006) (contract claims based on loss of stock options).

87. The breaches of contracts at issue, moreover, need not relate to the actual purchase of the security, but can arise out of events that occur after purchase of the security and relate to obligations that go beyond the actual purchase or sale of the security. See Baroda Hill Invs., Ltd. V. Telegroup. Inc. (In re Telegroup, Inc.), 281 F.3d 133, 137 (3d Cir. 2002) (holding that claim for breach of obligation to register stock gives rise to section 510(b) claim even if breach occurs subsequent to actual purchase of stock).

88. ***RMBS Trust Claims***. The RMBS Trust Claims, although framed in contractual terms, materially overlap with securities fraud claims that have been, or could be,

asserted against the Debtors. The objective of each of the RMBS breach of representation and warranty claims and securities fraud claims arising in connection with the issuance of the RMBS is the same— each seeks reimbursement for losses suffered by the RMBS Trust's certificate holders. Under sections 11I, 12(a)(2) or 15 of the Securities Act, a fraudulent description of mortgages in a prospectus would entitle security holders to recover damages or rescind their investment. Similarly, a material breach of the RMBS representations and warranties would entitle the trust issuing the RMBS to rescind its purchase of the deficient mortgages and either receive a substitution of eligible mortgages, which is not feasible, or a refund of the purchase price. Accordingly, both breach of contract and fraud claims seek to restore the RMBS holders to the same position they would have been in had the mortgages been represented properly at the time of the securitization.

89. In a similar situation, former Chief Judge Gonzalez recognized that section 510(b) may require subordination of contractual claims, such as the representation and warranty claims at issue here, when they are substantively similar to claims for fraudulent issuance. See Enron, 341 B.R. at 144 (subordinating claims, including breach of contract, of employees with stock option components to their compensation packages). In connection with the breach of contract claim at issue in Enron, the Court determined that the claimants' chief contention was that Enron fraudulently misrepresented the value of the stock options that it offered to its employees. Id. At 162. Therefore, the Court held that the breach of contract claim was a disguised claim of fraud in the issuance and that such fraud claims are clearly subject to subordination under section 510(b) of the Bankruptcy Code.

90. In order for the Plan to be confirmed, the Intercompany Claims must be paid ahead of the Securities-Related Claims and the value of the Intercompany Claims adjusted

upward to take into account this mandatory subordination of the Securities-Related Claims pursuant to section 510(b).

D. To the Extent that the Plan's Failure to Recognize Mandatory Subordination Under Section 510(b) Adversely Impacts the Value of the JSNs' Deficiency Claim, the Plan Violates the Absolute Priority Rule

91. The JSNs believe that to the extent the Court determines that the JSNs are undersecured, the recovery on their deficiency claim will be sufficient to permit the JSNs to recover postpetition interest and fees owing under the JSN Indenture through the aggregation of recoveries or by providing for the payment postpetition interest prior to the payment of subordinated claims. That issue will be more fully addressed in connection with Phase II of the JSN Adversary Proceeding. If, however, the Plan Proponents take the position that the recovery on JSN's deficiency claims are not sufficient to pay all amount owing (including postpetition interest), the Plan violates the absolute priority rule set forth in section 1129(b) due to the Plan's failure to subordinate the Securities-Related Claims as set forth in the immediately preceding section.

E. The Plan's "Partial Consolidation" Of The Debtors' Estates Cannot Be Approved To The Extent That the Plan Proponents Seek to Use It To Strip The JSNs Of Collateral Value Or Related Entitlements

92. The Plan Proponents state that "the Plan provides for the partial consolidation of the Debtors' into three (3) Debtor Groups . . . ***solely*** for the purposes of describing their treatment under the Plan, confirmation of the Plan, and making distributions under the Plan." (Disclosure Statement at 39 (emphasis added).) To the extent the Debtors are pooling assets and liabilities and eliminating intercompany claims through consolidation to determine the rights of the JSNs and the value of their collateral, such "partial consolidation" is

inappropriate. See United Savings Bank v. Augie/Restivo Baking Co., Ltd. (In re Augie/Restivo Baking Co., Ltd.), 860 F.2d 515, 518 (2d Cir. 1988). The JSNs submit that the Court should not permit the "partial consolidation" contained in the Plan to control its determination of the JSNs' rights and entitlements; however, to the extent the Plan Proponents insist that the partial consolidation should affect the JSNs' substantive rights, the Court must deny confirmation.

