

Hearing Date: September 19, 2012 at 10:00 a.m. (ET)

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**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

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

**NOTICE OF HEARING ON DEBTOR’S MOTION PURSUANT TO
FED. R. BANKR. P. 9019 FOR APPROVAL OF THE RMBS TRUST SETTLEMENT
AGREEMENT [DOCKET # 320] AND DEBTOR’S SUPPLEMENTAL MOTION
PURSUANT TO FED. R. BANKR. P. 9019 FOR APPROVAL OF
THE RMBS TRUST SETTLEMENT AGREEMENT [DOCKET # 1176]**

PLEASE TAKE NOTICE that, on September 18, 2012, Debtors and Debtors in Possession (the “Debtors”) filed the *Debtors’ Status Report Regarding Discovery Related to Their Motion Pursuant to Fed. R. Bankr. P. 9019 for Approval of the RMBS Settlement Agreements [Docket Nos. 320, 1176]*.

PLEASE TAKE FURTHER NOTICE that a hearing on the Motion will be held before the Honorable Martin Glenn, United States Bankruptcy Judge, at the United States Bankruptcy Court for the Southern District of New York, Courtroom 501, One Bowling Green, New York,



New York 10004 (the “Bankruptcy Court”) on **September 19, 2012 at 10:00 a.m. (prevailing Eastern Time)**, or as soon thereafter as counsel may be heard.

Dated: September 18, 2012
New York, New York

/s/ Gary S. Lee

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**UNITED STATES BANKRUPTCY COURT
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In re:) Case No. 12-12020 (MG)
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RESIDENTIAL CAPITAL, LLC, et al.,) Chapter 11
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Debtors.) Jointly Administered
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**DEBTORS' STATUS REPORT REGARDING DISCOVERY RELATED TO THEIR
MOTION PURSUANT TO FED. R. BANKR. P. 9019 FOR APPROVAL OF THE RMBS
TRUST SETTLEMENT AGREEMENTS [DOCKET Nos. 320, 1176]**

Residential Capital, LLC (“ResCap LLC”) and its affiliated debtors and debtors in possession in the above-captioned chapter 11 cases (collectively, the “Debtors”) hereby submit this status report regarding discovery related to the *Debtor’s Motion Pursuant to Fed. R. Bankr. P. 9019 for Approval of the RMBS Trust Settlement Agreements* (as amended, the “RMBS Trust Settlement Agreements”) [Docket No. 320] and *Debtor’s Supplemental Motion Pursuant to Fed. R. Bankr. P. 9019 for Approval of the RMBS Trust Settlement Agreements* [Docket No. 1176] (collectively, the “9019 Motion”).

INTRODUCTION

1. The Debtors’ 9019 Motion was filed over three months ago on June 14, 2012. On July 27, 2012, the Official Committee of Unsecured Creditors (the “Committee”), the institutional investors who are parties to the RMBS Trust Settlement Agreement (the “Institutional Investors”), the trustees to the trusts that are the subject of the RMBS Trust Settlement Agreement (the “Trustees”) and the Debtors stipulated to entry of *Revised Joint Omnibus Scheduling Order and Provisions for Other Relief Regarding (I) Debtors’ Motion Pursuant to Fed. R. Bankr. P. 9019 for Approval of RMBS Trust Settlement Agreements, and (II) the RMBS Trustees’ Limited Objection to the Sale Motion* [Docket No. 945] (the “Scheduling Order”). Additionally, MBIA Insurance Corp. (“MBIA”) attended all negotiations of the Scheduling Order and did not object or voice any disapproval. The Court entered the Scheduling Order on July 31, and it set the hearing on the motion for November 5. This schedule – agreed to by the Committee, the Trustees, the Institutional Investors, and the Debtors – allows nearly five months for discovery, expert analysis, and pre-hearing preparation between the filing of the original motion and the hearing.

2. The Debtors have, in connection with their 9019 Motion, received six formal document requests, five sets of interrogatories, two deposition notices, and numerous informal requests for documents and information. Most of these requests were not received until late August – more than two months after the original motion was filed, and nearly four weeks after the Scheduling Order was entered. Several of the requests were not received until last Friday.

