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UNITED STATE 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-ap-02051 (MG) Oral Argument Requested

PLAINTIFF'S REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF MOTION TO REMAND TO NEW YORK STATE SUPREME COURT

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Defendants concede that this is a state common law fraud action against non-bankrupt entities that involves no federal question ***and*** that the vast majority of all relevant factors supporting mandatory and equitable abstention are met here. Nevertheless, Defendants try to justify removal by effectively asserting that the Debtors are liable for Deutsche Bank's alleged fraud. This effort to pin the blame for their own conduct on non-parties fails. Sealink has brought claims against ***Deutsche Bank*** for false statements that ***Deutsche Bank*** made. As the Debtors' liability is not at issue in this action, in order to trigger indemnification, the Debtors would have to be found liable for the false statements at issue in a separate proceeding. Defendants' claims are simply no different than any of the potentially thousands of contingent and unliquidated claims filed in the ResCap Chapter 11 Proceeding.[1]

Next, Defendants wrongly contend that mandatory abstention is not required because there is diversity jurisdiction. Complete diversity is defeated by the presence of aliens on both sides of this litigation; removal on the basis of diversity violates the forum defendant rule; and diversity could not even arguably be the basis for retaining jurisdiction unless the Court ignores Sealink's allegations against DBAG. Moreover, Defendants' effort to show that DBAG was "fraudulently joined" comes nowhere close to the required ***proof*** of outright fraud, or a showing that DBAG's liability is a "legal impossibility." Tellingly, Defendants' removal notice never mentions diversity or fraudulent joinder. Last, Defendants rely on the wrong standard to support a half-hearted assertion that the Court should not abstain on equitable grounds. In sum, Defendants have not and cannot meet their burden here. This action should be remanded.

I. There Is No Bankruptcy Jurisdiction Over This Action

Defendants' argument that this action is "related to" the ResCap Chapter 11 Proceeding fails for three reasons. *First*, "not all indemnification agreements between a defendant in a civil action and a non-party bankruptcy debtor create 'related to' jurisdiction…the right to

[1] Unless otherwise indicated, all capitalized terms that are not defined herein have the meanings ascribed to them in Plaintiff's opening brief. "Rem. Br." refers to Plaintiff's opening brief. "Opp." refers to Defendants' opposition brief, and "Woll Decl." refers to the supporting Declaration of David J. Woll. "Wales R.D." refers to the Declaration of David L. Wales in support of this reply.

indemnification [must be] established and [] not contingent on the filing of a separate action." *Prudential Ins. Co. of Am. v. J.P. Morgan Sec., LLC*, 2012 WL 6771977, at *4 (D.N.J. Dec. 20, 2012) ("*Prudential I*"). Thus, the relevant inquiry is "whether the debtor's liability [is] automatically triggered when the purported related action against the party seeking indemnification beg[a]n." *Id.* Defendants contend that "the mere filing" of their proofs of claim "triggers an immediate obligation by the [Debtors] 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."[2] Opp. 7. But Sealink has alleged that ***Deutsche Bank***, and not the Debtors, made and is liable for these false statements. As Judge Walls recently explained in rejecting the same argument, based on virtually identical contractual language:

> The suit before this Court involves alleged untrue statements by *Defendants;* it does not involve alleged untrue statements by the *Bankrupt Originators.* While Defendants may wish to claim that the fraud on behalf of the Bankrupt Originators underlies the Plaintiff's complaint, a lawsuit establishing the Bankrupt Originators' liability is not before this court. A separate suit would be required to establish whether the Bankrupt Originators' indemnification clause accrued "insofar as such...liabilities...arise out of or are based upon any untrue statement or alleged untrue statement or alleged untrue statement of material fact contained in the...Prospectus Supplement." *Prudential I*, at *4.

Accordingly, there is no "related to" jurisdiction here because "there are determinations that must be made in a second proceeding with respect to allocation of any blame between Defendants and the Originators and any rights to indemnification." *Prudential Ins. Co. of Am. v. Barclays Bank PLC*, 2013 WL 221995, at *6 (D.N.J. Jan 22, 2013) ("*Prudential II*").[3]

[2] Significantly, while Defendants repeatedly claim that the Debtors have an immediate obligation to pay their legal fees, they never suggest that any such fees have been paid, or that they have even attempted to collect them.