93. In the Second Circuit, the party seeking substantive consolidation "bears the burden of proof to demonstrate that any prejudice resulting from consolidation is outweighed by the greater prejudice posed by the continued separation of the estates." In re Donut Queen, Ltd., 41 B.R. 706, 709 (Bankr. E.D.N.Y. 1984).

94. The Second Circuit standard for approving substantive consolidation was established in the 1988 decision in Augie/Restivo. Augie/Restivo sets out two factors, "creditor reliance" on the debtor group as a single economic unit and "hopeless entanglement" of the debtors' affairs, and holds that the proponent of substantive consolidation must establish at least one of the two to prevail. Augie/Restivo, 860 F.2d at 519; Colonial Realty Co., 966 F.2d 57, 61 (2d Cir. 1992). The Plan Proponents have not and cannot prove up either "creditor" reliance" or "hopeless entanglement" in these cases.

95. The Plan Proponents have introduced no evidence to suggest that any creditors relied on the Debtors being a consolidated single unit or that the Debtors' affairs are hopelessly entangled. To the contrary, the JSNs negotiated for, and received, a combination of direct obligations (whether as issuer or as guarantor) and asset pledges from various of the Debtors. Moreover, the Debtors' books and records are in order and, while there may be disputes as to the proper characterization of certain of the Intercompany Claims, they are not

impossible to decipher. Thus, there is no basis to approve the "partial" substantive consolidation contained in the Plan.

96. Nor can the Plan Proponents rely on the Global Settlement to avoid establishing a basis for substantive consolidation. In re Adelphia Commc'ns Corp., 361 B.R. 337 (S.D.N.Y. 2007) addressed a similar issue. In that case, the confirmed plan contained a settlement of what the bankruptcy court termed the "inter-creditor dispute," which, much like here, addressed issues that included the allocation of assets among debtors, intercompany claims, and fraudulent transfers and other inter-debtor causes of action. Id. At 343-44. In the context of a motion for stay pending appeal, the district court concluded that the appellants had "shown a substantial probability of success on their claim that the bankruptcy court erroneously approved an improper substantive consolidation and unfairly treated the intercompany claims" by conflating its substantive consolidation and intercompany claim conclusions. Id.

97. The parties agreed that the bankruptcy court "did not expressly undertake to analyze and make a finding that the Plan effect[ed] a substantive consolidation." Id. Rather, the appellants argued and the district court concluded, that the bankruptcy court "improperly approved a Plan that implicitly impose[d] substantive consolidation and ignore[d] the integrity of each Debtor's separate estate." Id. In other words, the bankruptcy court "summarily approved, for the sake of administrative convenience, a Plan that effected a *de facto* substantive consolidation"—which the district court concluded made it likely that approval of the plan would be reversed on appeal. Id. The same considerations that applied in Adelphia apply here.

IV. THE THIRD-PARTY RELEASES CANNOT BE IMPOSED ON THE JSNs[26]

98. Pursuant to the Plan, Ally and a number of related parties are being granted broad releases. (Plan § IX.D.) A third-party release of such breadth cannot be imposed on the JSNs or the Notes Trustee or its predecessors because: (i) a third-party release cannot be imposed with respect to claims deemed "unimpaired" under the Plan; (ii) the Third-Party Releases cannot satisfy the stringent standard set forth in Deutsche Bank AG v. Metromedia Fiber Network, Inc. (In re Metromedia Fiber Network, Inc.), 416 F.3d 136, 141 (2d Cir. 2005) and its progeny for imposition of releases of this type on any third-party creditor; and (iii) even if the Metromedia standard could be satisfied, imposing the third-party releases on the JSNs and the Notes Trustee would result in the Plan failing to satisfy the "best interests of creditors" test.