3. The Debtors have responded to all of the document requests, interrogatories, and informal requests for documents and information (except for the requests received last Friday, to which responses are not yet due). The Debtors have produced more than 500,000 pages of documents, all on an expedited basis, and have also made available millions of pages of loan level, trust-related information through the Debtors' Vision website. The Debtors have also answered well over 100 separate interrogatories.

4. The Debtors have also made extraordinary efforts to reach agreement with the various parties seeking discovery. The Debtors have continued a constant dialogue with the Committee and other parties since the filing of the 9019 Motion. Since last week's hearing, the Debtors have held intensive meet-and-confer sessions with each party and have sent and received numerous telephone calls, letters, and emails. The Debtors' efforts culminated in an "all-hands" face-to-face meet-and-confer session last Friday. Each party that attended (the Committee alone declined to attend) was able to raise any issues and get answers to its questions.

5. As a result of these efforts, the Debtors are able to represent to the Court that they are not aware of any outstanding discovery issue requiring intervention by the Court, except as follows:

- *Alter Ego, Substantive Consolidation, and “HoldCo Election”*

Documents. The Committee and the ad hoc group of senior unsecured noteholders of ResCap LLC (the “SUNs”), whose interests are now being pursued by Wilmington Trust as indenture trustee for such notes (and perhaps other parties), seek to conduct comprehensive discovery regarding potential alter ego claims against ResCap LLC, the holding company. As a related matter, they also seek discovery regarding the so-called “HoldCo Election,” even though the Debtors have informed all parties that this provision has been removed from the RMBS Trust Settlement Agreement. With the removal of the HoldCo Election, the issue of alter ego has no relation to the pending 9019 Motion. Under the Second Amended RMBS Trust Settlement Agreement, which the Debtors expect to finalize and execute soon, ResCap LLC will not receive a release, and any party that chooses to do so will be allowed to file a proof of claim against ResCap LLC. Correspondingly, any party who disagrees with any such proof of claim (including the SUNs) may file an objection thereto. The appropriate time for discovery regarding the advancement of any such alter ego theory will be if and when those claims are filed, not now. Alter ego discovery should not be allowed to derail the 9019 Motion approval process or the upcoming sale of ResCap’s operating businesses.

- *Depositions Concerning the Negotiation of the RMBS Trust*

Settlement. The Committee and the SUNs (and perhaps other parties) seek to conduct extensive discovery into the process by which the RBMS Settlement Agreement was negotiated. The Debtors have, without waiving their objections, agreed to produce communications between the Debtors (and Debtors’ counsel) and the other parties involved in the negotiating process. But the Committee and the SUNs say that is not

enough. They insist that those who negotiated the settlement – a group comprised almost exclusively of the Debtors’ in-house and retained attorneys – must also submit to depositions. The Debtors contend that such depositions are irrelevant to the merits of the RMBS Trust Settlement, and are largely prohibited in the Second Circuit.

6. More generally, several parties bemoan the short amount of time left before the close of discovery under the stipulated Scheduling Order, and have indicated an intention to seek to change the schedule they previously agreed to. In support of their plans, these parties will attempt to fault the Debtors for any alleged delays in discovery. However, as this report will demonstrate, most of the complaining parties did not initiate any discovery efforts in June, when the motion was filed. Further, most parties did not even begin to seek discovery until the last week of July, when the Court entered the stipulated Scheduling Order. Fully aware of the Scheduling Order, these same parties have exponentially increased their discovery demands during the last week of August. It is clear that such delays cannot be ascribed to the Debtors. Moreover, looking at these demands in light of the Scheduling Order, it becomes clear that the Debtors could not have done anything to please any party whose goal is to delay the proceedings. Such a party will devise discovery disputes and allegations of delay regardless of the Debtors’ efforts to fill all discovery demands.

7. For example, the Committee made clear in its recently filed pleading regarding this matter¹ that – separate from any issue having to do with discovery or its review of the merits of the proposed \$8.7 billion allowed claim – it intends to adjourn this Court’s evidentiary hearing on the 9019 Motion until after the filing of a plan and disclosure statement.