[3] Moreover, "even if the fraud ultimately *did* originate with the bankrupt entities, as defendants (in both cases) claim, it would still not trigger automatic indemnification sufficient to support related-to jurisdiction…[because] the indemnification agreements did not accrue upon the filing of the present suit." *Prudential II*, 2013 WL 221995, at *6 (citing *Prudential I*, at *5); *see* Rem. Br. at n.7 (claim accrues at the time indemnification agreement is executed). The cases cited by Defendants at Opp. n. 8, in contrast, contained different indemnification clauses, or the Court did not consider the indemnification clauses. *See Prudential II*, at *4 (distinguishing *Stichting Pensioenfonds ABP v. Countrywide Fin. Corp.*, 447 B.R. 302, 209 (C.D. Cal. 2010) and *Allstate Ins. Co. v. ACE Sec.*, 2011 WL 3628852, at *4 (S.D.N.Y. Aug. 17, 2011) on this basis). Defendants' contention that they are entitled to immediate indemnification for their own fraud, contrary to New York public policy, fails for the same reason. Opp. n.11.

Second, even under Defendants' theory, their proofs of claim, like the thousands of other contingent and unliquidated claims in the ResCap Chapter 11 Proceeding, "will have to be…either denied or reduced to a liquidated amount before there can be any effect on the bankruptcy estate." *Kerusa Co. LLC v. W10Z/515 Real Estate Ltd. P'ship*, 2004 WL 1048239, at *3 (S.D.N.Y. May 7, 2004) (remanding action where, as here, the bankruptcy plan at issue called for liquidation, not reorganization); *see also In re Balensweig*, 410 B.R. 157, 164 (Bankr. S.D.N.Y. 2008) (no "related to" jurisdiction where adversary proceeding "will only have a 'speculative, indirect or incidental' effect on the Debtor's estate").[4]

Last, Defendants' speculative claim that "substantial discovery" of the Debtors may occur down the line does not come close to a demonstration that removal was proper.[5] The Complaint details how defendant DBSI (a) conducted due diligence on the underlying loans, ¶¶71-74; (b) decided which loans would be securitized and sold to Sealink's assignors, ¶¶81-86; (c) internally disparaged its own RMBS as "crap," and "generally horrible," ¶¶132-39; (d) reviewed and distributed the offering materials for each securitization, ¶46; and (e) sold the resulting RMBS, ¶47. As these allegations make abundantly clear, in this fraud case against ***Deutsche Bank,*** it is ***Deutsche Bank*** which "create[s], possess[es], and control[s]," Opp. 8, the relevant documents. This is simply not a case, such as the adversary proceeding cited by Defendants,[6] where the liability of the defendants is based on, and derivative of, the Debtors' alleged conduct. Opp. 8. Here, Deutsche Bank is liable for ***its own*** fraudulent conduct and no

[4] Defendants have also omitted important carve-outs in the underwriting agreements for the ResCap Trusts, which call into question whether these potential claims would be covered at all. *See, e.g.*, ECF No. 20, Ex. A-B §§7.1 & 1.1(c)(v) (no indemnity liability related to "Excluded Information," as defined in exhibit omitted by Defendants).

[5] Contrary to Defendants' assertions, Opp. n.12, it is well-settled that "[o]n a motion to remand, the party seeking to sustain the removal, not the party seeking remand, bears the burden of demonstrating that removal was proper." *In re Village of Kiryas Joel, N.Y.*, 2012 WL 1059395, at *2 (S.D.N.Y. Mar. 29, 2012) (collecting cases).

[6] Indeed, even in *Residential Capital LLC v. Allstate Insurance Co. (In re Residential Capital)*, Case No. 12-12020-mg, Adv. Proc. No. 12-01671-mg (Bankr. S.D.N.Y.), where the Debtors sought to extend the stay and enjoin related RMBS litigation because of indemnification claims against ResCap, they at no point argued that indemnification claims involving underwriters (other than affiliated entities) were related enough to the bankruptcy to warrant their inclusion in the Debtors' own motion to extend the stay. *See* Wales R.D. Ex. C. A need for discovery from the Debtors in connection with this action is rendered all the more unlikely by the fact that the Debtors have sold substantially all of their assets, including their serving business.

Debtor entity is a defendant is this action. As such, there is no bankruptcy jurisdiction over this action, and Defendants have failed to demonstrate that removal was proper.[7]

II. The Court Must Abstain Under 28 U.S.C. §1334(c)(2)

Defendants concede that four of the six mandatory abstention factors are met here, offering only two reasons for the Court not to abstain. Opp. 9. First, Defendants assert that this action should remain in federal court because the parties are diverse. However, Plaintiff is an Irish company, not a U.S. citizen or an "organ" of Germany, and the complete diversity rule is not met. Second, Defendants ask the Court to "ignore" Plaintiff's argument that this action can be timely adjudicated in state court, where numerous RMBS cases, including those involving ResCap loans are currently pending, on the basis that it would be faster to obtain discovery from Europe in federal court. Defendants miss the point, which is simply whether the action can be timely adjudicated in state court, not which forum would be faster. Even if the Court finds that there is bankruptcy jurisdiction over this action, abstention is required.