A. A Third-Party Release Cannot Be Imposed Upon an Unimpaired Creditor

99. As a threshold matter, the Plan Proponents have chosen to treat the JSN Claims as "unimpaired" at certain Debtors. Imposing the Third-Party Releases through the Plan indisputably alters the legal, equitable, and contractual rights of the JSNs in direct violation of section 1124 of the Bankruptcy Code. See In re Union Meeting Partners, 160 B.R. 757, 771 (Bankr. E.D. Pa. 1993) ("[I]mpairment is a term of art and includes virtually any alteration of claimant's rights.") Having selected such treatment for this subset of JSNs Claims, the Plan Proponents cannot impose the Third-Party Release on the JSNs.[27]

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[26] If the Court otherwise determines that the JSNs are entitled to the full discharge of their claims through the payment of all amounts owing, including postpetition interest and fees, this objection is moot.

[27] The Plan Proponents separately contend that the JSN Claims are "unimpaired" at Debtors where they "pledged specific assets as collateral" because the JSNs "will receive such collateral (i.e., Cash) under the Plan." (Disclosure Statement at 11 n.21.) As unimpaired creditors, the JSNs are entitled to apply such recoveries to the payment of accrued postpetition interest and fees.

B. The Third-Party Releases Do Not Satisfy Any of the *Metromedia* Factors

(i) The Plan Proponents Cannot By Contract Expand the Court's Jurisdiction

100. A threshold issue is the jurisdiction of this Court to grant the Third-Party Releases. The Second Circuit has cautioned that, before approving non-debtor releases, courts should carefully consider whether they have the subject matter jurisdiction to do so. See Johns-Manville Corp. v. Chubb Indem. Ins. Co. (In re Johns-Manville Corp.), 517 F.3d 52, 63 (2nd Cir. 2008), rev'd on other grounds and remanded *sub nom* Travelers Indem. Co. v. Bailey, 557 U.S. 137 (2009), on remand, Johns-Manville Corp. v. Chubb Indem. Ins. Co. (In re Johns-Manville Corp.), 600 F.3d 135, 137 (2nd Cir. 2010). In Johns-Manville, for example, the Second Circuit held that the bankruptcy court did not have jurisdiction to enjoin ***direct*** (as opposed to derivative) claims that one third party may have against another. Id. At 65; see also In re Madoff, 848 F.Supp.2d 469, 489-90 (S.D.N.Y. 2012) (approving non-debtor releases where they were "narrowly tailored" and excluded creditors' direct claims against releasees). But that is exactly what, among other things, the Ally Releases purport to do with respect to the JSNs. (Plan § IX.D (releasing claims "derivative ***or direct***") (emphasis added).)

(ii) Imposing the Third-Party Releases on the JSNs is Not "Important" to the Plan

101. The Third-Party Releases cannot be approved because the Plan Proponents have not proven, and cannot prove, that imposing the Third-Party Releases on the JSNs and the Notes Trustee is "important" to the Plan. In re Metromedia Fiber Network, 416 F.3d at 141. The Debtors contend that (i) the releases are an "essential component" of the Global Settlement and the Plan; and (ii) Ally "has insisted that the [Ally Releases] are conditions to its agreement to make the Ally Contribution," (Disclosure Statement at 23-24), but simply establishing that a

release is a necessary part of, or a condition to the consummation of, a plan is not adequate to satisfy the Metromedia standard.

102. As the Adelphia court stated: "It would set the law on its head if parties could get around [the Metromedia "importance" requirement] by making a third party release a *sine qua non* of their deal, to establish a foundation for an argument that [such release] is essential to the realization, or even an 'important part' of the reorganization." In re Adelphia Communs. Corp., 368 B.R. at 140, 269 (Bankr. S.D.N.Y. 2007); see also Cartalemi v. Karta Corp. (In re Karta Corp.), 342 B.R. 45, 55 (S.D.N.Y. 2006) ("Anyone can devise a plan that involves contributions from non-debtors who (not surprisingly) would condition their participation on being shielded from ***their*** creditors.") (emphasis in original).