Specifically:

¹ See *Response of Official Committee of Unsecured Creditors to Debtors’ September 7, 2012 Status Report Regarding Their Initial and Supplemental Motions for Approval of RMBS Trust Settlement Agreement* (the “Committee Response”).

The Committee believes that the Court and the parties would benefit from a deferral of consideration of the RMBS Trust Settlement until after the filing of a plan and disclosure statement that take into account the Examiner's findings and conclusions.

Apart from the discovery and HoldCo Election issues discussed above, the Committee has additional concerns about the Rule 9019 Motion, which it will explain in greater detail at the September 11, 2012 status conference. Based on its work over the past several months, the Committee has come to understand that this motion has complex and far-reaching implications beyond those that are immediately apparent. The motion should not be decided on the basis of a hasty and incomplete record, nor should it be decided in a vacuum, divorced from the broader considerations that the Examiner is investigating and that the parties will need to address in the context of a chapter 11 plan.

Committee Response at ¶¶ 7 and 11.

8. For its part, MBIA has already made its decision to object to the 9010 Motion. Indeed, based on the extensive discovery that it conducted in its suit against the Debtor over a three year period,² on July 23, 2012, MBIA sent letters to the Trustees instructing them not to even consider the proposal in the RMBS Trust Settlement Agreement, demanding specifically as follows:³

We hereby instruct you to not consider or accept any settlement or compromise offers relating to any claims that may belong to the above-referenced Trusts, including, but not limited to the RMBS Trust Settlement Agreement, dated as of May 13, 2012 (the "Settlement Agreement"), by and between Residential Capital, LLC and its direct and indirect subsidiaries and the Institutional Investors (as defined in the Settlement Agreement).

As such, it is [MBIA's] position that it would not be reasonable for you to incur any costs or expenses in evaluating any such settlement or compromise offers....

See MBIA letter attached hereto as Exhibit A.

² Since 2010, the Debtors produced over a million pages of documents and a terabyte of data to MBIA, and MBIA conducted over 90 days of fact depositions.

³ In addition to MBIA, the other monoline insurance company that is a member of the Committee, FGIC, also sent a similar letter to the Trustees instructing them not to accept the RMBS Trust Settlement. Given that the three Trustees that are members of the 9 member Committee have recused themselves from the Committee's decisions regarding these matters, MBIA, FGIC and Wilmington Trust (on behalf of the SUNs) have 50% of the voting power on the committee on these matters.

9. Similarly, the SUNs last week informed the Debtors that, notwithstanding the removal of the HoldCo Election, they will continue to seek to conduct alter ego discovery and correspondingly press for an adjournment of the hearing on the 9010 Motion.

10. The Debtors respectfully submit that the discovery that is relevant to the Debtors' 9019 Motion has been provided, or will be provided in substantial compliance with the Court's Scheduling Order. The parties agreed to the Scheduling Order because of the need to resolve claims arising from RMBS litigation before the sale of the Debtors' operating businesses, and because of the beneficial substantive terms related thereto that are included in the integrated Scheduling Order. The adjournment sought by the Committee, the SUNs, and MBIA, among others, puts these important benefits at risk, and the discovery disputes before the Court concern matters that are irrelevant to approval of the RMBS Trust Settlement.

STATUS OF DISCOVERY REQUESTS AND RESPONSES

11. Since the Debtors' motion was filed on June 14, the Debtors have received six formal document requests, five sets of interrogatories, two deposition notices, and numerous informal requests for documents and information. The informal and formal document requests sought, in the aggregate, hundreds of separate categories of documents. The Debtors have provided responses to all these document requests (except for those received last Friday) and have, in response, produced approximately 500,000 pages of documents (in addition to the millions of pages made available on the Debtors' Vision website). The interrogatories sought over a hundred separate requests for information, and the Debtors have responded to all these interrogatories (except those received last Friday).