A. There Is No Diversity Jurisdiction

"Under Second Circuit law, the presence of aliens on two sides of a case destroys diversity jurisdiction," and the action must be remanded under the complete diversity rule. *Flores v. Citizens Int'l Bank*, 1992 WL 309546, at *1 (S.D.N.Y. Oct. 15, 1992) (collecting cases). It is indisputable that Plaintiff and Defendant DBAG are aliens, and there is no diversity here. Defendants cannot demonstrate complete diversity,[8] and the action must be remanded.

Deutsche Bank concedes that complete diversity is required, but urges the Court to "disregard" Plaintiff's claims against alien Defendant DBAG. Opp. 12-13. Significantly, "[f]raudulent joinder is not meant to substitute for a merits analysis" and "[a]ll factual allegations

[7] Defendants effectively abandon their assertion that this action is "related to" the AHM bankruptcy, asserting in a footnote that AHM's continuing payment obligation on Defendants' unsecured claims can create bankruptcy jurisdiction where that claim has now been fixed by order of the Bankruptcy Court. Opp. n.7. A plan of liquidation has been confirmed by final order in the AHM Proceeding and any claims Defendants had against AHM have been fully and finally adjudicated. Defendants will therefore receive a pro rata share of any future distribution to which they are entitled. There is simply no way that this litigation could alter or affect that distribution.

[8] *See Allendale Mut. Ins. Co. v. Excess Ins. Co.*, 62 F. Supp. 2d 1116, 1122 (S.D.N.Y. 1999) (burden on party seeking to invoke diversity to prove complete diversity).

in the complaint are assumed to be true." *Prudential II*, at *10; *see also Chin v. CH2M Hill Cos.*, 2012 WL 4473293, at *1 (S.D.N.Y. Sept. 28, 2012) ("all factual and legal ambiguities are on such a motion resolved in favor of Plaintiff"). Here, the Complaint details numerous ways in which DBAG was an active participant in Deutsche Bank's fraudulent scheme and is a proper Defendant. For example, DBSI, the underwriter of all of the RMBS at issue in this action, identified DBAG in its own public reports as "a foreign bank that 'controls the firm'…and 'direct[s] the management or policies' of DBSI." ¶27. Plaintiff further alleges that DBAG admitted responsibility for fraud at originator MortgageIT, ¶112; instituted Deutsche Bank's "correspondent lending program" through which Defendants knowingly obtained defective loans (including "early payment default" loans) for its RMBS securitizations, ¶122; had first-hand knowledge of Deutsche Bank's $10 billion short position (through which it bet that RMBS from the same shelves at issue here would fail), ¶¶139 & n.17; and extended ***billions of dollars*** in warehouse lines of credit to some of the worst mortgage loan originators in the industry (which also originated RMBS purchased by Sealink's assignors), ¶152. Moreover, Michael Commaroto, who Defendants now concede was a senior executive at DBAG,[9] personally received reports from Deutsche Bank's due diligence vendor, Clayton Holdings, that revealed the extent to which Deutsche Bank "waived in" egregiously defective loans to its RMBS. ¶94. Accordingly, DBAG is named in each count of the Complaint. ¶¶294-317.

Defendants make no mention of these allegations, and assert that DBAG was fraudulently joined in this action to defeat diversity. In support, Defendants cite to two inapposite cases dismissing fraud claims against different defendants in different circumstances, and the transcript of an oral argument dismissing claims against DBAG, during which plaintiff's counsel stated on the record that no direct fraud by DBAG was alleged. Woll Dec. Ex. I, at 118; *see* Opp. 12-13. This argument fails. In the Second Circuit, a successful claim of fraudulent joinder requires that Defendants "demonstrate, ***by clear and convincing evidence,*** either that there has been outright

[9] *Contra Bayerische Landesbank v. Deutsche Bank AG*, No. 12-ap-1884 (S.D.N.Y.) (MG) ECF #18, at 11.

fraud committed in the plaintiff's pleadings, or that ***there is no possibility, based on the pleadings, that the plaintiff can state a cause of action against the non-diverse defendant in state court."*** *Pampillonia v. RJR Nabisco, Inc.*, 138 F.3d 459, 461 (2d Cir. 1998); *see also Chin*, 2012 WL 4473293, at *1 (same).[10] As numerous courts have observed, this burden "is even greater than the requisite burden to dismiss for failure to state a claim." *Tycz v. Asbeka Indus. of New York, Inc.*, 2012 WL 3262423, at *2 (W.D.N.Y. Aug. 8, 2012). Having based their argument on motions to dismiss in other cases, Defendants have failed to meet their burden, especially in light of the Complaint's allegations regarding DBAG's misconduct. The lack of complete diversity here requires remand.

