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

SEALINK FUNDING LIMITED,

Plaintiff,

-v-

DEUTSCHE BANK AG; DEUTSCHE BANK
SECURITIES INC.; DB STRUCTURED
PRODUCTS, INC.; ACE SECURITIES CORP.
and DEUTSCHE ALT-A SECURITIES, INC.,

Defendants.

Adv. Proc. No. 12-02051-mg

Oral Argument Requested

**DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION
TO PLAINTIFF'S MOTION TO REMAND THIS
ACTION TO NEW YORK STATE COURT**



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Defendants Deutsche Bank AG (“DBAG”), Deutsche Bank Securities Inc. (“DBSI”), DB Structured Products, Inc. (“DBSP”), ACE Securities Corp. (“ACE”), and Deutsche Alt-A Securities, Inc. (“DBALT”) (collectively, “Deutsche Bank” or “Defendants”), by and through their attorneys, Simpson Thacher & Bartlett LLP, respectfully object to Plaintiff’s Motion to Remand (the “Remand Motion”) and submit this Memorandum of Law in Opposition thereto, along with the supporting Declaration of David J. Woll and its annexed exhibits (“Ex. __”).

PRELIMINARY STATEMENT

This Court clearly has jurisdiction over this action, which is “related to” the bankruptcies of several affiliates of Residential Capital, LLC, pending before this Court (collectively, the “ResCap Bankruptcy”). *See* 28 U.S.C. §§ 1334(b), 1452(a). The operative complaint (the “Amended Complaint”) filed by Sealink Funding Limited (“Sealink” or “Plaintiff”) alleges that the offering materials for various residential mortgage-backed securities (“RMBS”) fraudulently misrepresented the characteristics of the collateral backing those securities. Nearly \$120 million worth of the securities that are at issue in this case were created by, structured by, or collateralized with loans originated by the debtors in the ResCap Bankruptcy (collectively, the “Debtors”). The Debtors agreed to indemnify Defendants for losses, including defense costs, resulting from any alleged misstatements in the offering materials for these securities. Actions such as this one, which give rise to actual or contingent claims for indemnification against a debtor’s estate, are plainly “related to” bankruptcy proceedings pursuant to Section 1334(b). *See infra* Part I, pp. 4-8.

Neither mandatory nor equitable remand is appropriate in this case. Mandatory abstention is inapplicable because Plaintiff could have commenced this action in federal court based on diversity jurisdiction, and because this suit would be more efficiently and timely resolved in the federal courts due to its close relationship to the ResCap Bankruptcy, which is

already being adjudicated in the Southern District of New York. *See infra* Part II.A, pp. 9-14. Likewise, Plaintiff has failed to carry its burden of establishing a basis for equitable remand. This action involves no novel or unsettled issues of state law and the need for substantial discovery from the Debtors, should Plaintiff's claims survive Defendants' motion to dismiss (filed January 16, 2013), also weighs against equitable remand. *See infra* Part II.B, pp. 15-18.

FACTUAL AND PROCEDURAL BACKGROUND

On October 19, 2012, Plaintiff filed the Amended Complaint in the Supreme Court for the State of New York (the "State Court"), asserting various civil claims against Defendants.¹ The Amended Complaint alleges that Plaintiff's predecessors purchased RMBS issued by 19 issuing trusts (the "Trusts") for which one or more of the Defendants acted as sponsor, depositor, issuer, or underwriter, and that certain disclosures concerning the characteristics of the loans collateralizing the Trusts were false or misleading.² Certain Debtors served as originators, depositors, and/or sponsors for three of the Trusts: RALI 2007-QO2, RAMP 2007-RS1, and DBALT 2007-OA1 (the "ResCap Trusts"). (AC ¶ 211.) ResCap Debtor Residential Funding Company, LLC ("RFC") sponsored RALI 2007-QO2 and RAMP 2007-RS1 (the "RFC Sponsored Trusts"). The depositors for RALI 2007-QO2 and RAMP 2007-RS1 were Debtors Residential Accredited Loans, Inc. ("RALI") and Residential Asset Mortgage Products, Inc. ("RAMP"). RFC and its affiliates originated 60.86% of the loans underlying DBALT 2007-

¹ A copy of the Amended Complaint is attached as part of Exhibit 1 to Defendants' Notice of Removal. The original complaint in this matter, filed on June 22, 2012, is also attached as part of Exhibit 1 to the Notice of Removal. The Amended Complaint is cited herein as "AC ¶ ____." Exhibits to the Declaration of David L. Wales in support of the Remand Motion are cited herein as "Wales Decl. Ex. ____."

² 18 of these RMBS were offered pursuant to registration statements and related prospectus supplements filed with the United States Securities and Exchange Commission; one (DMSI 2006-PR1) was a private placement.

OA1, 30.7% of the loans underlying RALI 2007-QO2, and 11.2% of the loans underlying RAMP 2007-RS1.³

DBSI served as an underwriter for RALI 2007-QO2 and RAMP 2007-RS1 (AC ¶ 149) pursuant to underwriting agreements with the Debtors (the “Underwriting Agreements”). In these agreements, the Debtors agreed to indemnify DBSI for “any and all losses, claims, damages and liabilities . . . caused by any untrue statement or alleged untrue statement of a material fact” in the offering documents for these offerings and for “reasonable fees and disbursements of . . . counsel related to” any proceeding “in respect of which indemnity may be sought.”⁴ DBALT 2007-OA1 was sponsored by DBSP and largely collateralized by loans originated by RFC. As sponsor, DBSP purchased these loans pursuant to an Amended and Restated Standard Terms and Provisions of Sale and Servicing Agreement between DBSP and RFC dated August 22, 2005 (the “Loan Purchase Agreement” or “LPA”). In this agreement, RFC agreed, among other things, to “indemnify [DBSP] for any untrue statement . . . or the omission to state . . . a material fact” in the offering documents for any securitization collateralized by the purchased loans.⁵