12. The following chart shows the requests received and the responses provided:

Request Date	Requesting Party	Description	Response Dates
6/14/12	MBIA	MBIA's First Request for the Production of Documents requesting 33 categories of documents	Debtors' response tolled by agreement of July 6, 2012. Production began on July 9, 2012.
6/19/12	Committee	Informal request for access to Debtors' Vision website	Access granted to Committee's counsel on the same day, June 19, 2012.
6/27/12	Committee	Informal telephone conference where Committee informed the Debtors that the Committee would retain an expert by July 9, 2012, to analyze the 9019 Motion and requested the production of documents relevant to the 9019 Motion	Requested materials produced on July 9, 2012.
7/6/12	Committee	Request for phone conference with Debtors' expert, Frank Sillman	The Debtors provided Sillman for a phone conference on July 13, 2012.
7/13/12	Committee	Request for an additional phone conference with Frank Sillman, for which the UCC would provide written inquiries	The Debtors provided Sillman for a phone conference on July 17, 2012.
7/13/12	FGIC	FGIC's First Request for the Production of Documents requesting 59 categories of documents	Debtors' response tolled by letter agreement of July 19, 2012. Production of the agreed-upon categories of documents was completed on August 9, 2012. The Debtors formally responded on September 14, 2012.
7/18/12	FGIC	10 Interrogatories	Debtors' response tolled by letter agreement of July 19, 2012. The Debtors formally responded on September 14, 2012.
7/25	SUNs	Informal "Diligence Questions" requesting 56 categories of documents	Production of the requested documents had been underway since August 22, 2012.

Request Date	Requesting Party	Description	Response Dates
7/28/12	Committee	The Committee's informal "Initial Diligence List" requesting 38 categories of documents	Debtors provided a written response on August 2, 2012. Debtors provided an updated written response on August 9, 2012. Substantially all documents requested by the Committee were produced by August 13, 2012.
8/2/12	Committee	Informal requests made at meet and confer for (1) RMBS-related pleadings studied by the Debtors, (2) a meeting with FTI Consulting ("FTI") regarding the Debtors' bankruptcy waterfall, and (3) a presentation by Debtors' RMBS litigation counsel Carpenter Lipps & Leland	These documents were produced on August 7, 2012. FTI meeting was held on August 16, 2012. PLS Litigation presentation held on August 21, 2012.
8/16/12	Committee	Informal request for tolling agreements between Debtors and potential claimants	These documents were produced on August 20, 27, and September 5, 2012.
8/17/12 (17 days after entry of Sched. Order)	Committee	List of 1500 loan files	The Debtors made their first production of 924 loan files on September 1, 2012. By September 11, 2012, 1462 loan files have been produced.
8/25/12	Committee	13 Interrogatories	The Debtors formally responded on September 14, 2012.
8/25/12	Committee	The Committee's First Request to Debtors for the Production of Documents requesting 18 categories of documents	The Debtors had been producing documents responsive to these requests since July 9, 2012. The Debtors formally responded on September 14, 2012.

Request Date	Requesting Party	Description	Response Dates
8/28/12	Committee	Email request for documents and access for experts to Vision website	Access to Vision for the Committee's experts was provided in response to this request on August 29, 2012. By letter of September 5, 2012, the Debtors informed the Committee that all requested documents were already in the Committee's possession.
8/28/12	Committee	Email request for "mortgage schedules" for the 392 Settlement Trusts	By letter of September 5, 2012, the Debtors informed the Committee that all requested documents were already in the Committee's possession or were publicly available
8/30/12	SUNs	24 Interrogatories	The Debtors formally responded on September 14, 2012.
8/30/12	SUNs	SUNs' First Request to Debtors for the Production of Documents requesting 131 categories of documents	Production of the requested documents had been underway since August 22, 2012. The Debtors formally responded on September 14, 2012.
8/30/12	FGIC	Letter requesting 14 categories of documents	The Debtors produced documents responsive to this request by September 14, 2012.
8/31/12	MBIA	15 Interrogatories	The Debtors responded on September 12, 2012.
8/31/12	MBIA	Second Request for the Production of Documents requesting 17 categories of documents	Production of documents responsive to these requests had been underway since July 9, 2012. The Debtors formally responded on September 14, 2012.