103. The JSNs are different from the holders of the Securities-Related Claims who have asserted contingent liabilities in massive amounts, but maintain no direct privity with Ally. The JSNs, on the other hand, are in privity with Ally under the Intercreditor Agreement and possess potential damage claims in discrete and quantifiable amounts. There is no basis for lumping the JSNs with all other not similarly situated creditors when it comes to imposing the Third-Party Releases. See In re AOV Indus., Inc., 792 F.2d 1140, 1151 (D.C. Cir. 1986) (plan requiring creditor that had ***unique direct claim*** against plan funder to provide release of plan funder unfairly discriminated against creditor). Moreover, Ally has steadfastly maintained that the JSNs have no claims against it. If this is true, imposing the Third-Party Releases on the JSNs is not important. If this is not true, imposing the releases on the JSNs is not fair.

104. Finally, the Plan itself proves that imposing the Third-Party Releases on ***all*** parties is not "necessary" to the Plan. Ally and the Plan Proponents have already expressly

carved out other parties from the Third-Party Release requirement, including FHFA. (Plan § III.D.) There is no basis to impose the Third-Party Releases on the JSNs.

(iii) The Plan Proponents Have Not, and Cannot, Show That Ally Has Made a "Substantial Contribution" as it Relates to the JSNs

105. The Ally Contribution is not sufficiently "significant," as it relates to the JSNs, to justify the Third-Party Releases being imposed on the JSNs because the JSNs are receiving no value in exchange for granting the Third-Party Releases. Although $2.1 billion, the current amount of the Ally Contribution, is a substantial amount of money, this amount cannot be viewed in a vacuum. The $2.1 billion is not paying only for the Third Party Releases, but is paying primarily for the release of substantial estate causes of action.

106. According to the Examiner, the Debtors' estates are "likely to prevail" on causes of action against Ally with potentially billions of dollars in damages. Judge Lyons, the JSNs' expert, has concluded that these claims have a settlement value of not less than $1.92 billion. (Expert Report of Raymond T. Lyons, Esquire (the "Lyons Report"), a copy of which is annexed to the Cohen Declaration as Exhibit "C," at 5.) While the Plan Proponents and Ally have decided not to allocate value among the various causes of action that are being released, or between estate claims and third-party claims, any reasonable allocation of the Ally Contribution to estate claims would result in the JSNs still receiving their full principal plus prepetition accrued interest if the Court determined that the JSNs are undersecured. (Expert Report of Michael Fazio (the "Fazio Report"), a copy of which is annexed to the Cohen Declaration as Exhibit "B," at 11.) But in the absence of the Third-Party Releases, the JSNs would also be free to potentially pursue Ally for their postpetition interest. Thus, the JSNs are receiving no consideration for such releases. The JSNs understand that Ally wants a third-party release from

the JSNs. To obtain such a release, however, either Ally or the Plan Proponents must pay for it through the allocation of value to the JSNs' postpetition interest claims.

(iv) The Third-Party Releases of The Debtors' Directors and Officers Are Inappropriate as They Apply to the Notes Trustee

107. The Third-Party Releases also improperly provide broad releases to each of the Debtors' directors, officers and representatives. As required by the JSN Indenture, the Debtors' directors and officers prepared numerous certificates and documents, and made numerous representations, upon which the Notes Trustee and its predecessors were entitled to rely. To the extent such documents or representations were inappropriate, and the Notes Trustee is subject to any liability as a result of its reliance thereon, the Notes Trustee may have claims against such directors and officers. As the Notes Trustee has not consented to the Third-Party Releases, from which the Notes Trustee will derive no benefit, such Third-Party Releases are inappropriate and should be denied as they apply to the Notes Trustee and its predecessors

C. Imposing the Third-Party Releases on the JSNs Would Result in the Plan Failing to Satisfy the "Best Interests of Creditors" Test

108. Even if the Third-Party Release could satisfy the Metromedia standard, imposing these releases on the JSNs without any consideration or compensation would result in the Plan violating the requirements of § 1129(a)(7)(ii), otherwise known as the "best interests of creditors test." The plan proponent bears the burden of proof to establish by a preponderance of the evidence that its plan meets the best interests test. See In re Briscoe Enters., Ltd. II, 994 F.2d 1160, 1167 (5th Cir. 1993).