On May 14, 2012, the Debtors filed voluntary petitions for reorganization under chapter 11 of the Bankruptcy Code, which were assigned to this Court. This Court fixed November 9, 2012 as the bar date for creditors to file proofs of claim. *See Order, In re Residential Capital,*

³ See RALI Series 2007-QO2 Trust, Prospectus Supplement (Feb. 26, 2007), *available at* http://www.sec.gov/Archives/edgar/data/1388212/000089109207000696/e26376_424b5.txt; RAMP Series 2007-RS1 Trust, Prospectus Supplement (Mar. 7, 2007), *available at* <http://www.sec.gov/Archives/edgar/data/1388518/000095013607001484/0000950136-07-001484.txt>; Deutsche Alt-A Securities Mortgage Loan Trust, Series 2007-OA1 Prospectus Supplement (Feb. 28, 2007), *available at* <http://www.sec.gov/Archives/edgar/data/1390485/000116231807000267/m0241424b5combined.htm>.

⁴ See Ex. A ¶ 7.1 (RALI 2007-QO2 Underwriting Agreement); Ex. B ¶ 7.1 (RAMP 2007-RS1 Underwriting Agreement); Ex. A ¶ 7.3 (RALI 2007-QO2 Underwriting Agreement); Ex. B ¶ 7.3 (RAMP 2007-RS1 Underwriting Agreement).

⁵ See Ex. C § 3.18(a) (LPA).

LLC, et al., Case No. 12-12020-mg, Dkt. No. 1309, ¶ 2 (Bankr. S.D.N.Y. Aug. 29, 2012). The Debtors' indemnification obligations "arose immediately upon the filing of this lawsuit," *Allstate Ins. Co. v. ACE Sec. Corp.*, 2011 WL 3628852, at *4 (S.D.N.Y. Aug. 17, 2011), and Defendants timely filed proofs of claim against the Debtors.⁶

Based on these indemnification obligations, Defendants removed this action to the United States District Court for the Southern District of New York on November 19, 2012. Pursuant to that court's January 31, 2012 Amended Standing Order of Reference, the case was then referred to Bankruptcy Court. On December 19, 2012, Plaintiff filed its Remand Motion before this Court and separately moved in District Court to withdraw the reference (the "Withdrawal Motion").

ARGUMENT

I. THE COURT HAS JURISDICTION UNDER 28 U.S.C. § 1334 BECAUSE OF DEBTORS' DUTIES TO INDEMNIFY DEFENDANTS

This action presents a quintessential example of "related to" bankruptcy subject matter jurisdiction under 28 U.S.C. § 1334(b). Plaintiff alleges that Defendants made certain misstatements in connection with the sale of securities. These allegations trigger immediate contractual obligations of the Debtors to indemnify Defendants and hold them harmless.

A. A Lawsuit Is "Related to" a Bankruptcy If It Could Have a "Conceivable Effect" on the Bankrupt Estate and Its Administration

Section 1334(b) provides that "district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under Title 11, or arising in or related to cases under Title 11." 28 U.S.C. § 1334(b). Section 1452(a), in turn, makes such claims removable. 28 U.S.C. § 1452(a). In the Second Circuit, "related to" bankruptcy jurisdiction arises under Section 1334(b) in any civil action in which the outcome "might have any 'conceivable effect' on [a bankruptcy] estate." *In re Cuyahoga Equip. Corp.*, 980 F.2d 110, 114 (2d Cir. 1992). To

⁶ See Ex. D (Proofs of Claim).

have a “conceivable effect” on a bankruptcy estate, “[c]ertainty, or even likelihood, is not required.” *Winstar Holdings, LLC v. Blackstone Grp. L.P.*, 2007 WL 4323003, at *1 n.1 (S.D.N.Y. Dec. 10, 2007); *In re WorldCom, Inc. Sec. Litig.*, 293 B.R. 308, 322 (S.D.N.Y. 2003). Rather, an action has a “conceivable effect” if “the outcome could alter the debtor’s rights, liabilities, options, of freedom of action (either positively or negatively)” and “in any way impacts upon the handling and administration of the bankrupt estate.” *Id.* at 317 (quoting *Celotex Corp. v. Edwards*, 514 U.S. 300, 308 n.6 (1995)); *see also In re Wood*, 825 F.2d 90, 94 (5th Cir. 1987) (even where suit “may ultimately have no effect on the bankruptcy,” jurisdiction is established where a court “cannot conclude, on the facts before [it], that it will have no conceivable effect”) (emphasis omitted).

Jurisdiction is particularly likely to exist where, as here, it is premised on a contractual indemnification obligation by a bankrupt entity. *See, e.g., WorldCom*, 293 B.R. at 318-19 (collecting cases). “Related to” jurisdiction is, by design, a broad grant of federal jurisdiction. *See, e.g., City of Ann Arbor Emps. Ret. Sys. v. Citigroup Mortg. Loan Trust Inc.*, 572 F. Supp. 2d 314, 317 (E.D.N.Y. 2008) (“The scope of ‘related to’ bankruptcy jurisdiction has been broadly interpreted by the Second Circuit.”); *Bond St. Assocs., Ltd. v. Ames Dep’t Stores, Inc.*, 174 B.R. 28, 32-33 (S.D.N.Y. 1994) (“The legislative history makes it clear that § 1334(b), taken as a whole, constitutes an extraordinarily broad grant of jurisdiction to the Article III District Court.”).