Request Date	Requesting Party	Description	Response Dates
9/6/12	Committee	Informal request for 3,177 complete addresses for loan files	The Debtors produced addresses for approximately 3100 of these loans on September 13, 2012, and supplemented this production on September 17, 2012. The remaining loans could not be located from the list provided by the Committee.
9/12/12	Trustees	Second Request for the Production of Documents requesting 60 categories of documents	Documents responsive to these requests were produced on September 1, 2012.
9/14/12	JSBs	Notice of Deposition of Debtors Pursuant to Fed. R. Civ. P. 30(B)(6)	The Debtors have not formally responded.
9/14/12	Committee	2 Interrogatories	Documents responsive to these interrogatories were produced on September 6, 2012. The Debtors have not formally responded.
9/14/12	Committee	Second Request for the Production of Documents requesting 8 categories of documents	The Debtors have not formally responded.
9/14/12	Committee	Notice of Deposition of Debtors Pursuant to Fed. R. Civ. P. 30(B)(6)	The Debtors have not formally responded.

STATUS OF DOCUMENT PRODUCTIONS

13. The documents and information provided by the Debtors cover all of the information relevant to the Debtors’ 9019 Motion and then some. The Debtors have made a comprehensive production of electronically stored loan information, a representative sample of actual hard-copy loan files, all of the documents and material provided to the Debtors’ experts, all of the documents and analyses produced by those experts, and virtually all of the non-privileged documents concerning the negotiation and drafting of the RMBS Trust Settlement

Agreements. And the Debtors have produced these documents even though they are not required by law and do not bear on the case question of whether the proposed \$8.7 billion allowed claim in the RMBS Trust Settlement is fair.

14. Electronically-Stored Trust Information. The Debtors have produced the equivalent of millions pages of trust level information for the 392 trusts at issue in the litigation. The production included granting the parties access to the Vision website, which contains extensive, loan-level information including:

- Shelf structure and types of loans in each shelf for each trust;
- Prospectus, pooling and servicing agreement, indenture, servicing agreement, and purchase agreement for each securitization;
- Representations and warranties for each transaction;
- Monthly distribution statements for each trust, including collateral losses and performance;
- Loan tapes for each trust; and
- Underwriting guidelines for Residential Funding Company and GMAC Mortgage Corporation.

15. 1,500 Sample Hard-Copy Loan Files. The Debtors have produced 1,463 complete hard-copy loan files to all requesting parties and their experts (for technical reasons, the remaining 37 files are not immediately available, and the Debtors have asked the parties either to designate replacement loans or to consider this sample sufficient). These files largely contain the same information as was produced previously in electronic format.

16. At last week's hearing, several parties argued that the Debtors "delayed" producing these files, and that this supposed "delay" justifies continuing the November 5

hearing. But the Committee “delayed” more than two months before even asking for the files and no one mentioned hard-copy loan files at the time the Scheduling Order was negotiated. The chronology is as follows:

- July 3. Debtors provide Committee with list of information to be put in 9019 data room on Intralinks. Hard copy loan files were not requested.
- July 6. Committee indicates that it hopes to perform a “top down” analysis, not a “bottom up” analysis, because of difficulties of obtaining and reviewing hard-copy loan files.
- July 25 to 27. Parties negotiate Scheduling Order. No party mentioned any need for hard-copy loan files.
- July 28. Committee sends the Debtors an “Initial Diligence List.” The list does not include hard-copy loan files.
- August 3. Committee, for the first time, asks questions about the process of imaging and reviewing loan files. Debtors explained that loan file imaging and review is time-consuming and burdensome and not necessary. The Committee insists it will proceed with loan file review, and says it will send a list of sample loans during the week of August 6.
- August 10. Committee says it will not be able to provide the list of loan files.
- August 17. Committee finally provides a list of 1,500 loan files for review on Friday evening. Agrees that loan files may be produced on a rolling basis.
- September 1. Debtors complete the collection, imaging, and production of 924 loan files, along with accompanying pay histories and servicing notes.
- September 11. Debtors complete production of 1,463 loan files. Debtors ask the Committee to designate 37 substitute loan files or deem the production sufficient.

17. The Debtors also note that other parties, including the Trustees, have engaged experts to review the same loan files and have indicated they will be able to review the files and analyze the RMBS Trust Settlement within the agreed-upon schedule.