109. In a chapter 7 liquidation, there would be no Ally Settlement and Ally Releases, and both the Debtors and all third parties, including the JSNs, would retain whatever claims they have against Ally. On the Debtor side, the Debtors' estates would possess billions of

dollars of claims against Ally which were deemed viable by the Examiner and which the Lyons Report values for settlement purposes at $1.92 billion. (Cohen Decl., Ex. C, at 5.)

110. The Plan Proponents state that "[n]o estimate is included in the Liquidation Analysis for recoveries relating to potential affirmative damage claims against Ally" because "the Debtors believe that an estimate of the ultimate recoveries from such claims is highly subjective. " (Disclosure Statement, Ex. 8, at 5.) This problematic omission is contrary to case law holding that all contingent claims must be reflected in a liquidation analysis and renders the Debtors' Liquidation Analysis fatally flawed. In re Sierra–Cal, 210 B.R. at 172 (liquidation analysis requires an estimation of the value of all of the bankruptcy estate's assets, including disputed and contingent claims, the potential disallowance of claims, the probability of success and value of causes of action held by the estate); In re Texas Extrusion Corp., 844 F.2d 1142, 1158 (5th Cir.1988) (same).

111. Based on this simple metric—unless the Court otherwise determines, as a consequence of the resolution of the Phase I and Phase II issues, that the JSNs are otherwise entitled to payment sufficient to discharge all of their claims, including postpetition interest and fees—the Plan Proponents cannot satisfy the best interest of creditors test.

RESERVATION OF RIGHTS

112. The Notes Trustee and the Ad Hoc Committee reserve any and all rights to advance additional arguments with respect to the Plan at any time prior to confirmation of the Plan and to respond to any arguments made by any other parties including the Plan Proponents.

WHEREFORE, the Notes Trustee, acting on behalf of the JSNs, and the Ad Hoc Committee respectfully requests that the Court enter an order: (a)(i) determining that the JSNs are entitled to full discharge of their claims through the payment of all amounts owing under the

JSN Indenture, including postpetition interest at the default rate and fees; or (ii) denying confirmation of the Plan; and (b) granting such other and further relief as is just and proper.

Dated: October 22, 2013

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Exhibit A

EXHIBIT A

I. Intercompany Claims Upon Which the JSNs Have a Direct Lien

Receiving Debtor Entity	Paying Debtor Entity
Residential Capital, LLC	GMAC Residential Holding Company, LLC
Residential Funding Company, LLC	Residential Capital, LLC
Homecomings Financial, LLC	Residential Funding Company, LLC
Residential Funding Company, LLC	RFC Asset Holdings II, LLC
Residential Funding Company, LLC	GMAC Mortgage, LLC
GMAC Residential Holding Company, LLC	GMAC Mortgage, LLC
GMAC Mortgage, LLC	GMAC Residential Holding Company, LLC
Residential Capital, LLC	GMAC Residential Holding Company, LLC
GMAC Mortgage, LLC	CAP RE of Vermont LLC
Homecomings Financial, LLC	RFC Asset Holdings II, LLC
GMAC Mortgage, LLC	Executive Trustee Services, LLC
Residential Funding Company, LLC	GMAC Res Fund of Canada
GMAC Mortgage, LLC	GMAC RH Settlement Service, LLC
Residential Funding Company, LLC	GMAC Mortgage, LLC
Residential Funding Company, LLC	RFC SFJV-2002, LLC
Residential Funding Company, LLC	Equity Investments I, LLC
Residential Funding Company, LLC	DOA Holding Properties, LLC
GMAC Mortgage, LLC	Homecomings Financial, LLC
GMAC Mortgage, LLC	Home Connects Lending Services, LLC
Residential Capital, LLC	GMAC Mortgage, LLC
Residential Capital, LLC	RFC Asset Holdings II, LLC
GMAC Residential Holding Company, LLC	GMAC Mortgage, LLC
GMAC Mortgage, LLC	Residential Consumer Services, LLC
GMAC Mortgage, LLC	Home Connects Lending Services, LLC
GMAC Mortgage, LLC	Executive Trustee Services, LLC
GMAC Mortgage, LLC	CAP RE of Vermont LLC
Residential Capital, LLC	Residential Funding Company, LLC
Residential Funding Company, LLC	DOA Properties IX (Lots-Other), LLC
Residential Capital, LLC	GMAC RFC Europe Limited
GMAC Mortgage, LLC	ETS of Washington, Inc.
Residential Funding Company, LLC	Home Connects Lending Services, LLC
GMAC Mortgage, LLC	Executive Trustee Services, LLC
GMAC Mortgage, LLC	ditech, LLC
GMAC Mortgage, LLC	ETS of Virginia, Inc.
Homecomings Financial, LLC	RFC Asset Management, LLC