B. Defendants' Substantial Claims in the ResCap Bankruptcy Create "Related to" Bankruptcy Jurisdiction Over This Action

The relationship between this action and the ResCap Bankruptcy is quite simple.⁷ RALI 2007-QO2 and RAMP 2007-RS1 were sponsored by RFC and underwritten by DBSI. RFC's affiliates indemnified DBSI against losses incurred as result of alleged misrepresentations or omissions in the related offering materials. A majority of the loans collateralizing DBALT 2007-OA1 were acquired from RFC pursuant to the Loan Purchase Agreement, which imposed similar indemnification obligations on RFC. The Debtors filed for bankruptcy protection and Plaintiff filed this action alleging that the offering materials for the ResCap Trusts contained material misstatements.

Nearly every court to consider the question in the RMBS context has concluded that the assertion of a contractual indemnification claim creates "related to" bankruptcy jurisdiction⁸—

⁷ While this action is primarily related to the ResCap Bankruptcy, Defendants also possess potential claims related to the bankruptcy of American Home Mortgage Corporation ("AHM"), *In re Am. Home Mortg. Corp.*, Case No. 07-11051 (Bank. D. Del.), that also support "related to" bankruptcy jurisdiction even though a plan of reorganization for AHM has been confirmed. *See Allstate v. ACE*, 2011 WL 3628852, at *5 (collecting cases and concluding that there is "related to" bankruptcy jurisdiction over DBSP's claims relating to AHM bankruptcy even under the narrower "close nexus" standard proposed by Plaintiff). AHM originated loans underlying ACE 2007-ASAP1, ACE 2007-ASAP2, DBALT 2007-AR1, DBALT 2007-AR2, and DBALT 2007-BAR1. Given the far closer nexus of this case to the ResCap Bankruptcy, the Court need not address the issues related to the AHM bankruptcy. Plaintiff's argument that this action cannot affect the bankruptcy of AHM because the proofs of claim which Defendants filed have been disallowed or settled by stipulation is incorrect. The stipulation provides for Defendants' proofs of claim to be allowed as general unsecured claims. *See Wales Decl. Ex. D (Stipulation Resolving Certain Proofs of Claim)*. Pursuant to AHM's Chapter 11 Plan of Liquidation, distributions on account of allowed unsecured claims are to be made on an annual interim basis provided several requirements with regards to reserve funding are met. *See Wales Decl. Ex. H. (AHM Chapter 11 Plan of Liquidation)*. Since AHM has this continuing payment obligation to Defendants and other allowed unsecured claimants, this action can indeed affect the bankruptcy of AHM.

⁸ *See, e.g., Lone Star Fund V (U.S.), L.P. v. Barclays Bank PLC*, 594 F.3d 383, 386-87 (5th Cir. 2010) (finding "related to" bankruptcy jurisdiction in RMBS suit and denying remand); *FDIC v. Banc of Am. Sec. LLC*, 2012 WL 2904310, at *3-4 (D. Nev. Jul. 16, 2012) (same); *Stichting Pensioenfond ABP v. Countrywide Fin. Corp.*, 447 B.R. 302, 308-12 (C.D. Cal. 2010) (same); *Mass. Bricklayers & Masons Trust Fund v. Deutsche Alt-A Sec., Inc.*, 399 B.R. 119, 123 (E.D.N.Y. 2009) (finding "related to" jurisdiction in RMBS suit against DBSI based on AHM bankruptcy and denying remand); *City of Ann Arbor*, 572 F. Supp. 2d at 318-19 (finding "related to" bankruptcy jurisdiction in RMBS suit and denying remand); *Am. Int'l Grp. v. Bank of Am. Corp.*, 2011 WL 6778473, at *3-5 (S.D.N.Y. Dec. 20, 2011) (finding "related to" bankruptcy jurisdiction and other federal subject matter jurisdiction in RMBS suit).

even those that ultimately determined that remand was appropriate.⁹ Under similar circumstances, this Court has recognized that indemnification obligations render a civil action so closely related to bankruptcy proceedings as to possibly warrant a stay of the civil action. *See* Hr’g Tr., *Residential Capital, LLC v. Allstate Ins. Co.*, Adv. Proc. No. 12-01671, Dkt. No. 75, at 135:11-17 (Bankr. S.D.N.Y. July 10, 2012) (the “July 10 Hearing Transcript”) (“Where a nondebtor party is entitled to absolute indemnity by the debtor on account of any judgment that might result against them in the case, extensions of the automatic stay may be appropriate.”) (citing *A.H. Robins Co. v. Piccinin*, 788 F.2d 994 (4th Cir. 1986)).

Plaintiff’s attempt to argue that it is too “speculative” to consider this action as related to the ResCap Bankruptcy fails for two reasons:

First, regardless of the outcome of this action, the mere filing of Defendants’ proofs of claim triggers an immediate obligation by the Debtors in the ResCap Bankruptcy to indemnify Defendants for any losses and expenses, including legal fees, resulting from claims of alleged misrepresentations in the offering materials for the ResCap Trusts.¹⁰ *Cf. City of Ann Arbor* 572 F. Supp. 2d at 318-19 (finding “related to bankruptcy” jurisdiction because defendants claimed