18. Expert Materials and Analyses. The Debtors have provided all materials provided to, or considered by, or produced by the Debtors' experts in relation to their 9019 Motion. The documents include:

- A trust-by-trust loss analysis completed by the Debtors' expert;
- Intex deal-level data for the 392 trusts;
- Sample governing agreements;
- Sample 3-month and 12-month roll rate reports for securitization;
- All spreadsheets and calculations by the Debtors' expert; and
- All industry reports, declarations, and data reviewed by the Debtors' expert.

19. Settlement Communications and Draft Agreements. Several parties have sought discovery into the settlement process, including all communications among counsel and all drafts of the relevant settlement documents. The Debtors have objected to the relevance and appropriateness of discovery into settlement negotiations for purposes of determining the fairness of the RMBS Trust Settlement. The ultimate question before the Court, of course, is whether, in light of the risks of litigation and possible favorable and unfavorable litigation outcomes, the proposed \$8.7 billion Total Allowed Claim falls within the "range of reasonableness." The daily back-and-forth among counsel will not shed light on this question.

20. Notwithstanding (and without waiving) these objections, the Debtors have agreed to produce emails and documents regarding the negotiation of the settlement. As counsel for the Debtors took the primary roles in the negotiation process, the Debtors initially collected and produced the emails of its counsel. At the meet-and-confer session on Friday, September 14, the Debtors agreed to expand their search to include in-house lawyers and others at ResCap to the extent they played any substantive role in the settlement process. The emails and documents

from the key negotiators have already been produced; the small amount of remaining documents and emails should be produced this week. While the Debtors reiterate that such discovery is not relevant to their 9019 Motion, the production of emails will also include relevant, non-privileged emails between the Debtors, their attorneys at Morrison & Foerster LLP, Ally Financial Inc., and the Institutional Investors. The Debtors are withholding settlement communication documents solely on the grounds of attorney-client privilege and attorney work product, for which the Debtors will provide a privilege log.

21. The Debtors also point out that the requesting parties' position on settlement negotiations discovery has changed over time. Initially, MBIA and FGIC made formal requests for settlement negotiations discovery. When the Debtors objected, MBIA told the Court that "[a]lthough MBIA and the Debtors have been unable to agree regarding the production of certain other documents, MBIA does not believe it is necessary to bring those matters before the Court at this time." (Docket No. 705.) The Committee did not request settlement negotiations discovery until August 25, 2012. Again, discovery relating to settlement negotiations is not a valid basis for arguing that the Debtors are guilty of any delay.

DISPUTED ISSUES FOR DECISION BY THE COURT

I. ALTER EGO, SUBSTANTIVE CONSOLIDATION, AND "HOLDCO ELECTION" DOCUMENTS SHOULD NOT BE PRODUCED AT THIS TIME.

22. The Committee and the SUNs (and perhaps other parties) seek to conduct extensive discovery regarding potential alter ego claims against ResCap LLC. As a related matter, they also seek discovery regarding the so-called "HoldCo Election," even though that provision has been dropped from the RMBS Trust Settlement Agreements.

23. The Debtors contend that this discovery has no relation to the pending 9019 Motion. In the RMBS Trust Settlement Agreements, as presently amended, ResCap LLC

will not receive a release, and any party that chooses to do so will be allowed to file a proof of claim against ResCap LLC. There will be plenty of time for discovery regarding alter ego theories if, and when, those disputed claims are asserted.

24. The Debtors thus propose that alter ego discovery be deferred until such time as any creditor submits a proof of claim against ResCap LLC. Alter ego discovery should not be allowed to derail the 9019 Motion approval process or the upcoming sale of ResCap's operating businesses, which can and should go forward while all potential alter ego claims are preserved.

II. SETTLEMENT COMMUNICATIONS ARE NOT DISCOVERABLE AND ARE NOT RELEVANT TO THE DEBTORS' 9019 MOTION.

25. During the meet and confer session held last Friday, several parties indicated that they intend to depose the people (most of whom are the Debtors' in-house and retained attorneys) who negotiated the RMBS Trust Settlement. Although no party has yet made such a request, formally or otherwise, the Debtors have been informed by the Committee and MBIA that they intend to seek such depositions and that, because such depositions will be extensive, the November 5 hearing date needs to be substantially delayed. Accordingly, the Debtors believe it is appropriate for the Court to rule on this matter now.