II. Ally Claims Upon Which the JSNs Assert a Lien[1]

(1) Breach of Contract for Misallocation of Net Revenues on Loans brokered by GMAC

(2) Breach of Contract for Failure To Pay Value of Purchased MSRs

(3) Breach of Contract Regarding the First 2009 Tax Allocation Agreement

(4) Breach of Contract Regarding 2005 Tax Allocation Agreement

III. Equity Pledges

Entities Whose Equity Has Been Pledged to JSNs
Asset Management Performance Services, LLC
CAP RE of Vermont, LLC
CHM Holdings, LLC
Developers of Hidden Springs, LLC
ditech, LLC
DOA Holding Properties, LLC
DOA Properties I, LLC
DOA Properties II, LLC
DOA Properties III (Models), LLC
DOA Properties IV, LLC
DOA Properties IX (Lots-Other), LLC
DOA Properties NoteCo, LLC
DOA Properties V (Lots-CA), LLC
DOA Properties VI, LLC
DOA Properties VII (Lots-NV), LLC
DOA Properties VIII, LLC
EPRE LLC
Equity Investments II, LLC
Equity Investments III, LLC
Equity Investments IV, LLC
Executive Trustee Services, LLC
Executive Trustee Services, LLC
GMAC Model Home Finance I, LLC
GMAC Mortgage USA Corporation
GMAC Mortgage, LLC

[1] This list is not intended to be inclusive of all claims that the JSNs possess a lien upon, and the JSNs expressly reserve the right to assert that there are additional claims to which the JSNs' liens attach.

GMAC Mortgage, LLC of TN
GMAC Residential Holding Company, LLC
GMAC RFC International Holdings Cooperatief U.A.
GMAC RH Settlement Service, LLC
GMACR Mortgage Products, LLC
GMAC-RFC Holding Company, LLC
HFN REO Sub II, LLC
Hidden Springs Sewer Company, LLC
Homecomings Financial Real Estate Holdings, LLC
Homecomings Financial, LLC
Ladue Associates, Inc.
Marbella Lakes Associates, LLC (f/k/a DOA Properties VIII (Marbella Lakes), LLC)
Passive Asset Transactions, LLC
PATI A, LLC
RAHI A, LLC
RC Properties I, LLC
RC Properties II, LLC
RC Properties III, LLC
RC Properties IV, LLC
RC Properties IX, LLC
RC Properties V, LLC
RC Properties VI, LLC
RC Properties VII, LLC
RC Properties VIII, LLC
RC Properties X, LLC
RC Properties XI, LLC
RC Properties XII, LLC
RC Properties XIII, LLC
RC Properties XIV, LLC
RC Properties XIX, LLC
RC Properties XV, LLC
RC Properties XVI, LLC
RC Properties XVII, LLC
RC Properties XVIII, LLC
RC Properties XX, LLC
REG-PFH, LLC
Residential Accredit Loans, Inc.
Residential Asset Mortgage Products, Inc.
Residential Asset Securities Corporation
Residential Consumer Services, LLC
Residential Funding Company, LLC
Residential Funding Mortgage Exchange, LLC

Residential Funding Mortgage Securities I, Inc.
Residential Funding Mortgage Securities II, Inc.
Residential Funding Real Estate Holdings, LLC
Residential Mortgage Real Estate Holdings, LLC
RFC Asset Holdings II, LLC
RFC Asset Holdings II, LLC
RFC Asset Management, LLC
RFC Construction Funding, LLC
RFC-GSAP Servicer Advance, LLC
Walnut Grove Funding, LLC
GMAC-RFC Europe Limited
GMAC-RFC Holdings Limited