⁹ *See, e.g.*, Ex. E, Hr’g Tr. at 21:7-13, *Bayerische Landesbank v. Merrill Lynch & Co., et al.*, Nos. 12 Civ. 2804, 3856, (S.D.N.Y. July 16, 2012) (acknowledging that “related to” jurisdiction existed, but determining that abstention was an appropriate “escape hatch” in that particular case); *Fed. Home Loan Bank of S.F. v. Deutsche Bank Sec. Inc.*, 2010 WL 5394742, at *2-4, *11-13 (N.D. Cal. Dec. 20, 2010) (finding “related to” jurisdiction in RMBS suit against DBSI and others based on AHM bankruptcy but remanding on equitable grounds not present here); *Fed. Home Loan Bank of Seattle v. Deutsche Bank Sec. Inc.*, 736 F. Supp. 2d 1283, 1289-91 (W.D. Wash. 2010) (same). While the courts in *Sealink Funding Ltd. v. Bear Stearns & Co., Inc.*, 2012 WL 4794450, at *3 (S.D.N.Y. Oct. 9, 2012) and *Allstate Ins. Co. v. Credit Suisse Sec. (USA) LLC*, 2011 WL 4965150, at *5 (S.D.N.Y. Oct. 19, 2011) found the relationship between those RMBS actions and the assertedly related bankruptcies too remote to support jurisdiction, this finding was predicated on those removing defendants’ failures to file timely proofs of claim, a circumstance not present here.

¹⁰ *See, e.g.*, Ex. A ¶ 7.3 (RALI 2007-QO2 Underwriting Agreement); Ex. B ¶ 7.3 (RAMP 2007-RS1 Underwriting Agreement).

defense costs and legal fees related to the action which were “not conditional upon the finding that Defendants [were] liable to Plaintiff”).¹¹

Second, in addition to its financial implications, this action impacts the handling and administration of the ResCap Bankruptcy because substantial discovery in terms of document requests to, and depositions of employees of, the Debtors will occur in this action in the event Plaintiff’s claims survive a motion to dismiss. This Court has already been asked to rule on requests for discovery against Debtors arising in similar actions. *See, e.g., In re Residential Capital, LLC*, 480 B.R. 529, 550 (Bankr. S.D.N.Y. 2012) (denying motion by RMBS litigants to compel discovery of loan files from Debtors). Debtors originated loans collateralizing each of the ResCap Trusts, and sponsored two of these three offerings. (*See* AC ¶ 211.) As Debtors’ counsel explained to this Court in connection with a motion to stay discovery of the Debtors’ affiliates with respect to similar claims, Debtors—not Defendants—created, possess, and control much of the information regarding the ResCap Trusts. *See* July 10 Hr’g Tr. at 63:16-21 (“Because the debtors issued the mortgage-backed securities, they have virtually all of the relevant documents. The debtors have the mortgage files, the loan level performance data, the underwriting guidelines, the due diligence materials, the deal documents, and all of the emails related to the deals.”). This reason alone is sufficient to consider this action related to the

¹¹ Plaintiff’s contention that Defendants would not be entitled to indemnification from the Debtors because “contracts that would indemnify a party for intentional or fraudulent conduct are void as against public policy” is misplaced. *See* Mem. of L. in Support of Mot. to Remand (“Remand Br.”) at 10. The very case that Plaintiff cites for that proposition also states that “New York courts have held that so long as the indemnity contract’s terms would apply to intentional conduct, an indemnified party is entitled to legal defense fees in cases alleging intentional or fraudulent wrongdoing until the indemnified party is found by the finder of fact to have acted intentionally or fraudulently.” *CBS Corp. v. Eaton Corp.*, 2010 WL 1375169, at *2 (S.D.N.Y. Mar. 30, 2010). Indeed, Defendants’ “rights to indemnification arose immediately upon the filing of this [case], covering the costs of litigation regardless of whether Defendants are ultimately found liable.” *Allstate v. ACE*, 2011 WL 3628852, at *4. Accordingly, the fact that Plaintiff has alleged fraud claims against Defendants does not void the Debtors’ indemnification obligations and therefore does not defeat this Court’s “related to” jurisdiction.

ResCap Bankruptcy. *See In re Adelpia Commcn's Corp.*, 285 B.R. 127, 137 n.31 (Bankr. S.D.N.Y. 2002) (collecting cases).

II. ABSTENTION AND EQUITABLE REMAND ARE NOT WARRANTED

Even though the Court has “related to” bankruptcy jurisdiction under 28 U.S.C. § 1334(b), Plaintiff asks this court to nonetheless abstain and remand despite “the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them.” *Colorado River Water Conservation Dist. v. U.S.*, 424 US. 800, 817 (1976). This Court should decline to do so.

A. Mandatory Abstention Under 28 U.S.C. § 1334(c)(2) Is Inapplicable

Mandatory abstention is appropriate only where “(1) the motion was timely brought; (2) the proceeding in federal court is based upon a state law claim; (3) the proceeding is related to a bankruptcy proceeding, but does not arise under title 11 or arise in a title 11 case; (4) section 1334 is the sole basis for federal jurisdiction; (5) an action is commenced in state court; and (6) the action can be timely adjudicated in state court.” Remand Br. at 14 (internal quotation marks and citation omitted). “A party is not entitled to mandatory abstention if . . . any one of the statutory requirements” is not met. *WorldCom*, 293 B.R. at 331.¹² Here, the fourth and sixth factors are not met.