26. Second Circuit authority provides that settlement communications are usually not discoverable. In order to conduct discovery into settlement negotiations, the party seeking discovery must first demonstrate a compelling need, such as by offering evidence of collusion. "Discovery with respect to a settlement agreement on an ongoing litigation, however, is permissible only where the moving party 'lays a foundation by adducing from independent sources of evidence that the settlement may be collusive.'" *Thornton v. Syracuse Sav. Bank*, 961

F.2d 1042, 1046 (2d Cir. 1992) (quoting *Mars Steel Corp. v. Continental Ill, Nat'l Bank and Trust Co. of Chicago*, 834 F.2d 677, 684 (7th Cir. 1987)).

27. No party has offered any evidence of collusion here.⁴ Accordingly, no additional discovery, and no depositions, should be allowed until a party lays such foundation and produces any evidence that the RMBS Trust Settlement is not a thoroughly-negotiated, arm's-length transaction. Any position to the contrary – which includes the position taken by several parties that settlement negotiations are relevant to an assessment of the reasonableness of the RMBS Trust Settlement or to the \$8.7 billion Total Allowed Claim – is highly speculative and not supported in fact. Notwithstanding the inherent speculative nature of the discovery requests and position taken by various parties, the Debtors agreed to produce their relevant, non-privileged emails concerning the negotiation of the RMBS Trust Settlement with the Institutional Investors, Ally, and the Trustees.

28. In light of this production, any party seeking a deposition in connection with the negotiation of the RMBS Trust Settlement must come forward with evidence of collusion, evidence which the Debtors are confident does not exist. Such depositions are additionally inappropriate in light of the fact that the RMBS Trust Settlement Agreement was primarily negotiated by attorneys. While the Federal Rules do not prohibit depositions of lawyers, an abundance of binding and persuasive authority demonstrates that taking the depositions of opposing attorneys is “disfavored.” *United States v. Yonkers Bd. of Educ.*, 946 F.2d 180, 185 (2d Cir. 1991) (“depositions of opposing counsel are disfavored”); *Alcon*

⁴ Common business practices and realities belie any theory that the timing of the contemporaneous execution of the RMBS Trust Settlement Agreements and the Plan Support Agreement is *per se prima facie* evidence of collusion. There is nothing “suspicious” about this timing at all. As is typical with the financial, legal, and practical complexities here at issue, the Debtors executed every major agreement relating to these cases within 48 hours of the Petition Date, including the Asset Purchase Agreement with Nationstar, the Barclays DIP Agreement, the RMBS Trust Settlement Agreements, and the AFI Settlement and Plan Sponsor Agreement.

Laboratories, Inc. v. Pharmacia Corp., 225 F. Supp. 2d 340, 342 (S.D.N.Y. 2002) (“the deposition of an opposing counsel [is] strongly disfavored”). As a result, the deposition of a lawyer should only be granted when the party seeking the discovery demonstrates that “no other means exist to obtain the information it seeks other than to depose counsel, and that the information sought is relevant, non-privileged and crucial to its case.” *Alcon Laboratories, Inc.*, 225 F. Supp. 2d at 342.

29. The Debtors will complete the production of settlement-related emails and documents this week. The Debtors propose that no depositions concerning the negotiation of the settlement be allowed at this time. If any party can demonstrate, using the documents that are being produced, compelling evidence of collusion, and can further demonstrate that “no other means exists” for obtaining relevant evidence, then that party can make a motion for leave to depose counsel. The Debtors respectfully submit that no party could make such a showing. But such a showing is an essential prerequisite to noticing any attorney depositions.