1. Section 1334 Is Not the Sole Basis for Jurisdiction Over This Action

Although Section 1334 may have been the basis on which this action was removed, it is not the only basis on which this Court has jurisdiction over this matter. The Court also has

¹² Relying on *Parmalat Capital Fin., Ltd. v. Bank of Am. Corp.*, 639 F.3d 572, 582 (2d Cir. 2011), Plaintiff argues that “Defendants bear the burden of demonstrating that the test for mandatory abstention has not been met.” Remand Br. at 14. However, the Second Circuit’s holding in *Parmalat* was narrower. The Second Circuit held that “[t]ypically, a party seeking relief bears the burden to show he is entitled to that relief” but that “[p]lacing the burden on the party seeking remand may nevertheless be inconsistent with the mandatory nature of abstention under Section 1332(c)(2).” *Parmalat*, 639 F.3d at 582 (emphasis added). In any event, *Parmalat* dealt only with which party has the burden to show that matters cannot be timely adjudicated in state court (factor six). *Id.*

original subject matter jurisdiction over this case because there is diversity under 28 U.S.C. §§ 1332(a)(3) and (4).¹³

28 U.S.C. § 1332(a)(4) provides for federal court jurisdiction in suits between a foreign state, as defined in 28 U.S.C. § 1603,¹⁴ and citizens of a state of the United States. Sealink was created and funded by state-owned German Landesbanks to serve an official function of the German government, the performance of which was previously sponsored by a state-owned German Landesbank. Sealink was established to receive, hold, and manage RMBS (including those at issue here) purchased by special purpose vehicles (“SPVs”) formerly sponsored by Sachsen LB, a Landesbank. (AC ¶ 17.) Sachsen LB “decided to provide support to these [SPVs]” in view of the “the withdrawal of investors from the funding of the conduit structures and the resulting drop in the price of positions.”¹⁵ That support “led to a significant strain on liquidity,” and Sachsen LB was forced to seek liquidity from other Landesbanks.¹⁶ “It was only through the bank pooling agreement among the Landesbanks and the investment in Sachsen LB by [Landesbank Baden-Württemberg (“LBBW”)] that the funding . . . could be stabilized and secured for the long term.”¹⁷ When Sachsen LB was acquired by LBBW, the SPVs were

¹³ Defendants could not remove this action on this basis by 28 U.S.C. § 1441(b) because certain defendants are citizens of the forum state (New York). However, “Section 1441(b) is a rule of procedure and does not state a jurisdictional requirement.” *Shapiro v. Logistec USA, Inc.*, 412 F.3d 307, 313 (2d Cir. 2005); *see also In re MTBE Prods. Liab. Litig.*, 522 F. Supp. 2d 557, 567 (S.D.N.Y. 2007) (“In the context of bankruptcy, Congress has treated subject matter jurisdiction and removal as two distinct issues.”). In other words, there is federal subject matter jurisdiction over this action, even though removal would have been improper on diversity grounds. *See WorldCom*, 293 B.R. at 331-32 (denying mandatory abstention because federal and state courts have concurrent jurisdiction over suits under the Securities Act of 1933 even though such claims are non-removable).

¹⁴ Section 1603 defines a foreign state to include a “political subdivision of a foreign state or an agency or instrumentality of a foreign state,” which means, in pertinent part, “any entity . . . which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof.” 28 U.S.C. § 1603(a)-(b).

¹⁵ Ex. F at 44 (2007 Sachsen LB Annual Report).

¹⁶ *Id.*

¹⁷ *Id.*

excluded from the acquisition.¹⁸ These portfolios were transferred to Sealink, “a new special purpose entity financed by LBBW” and other German Landesbanks.¹⁹

Due to Sealink’s financial structure and guarantees, German Landesbanks and the Free State of Saxony will incur any and all losses in relation to the RMBS purchased by the SPVs. Sealink’s publicly-filed 2009 financial statements disclose that a group of senior lenders, all German Landesbanks, and a junior lender, LBBW, have agreed to cover any and all losses resulting from diminished cash flows from the RMBS at issue.²⁰ Further, LBBW and Germany’s Free State of Saxony are guarantors of “all indirect and direct risk in relation to payment defaults on the portfolio assets.”²¹ Because it (i) was created and funded by state-owned German Landesbanks and (ii) serves an official function of the German government, Sealink is an organ or instrumentality of a foreign state and, as such, there is jurisdiction over this action under Section 1332(a)(4). *See In re 650 Fifth Ave. & Related Props.*, 2012 WL 3070028, at *13-17 (S.D.N.Y. Jul. 27, 2012) (holding that entity not directly owned by foreign sovereign was nonetheless “organ” of foreign sovereign); *accord EM Ltd. v. Repub. of Argentina*, 720 F. Supp. 2d 273, 298-99 (S.D.N.Y. 2010) (concluding that Central Bank of Argentina was alter ego of Republic of Argentina).²²

¹⁸ Ex. G at 20 (LBBW Financial Stability Forum Report).

¹⁹ Ex. F at 10 (2007 Sachsen LB Annual Report).

²⁰ Ex. H at 7, 9 (2009 Sealink Abridged Financial Statements).

²¹ *Id.* at 7, 11.

²² To the extent the Court believes further factual development is necessary to ascertain the full extent to which Sealink is an “organ of a foreign state” or whether DBAG has been improperly joined in this action, Defendants respectfully request that the Court permit narrow, expedited discovery of Plaintiff before resolution of Plaintiff’s Remand Motion. *See Anwar v. Fairfield Greenwich Ltd.*, 2009 WL 1181278, at *3 (S.D.N.Y. May 1, 2009) (“[W]hen a plaintiff moves to remand an action to state court after a defendant has removed it to federal court, a district court ‘may have . . . to authorize . . . discovery’ on the issue of subject matter jurisdiction.”) (quoting *Cantor Fitzgerald, L.P. v. Peaslee*, 88 F.3d 152, 155 (2d Cir. 1996)); *see also Fein v. Chrysler Corp.*, 1998 WL 34032284, at *10 (E.D.N.Y. Sept. 29, 1998) (“[T]he cases cited by defendant indicate a preference, even a requirement, for jurisdictional discovery, if necessary [in connection with a motion to remand].”).

Moreover, an alternative basis exists for diversity jurisdiction under Section 1332(a)(3) because this suit is between Sealink (a foreign entity) and, apart from DBAG, all of the defendants are citizens of the United States. For purposes of this analysis, Sealink's purported claims against DBAG (a foreign entity) can and should be disregarded because they were improperly joined with claims against the other Defendants in order to defeat diversity. *See Bounds v. Pine Belt Mental Health Care Res.*, 593 F.3d 209, 215 (2d Cir. 2010) ("A plaintiff may not defeat federal court diversity jurisdiction by improperly joining as a defendant a non-diverse party with no real connection to the controversy.").

The Amended Complaint is over 130 pages long yet its only allegations against DBAG are that: (i) it is a German financial services corporation whose stock is publicly-traded, (ii) it is a parent of certain Defendants and other entities referenced in the Amended Complaint, (iii) it entered into transactions such as interest rate swaps in connection with certain RMBS offerings and served as a warehouse lender for certain originators (transactions which Plaintiff does not allege to have been fraudulent, or to have impacted Plaintiff's investment decisions), and (iv) it was Michael Commaroto's employer. The Amended Complaint does not allege that DBAG sold anything to Plaintiff, made any statement or misstatement to Plaintiff, or was involved in any such statements. Even resolving all factual and legal ambiguities in Plaintiff's favor, these allegations do not state the barest of claims, much less fraud claims that need to be pled with particularity, against DBAG. *See, e.g., Fahlenbach v. Trans Pac. Capital (USA), Inc.*, 1996 WL 22602, at *5 (S.D.N.Y. Jan. 19, 1996) (dismissing a fraud claim because the complaint did not "allege specific false representations made by . . . defendants upon which plaintiffs relied in making their investment" decisions); *Daly v. Kochanowicz*, 884 N.Y.S.2d 144, 152-53 (N.Y.

App. Div. 2009) (dismissing fraud claim where complaint does not allege any misstatement made by that defendant).²³

2. This Action Can Be More Timely Adjudicated in the Federal Courts

This case can be more quickly and efficiently adjudicated in the federal court system because of this case's close relationship with the ResCap Bankruptcy. Plaintiff essentially concedes that courts in this district and the State Court's Commercial Division are almost equally well-equipped to opine on the merits of this case. Remand Br. at 15-16.²⁴ However, most of the documents relevant to Plaintiff's claims regarding the ResCap Trusts are believed to be in the custody or control of the Debtors. As Debtors' counsel explained to this Court in connection with nearly identical claims brought by other investors in similar Trusts, Debtors—not Defendants—created, possess, and control the information regarding these Trusts. *See supra* at 8. If this case proceeds to discovery, it is a foregone conclusion that the parties will be returning to this Court to seek permission to take document and deposition discovery of Debtors. *See, e.g., In re Residential Capital*, 480 B.R. 529.

Keeping this case before this Court eliminates the need for the parties to update the Court about the status and procedural posture of this case with every request for discovery from the Debtors and avoids the need, in the event this Court denies or delays such a request, for the parties to seek appropriate relief from the State Court (whether in the form of scheduling modifications or otherwise). Simply put, remanding this case will add an additional layer of complexity and delay. Denying remand enables this Court to balance the competing needs of

²³ Indeed, a New York state court recently dismissed all claims against DBAG as a matter of law in another suit relating to RMBS. *See* Ex. I, Hr'g Tr., *Stichting Pensioenfond ABP v. ACE Securities Corp.*, Index No. 652460/2011, at 118:15-16 (N.Y. Sup. Ct. July 27, 2012).

²⁴ Plaintiff's prediction of more timely adjudication in state court can be ignored. *See In re Hillsborough Holdings Corp.*, 123 B.R. 1004, 1012-13 (Bankr. M.D. Fla. 1990) (finding plaintiff's prediction of timely adjudication "totally unrealistic" in light of the complexity of the case and its "embryonic stage").

this case—including the need to reach a prompt resolution so the extent of Debtors’ indemnity to Defendants is known—with the burdens that the necessary discovery will impose on the Debtors. *See In re Semcrude, L.P.*, 442 B.R. 258, 275-76 (Bankr. D. Del. 2010) (holding mandatory abstention neither appropriate nor warranted where “it appears likely that the Debtors will be required to participate in the adjudication of these disputes, at a minimum to respond to discovery demands from all litigants”); *see also Stoe v. Flaherty*, 436 F.3d 209, 219 (3d Cir. 2006) (“[T]imeliness in this context must be determined with respect to needs of the title 11 case and not solely by reference to the relative alacrity with which the state and federal court can be expected to proceed.”).

Likewise, because this case involves a claim by a foreign entity, this case will likely involve substantial discovery of foreign parties, which is more readily available in a federal court. *Compare First Am. Corp. v. Price Waterhouse LLP*, 154 F.3d 16, 23 (2d Cir. 1998) (enforcing subpoena issued under FRCP and “declin[ing] . . . to adopt a rule mandating primary resort to the Hague Convention as the means of obtaining discovery from a foreign non-party witness”) with *In re Agusta*, 567 N.Y.S.2d 664, 665 (N.Y. App. Div. 1991) (holding that foreign discovery may only be sought through Hague Convention). This will be particularly important in connection with discovery of potential non-party witnesses such as investment advisors and former employees of Sealink’s alleged predecessors, who are likely to have unique knowledge concerning the investment decisions at issue in this action and Plaintiff’s predecessors’ sophistication and experience as RMBS investors.²⁵

²⁵ In a common law fraud action such as this, an investor’s knowledge and sophistication about relevant markets and products are relevant to the determination of whether its reliance on alleged misstatements was reasonable. *See HSH Nordbank AG v. UBS AG*, 941 N.Y.S.d 59, 65-70 (N.Y. App. Div. 2012).