30. Instead the Debtors propose that before any depositions are taken regarding the settlement negotiations that the parties first review the documents that are being produced regarding these negotiations for the purpose of determining whether there is anything that corroborates the suppositions upon which their theory of collusion rests. By first reviewing such information before determining whether such depositions are necessary or appropriate, the following benefits are achieved:

- The Debtors and the parties can continue to focus on the primary task at hand – namely, whether the \$8.7 billion Total Allowed Claim is in the best interests of the estate. Presumably, the parties’ judgment on the appropriateness of these depositions will be significantly informed by their view on whether the proposed settlement is actually fair.
- If nothing from the Debtors’ emails and related documents concerning the settlement negotiations supports the parties’ collusion hypothesis, then

presumably the parties will reconsider their request for these depositions because (a) consistent with the absence of such a suggestion in the documents, the depositions will not elicit any evidence of any alleged collusion, and (b) from a cost/benefit perspective, taking all of these depositions would pose a tremendous burden on the Debtors and their professional advisors and an incurrence of significant administrative expenses for the estate, while at the same time providing no benefit.

- It would avoid the need now for the adjournment of the Court's November 5 hearing date on the 9019 Motion and the corresponding substantial risk that the estates would lose the substantive waivers by the trustees of their potential cure claims relating to the Nationstar sale.

31. The above-described proposal does not (and will not) prejudice the parties in any way. If upon their review of the settlement negotiations documents the parties believe they have identified a document that supports their collusion hypothesis, they can then bring such information to the Court's attention and ask for an adjournment based thereon.

Alternatively, if the parties do not identify any such document, as is highly likely, then it would have greatly served the estate and its creditors by not having risked the substantial diminution to the net proceeds of the Nationstar sale available to the estates, and it would have avoided the needless incurrence of the significant administrative expenses that would have been further borne by this satellite litigation.

CONCLUSION

The Debtors have worked diligently to comply with their discovery obligations and the numerous information requests and to meet the deadlines set out in the Court's Scheduling Order. Through this process, the Debtors believe they have ensured the parties' ability to complete all necessary discovery and pleadings in the required time frame. Accordingly the hearing scheduled for November 5 on the 9019 Motion for approval of the RMBS Trust Settlement Agreement should commence as agreed to and as ordered by the Court.

New York, New York
Dated: September 18, 2012

/s/ Gary S. Lee

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Debtors in Possession*



July 23, 2012

URGENT MATERIAL ENCLOSED
BY E-MAIL AND CERTIFIED MAIL (RETURN RECEIPT REQUESTED)

U.S. Bank National Association
60 Livingston Avenue
EP-MN-WS3D
St. Paul, Minnesota 55107
Attention: Home Equity Loan Trusts 2007-HSA2 and 2007-HSA3

Re: Home Equity Loan Trust 2007-HSA2, Home Equity Loan Pass-Through
Certificates, Series 2007-HSA2; and

Home Equity Loan Trust 2007-HSA3, Home Equity Loan-Backed Term
Notes, Series 2007-HSA3

Ladies and Gentlemen:

Reference is made to the agreements (each an "Agreement") described on Exhibit A, each of which you are party to, relating to the series of securities described above (the "Securities"). With respect to each series of Securities, MBIA Insurance Corporation (the "Credit Enhancer") issued the Policy or Policies referred to in the applicable Agreement.

Pursuant to each Agreement, the Credit Enhancer has the right to direct remedial actions relating to the Securities, including, but not limited to, the acceptance of any settlement or compromise offers. We hereby instruct you to not consider or accept any settlement or compromise offers relating to any claims that may belong to the above-referenced Trusts, including, but not limited to the RMBS Trust Settlement Agreement, dated as of May 13, 2012 (the "Settlement Agreement"), by and between Residential Capital, LLC and its direct and indirect subsidiaries and the Institutional Investors (as defined in the Settlement Agreement). As such, it is the Credit Enhancer's position that it would not be reasonable for you to incur any costs or expenses in evaluating any such settlement or compromise offers and, therefore, the Credit Enhancer will not reimburse you for any such costs or expenses.

Sincerely,

MBIA Insurance Corporation

By: 

Name: David Glehan

Title: Managing Director

EXHIBIT A

1. Pooling and Servicing Agreement, dated as of April 1, 2007, among Residential Funding Mortgage Securities II, Inc., Residential Funding Company, LLC and U.S. Bank National Association, successor trustee to Bank of America, N.A., successor by merger to LaSalle Bank National Association
2. Indenture, dated as of May 30, 2007, among Home Equity Loan Trust 2007-HSA3 and U.S. Bank National Association, successor trustee to Bank of America, N.A., successor by merger to LaSalle Bank National Association