B. Equitable Factors Do Not Warrant Discretionary Abstention and Remand

Federal courts have recognized that abstention is an “extraordinary and narrow exception” to federal courts’ “virtually unflagging obligation . . . to exercise the jurisdiction given them.” *Colorado River*, 424 U.S. at 813, 817.²⁶ In considering a request for equitable remand under 28 U.S.C. § 1334(c)(1), courts consider:

(1) the effect or lack thereof on the efficient administration of the estate if a Court recommends abstention, (2) the extent to which state law issues predominate over bankruptcy issues, (3) the difficulty or unsettled nature of the applicable state law, (4) the presence of a related proceeding commenced in state court or other nonbankruptcy court, (5) the jurisdictional basis, if any, other than 28 U.S.C. § 1334, (6) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case, (7) the substance rather than form of an asserted “core” proceeding, (8) the feasibility of severing state law claims from core bankruptcy matters to allow judgments to be entered in state court with enforcement left to the bankruptcy court, (9) the burden [on] the court’s docket, (10) the likelihood that the commencement of the proceeding in a bankruptcy court involves forum shopping by one of the parties, (11) the existence of a right to a jury trial, and (12) the presence in the proceeding of nondebtor parties.

WorldCom, 293 B.R. at 332. “The movant bears the burden of establishing that permissive abstention is warranted.” *Margulies*, 476 B.R. at 402. The close relationship between this suit and the ResCap Bankruptcy (factors 1, 6, and 9), the presence of an alternate jurisdictional basis (factor 5), the relatively routine nature of Plaintiff’s state law claims (factors 2, 3, and 4) and the jury trial right available in the District Court (factor 11) all weigh against abstention. The remaining factors are inapplicable here.

²⁶ Discretionary abstention “was intended to codify non-bankruptcy judicial abstention doctrines” from *Colorado River* and other similar cases. *In re Margulies*, 476 B.R. 393, 401-02 (Bankr. S.D.N.Y. 2012) (citing *In re Pan Am. Corp.*, 950 F.2d 839, 845 (2d Cir. 1991)); *see also Trustees of Masonic Hall & Asylum Fund v. PricewaterhouseCoopers LLP*, 2009 WL 290543, at *5 (S.D.N.Y. Feb. 6, 2009) (*Colorado River* requires “[f]ederal courts . . . [to] be ‘sparing’ in their exercise of discretionary abstention”).

1. This Suit Is Directly Related to and Impacts the ResCap Bankruptcy

Plaintiff argues that “the outcome of this action will have no effect on the administration of any identified bankruptcy” and that “it is unnecessary to coordinate this action” with the ResCap Bankruptcy. Remand Br. at 17-20. Plaintiff misses the mark on both points.

First, this suit already is impacting the ResCap Bankruptcy because Defendants are entitled to indemnification, including legal fees, from the Debtors as a result of *alleged* misrepresentations in the offering materials for the ResCap Trusts. *See supra* Part I.B.

Second, Plaintiff asserts claims in this suit concerning \$120 million of securities it purchased that were issued by the ResCap Trusts, for which Defendants are entitled to indemnity and have filed proofs of claim. *See supra* Part I.B. Resolution of Defendants’ claims relating to this and other similar matters will be important to administration and resolution of the ResCap Bankruptcy. Plaintiff purchased \$120 million of RMBS issued by the ResCap Trusts, and a finding that the offering materials for those documents contained material misstatements or omissions could, following suits by other investors, create a claim against the Debtors concerning the approximately \$1.5 billion of RMBS issued by the ResCap Trusts overall,²⁷ which is nearly 10 percent of the Debtors’ reported \$15.7 billion in assets.²⁸ *See, e.g., Appatek Indus., Inc. v. Biolab, Inc.*, 2010 WL 731366, at *3 (M.D.N.C. Feb. 25, 2010) (denying equitable remand where a “damages award . . . of the sort contemplated by the parties will directly alter the estate’s assets by hundreds of thousands of dollars”); *WorldCom*, 293 B.R. at 334 (“[I]t is

²⁷ *See* RALI Series 2007-QO2 Trust, Prospectus Supplement (Feb. 26, 2007), *available at* http://www.sec.gov/Archives/edgar/data/1388212/000089109207000696/e26376_424b5.txt (offering \$527,132,000 of certificates); RAMP Series 2007-RS1 Trust, Prospectus Supplement (Mar. 7, 2007), *available at* <http://www.sec.gov/Archives/edgar/data/1388518/000095013607001484/0000950136-07-001484.txt> (offering \$478,271,000 of certificates); Deutsche Alt-A Securities Mortgage Loan Trust, Series 2007-OA1 Prospectus Supplement (Feb. 28, 2007), *available at* <http://www.sec.gov/Archives/edgar/data/1390485/000116231807000267/m0241424b5combined.htm> (offering \$434,575,000 of certificates).

²⁸ *See* Ex. J (BLOOMBERG, *Ally’s ResCap Files Bankruptcy, Plans Sale to Fortress* (May 14, 2012)).

important to weigh the impact of any remand on the ability of [the Debtor] to reorganize. . . . [T]he efficient and expeditious resolution of this litigation, and its concomitant claims for contribution and indemnification, will assist the reorganization effort.”).

Third, if there is discovery in this case at all, it will involve significant discovery from Debtors concerning the ResCap Trusts, which would impact the efficient administration of the Debtors’ estates. *See supra* pp. 7-8. “There is no good reason . . . to necessitate federal-state coordination of ongoing discovery needs in two separate courts.” *Adelphia*, 285 B.R. at 145 (denying remand).

2. There is a Basis for Federal Jurisdiction Other Than 28 U.S.C. § 1334

This case could have been commenced in federal court based upon diversity jurisdiction under 28 U.S.C. §§ 1332(a)(3) and (a)(4). *See supra* Part II.A.1.

3. Plaintiff’s State Law Claims Are Neither Novel Nor Unsettled and Are in Their Procedural Infancy

Although Plaintiff’s sole claim is under state law, “both the bankruptcy judges in this district, and the district judges here, address matters of state law on a regular basis.” *Adelphia*, 285 B.R. at 145. This suit does not raise “matters involving family law, probate law, condemnation law, or other specialized areas of the law not regularly addressed in the federal courts . . . , [and] there is no material difference . . . in the ability of the state and federal courts to decide those issues.” *Id.* at 146.²⁹ Indeed, “the state law claims are straightforward common-law claims that do not involve arcane or idiosyncratic provisions of state law that would ‘warrant

²⁹ Numerous cases, including those involving mortgage-backed securities, have reached the same conclusion. *See, e.g., Stichting Pensioenfonds ABP v. Countrywide Fin. Corp.*, 447 B.R. 302, 312 (C.D. Cal. 2010) (declining to abstain because “there are no unsettled or difficult issues of state law that weigh in favor of remand”); *Abbatiello v. Monsanto Co.*, 2007 WL 747804, at *4 (S.D.N.Y. Mar. 8, 2007) (although plaintiff raised a number of state law claims, “these causes of action are not ‘novel or complex’ and therefore not necessarily best resolved in state court”); *Rahl v. Bande*, 316 B.R. 127, 135 (S.D.N.Y. 2004) (“[E]ven if New York law applied to the majority of plaintiff’s claims, the existence of state law claims does not automatically dictate remand or abstention especially where, as is the case here, the state law claims are not particularly novel or complex.”).

abstention on comity concerns.”” *Refco Private Actions Trust v. Bennett*, 2008 WL 1990669, at *8 (S.D.N.Y. May 7, 2008). Likewise, there are no comity concerns because “the case was promptly removed . . . [so] New York state courts have invested little or no time in the case.” *Id.*; compare *Senorx, Inc. v. Coudert Bros., LLP*, 2007 WL 1520966, at *3 (N.D. Cal. May 24, 2007) (equitable remand not warranted on comity grounds even where some proceedings had occurred in state court prior to removal), with *Williams v. Shell Oil Co.*, 169 B.R. 684, 693 (S.D. Cal. 1994) (equitable remand was warranted where state courts had “devoted significant resources” to case including appointing coordinating judge and two special masters).

4. A Jury Trial Is Available in the District Court

Plaintiff’s right to a jury trial is not impacted by removal of this action. *See* FED. R. CIV. P. 38(a) (permitting jury trial in district court); 28 U.S.C. § 157(e) (permitting jury trial in bankruptcy court where otherwise available, subject to consent of district court and all parties); *see also In re Mid-Atlantic Res. Corp.*, 283 B.R. 176, 192 (S.D. W. Va. 2002) (“If the parties do not consent to the bankruptcy court conducting the trial, the trial will be held before [the district court].”). Even though the parties have not consented to a jury trial by this Court, this Court can still administer all pretrial proceedings until such time as the case is ready for trial, and then make recommendations to the district court on pretrial motions. *Enron Power Mktg., Inc. v. City of Santa Clara*, 2003 WL 68036, at *6-8 (S.D.N.Y. Jan 8, 2003). In short, Plaintiff’s right to a jury trial has not been impaired by the removal of this action, and therefore should not impact the Court’s decision on whether this case is appropriate for equitable remand.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Court deny Plaintiff's Motion to Remand this Action to New York State Court.

Dated: New York, New York
January 30, 2013

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CERTIFICATE OF SERVICE BY HAND

I, Peter Hartofilis, hereby certify under the penalty of perjury that on
January 30, 2013, I served a true and correct copy of the attached:

**- DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S
MOTION TO REMAND THIS ACTION TO NEW YORK STATE COURT**

- DECLARATION OF DAVID J. WOLL (with Exhibits A-J)

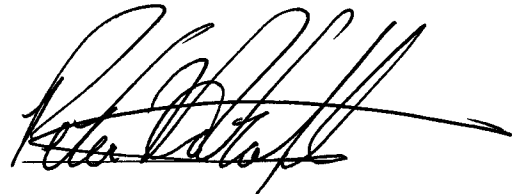
By-Hand upon:

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US Trustee for the Southern District of NY
Tracy Hope Davis, Linda A. Riffkin and Brian S. Masumoto
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By delivering true and correct copies of the above aforementioned documents to a person of
suitable age and discretion at the above aforementioned addresses.

Dated: New York, NY
January 30, 2013.

A handwritten signature in black ink, appearing to read 'Peter Hartofilis', with a long horizontal flourish extending to the right.

Peter Hartofilis

CERTIFICATE OF SERVICE

I, Peter Hartofilis, hereby certify under the penalty of perjury that on
January 30, 2013, I personally served a true and correct copy of the attached:

**- DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO
PLAINTIFF'S MOTION TO REMAND THIS ACTION TO NEW YORK STATE
COURT**

- DECLARATION OF DAVID J. WOLL (with Exhibits A-J)

By First Class Mail upon:

(SEE ATTACHED SERVICE LIST)

By depositing a true copy of the same in a properly addressed, postpaid wrapper in a regularly
maintained official depository of the United States Post Office located in the City, County and
State of New York.

Dated: New York, New York
January 30, 2013

A handwritten signature in black ink, appearing to read 'Peter Hartofilis', written over a horizontal line.

Peter Hartofilis

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