Without complete diversity, there can be no diversity under 28 U.S.C. §1332(a)(3). *See id.* (the action must be ***between*** "citizens of different states"); *see e.g.*, *Flores*, 1992 WL 309546, at *1 ("A diversity suit … may not be maintained in federal court by an alien against a citizen of a state and a citizen of some other foreign country."). In addition, the fact that no U.S. citizen is a plaintiff, ¶17, independently defeats diversity under section (a)(3). *See Bank of New York v. Bank of Am.*, 861 F. Supp. 225, 228 n.4 (S.D.N.Y. 1994) ("no citizen on one side [] took it out of (a)(3)") (collecting cases).

Defendant's last attempt at manufacturing diversity is that 28 U.S.C. §1332(a)(4) applies because Sealink is an "organ of a foreign state." Opp. 10-11. Defendants miss the point again. Without complete diversity, there is no jurisdiction pursuant to section (a)(4) regardless of whether Sealink is an "organ" or not. *See, e.g.*, *L'Europeenne de Banque v. La Republica de Venezuela*, 700 F. Supp. 114, 126 (S.D.N.Y. 1998) ("Section (a)(4) permits the assertion of

[10] Put another way, to defeat remand here, Deutsche Bank had to show that defendant DBAG's liability in this case is a ***"legal impossibility."*** *Ulysse v. AAR Aircraft Component Servs.*, 841 F. Supp. 2d 659, 683 (E.D.N.Y. 2012) (collecting cases); *see Tycz.*, 2012 WL 3262423, at *2 (same; remanding case); *Prudential II*, at *10 ("joinder is considered fraudulent *only* when there is *no* reasonable basis in fact or colorable ground supporting the claim in dispute. For a claim to lack a colorable basis, it must be wholly insubstantial and frivolous.") (internal quotations and citations omitted).

jurisdiction only against defendants who are 'citizens of a State or of different States, [not] 'citizens or subjects of a foreign state.'").[11]

Moreover, Defendants' only basis for claiming that Sealink is an "organ" is that it is financed by certain German Landesbanks. Putting aside the obvious point that Defendants have pointed to no authority for their assertion that an Irish company can really be an "organ" of Germany, the Supreme Court has made clear that only ***direct ownership*** by a foreign state is enough to confer "organ" status. *See Dole Food Co. v. Patrickson*, 538 U.S. 468, 474 (2003) ("Only direct ownership [] satisfies the statutory requirement.").[12] Indeed, courts in this District routinely refuse to assign "organ" status in factually indistinguishable circumstances. *See Ocean Line Holdings Ltd. v. China Nat'l Chartering Corp.*, 578 F. Supp. 2d 621, 626 (S.D.N.Y. 2008) ("To be deemed an instrumentality of the state, the investment must be directly from the state, not through a corporate intermediary, even if the intermediary is owned entirely by the state"); *Hyatt Corp. v. Stanton*, 945 F. Supp. 675 (S.D.N.Y. 1996) (bank that was not owned directly by a foreign state was not an "organ," even though it was majority-owned by an "organ"); *Bank of China, New York Branch v. NBM L.L.C.*, 2002 WL 1072235 (S.D.N.Y. May 28, 2002) (same). Defendants have therefore failed to show that Sealink is an "organ," which is, in any event, irrelevant given the lack of complete diversity here.

While Deutsche Bank concedes that it could not have removed this action on the basis of diversity jurisdiction, it asserts that the action should stay in federal court because there is

[11] Defendants' conditional request for further factual development on the issue of Sealink's "organ" status should therefore be denied as moot. *See* Opp. 11, n.22.

[12] Contrary to Defendant' assertions, *Dole Food* is still good law. Opp. 11. In *650 Fifth*, the plaintiff "submitted false affidavits and made false representations to the [N.Y. AG's office]," that "support[ed] an ***equitable disregard*** of the Foundation's corporate form," and, as the Supreme Court has held, "the Court may disregard the corporate form" when "formalistic adherence to corporate form can work inequality – particularly, where there is fraud." *In re 650 Fifth Ave. & Related Props.*, 881 F. Supp. 2d 533, 552-53 (S.D.N.Y. 2012). In *EM*, the court, in unique circumstances, reasoned that the bank was an alter ego of Argentina primarily because the bank paid Argentina's debts to the IMF. *EM Ltd. v. The Republic of Argentina*, 720 F. Supp. 2d 273, 299 (S.D.N.Y. 2010), *opinion vacated by NML Capital Ltd. & EM Ltd. v. Banco Central de la República Argentina*, 652 F.3d 172 (2d Cir. 2011). No such circumstances are present here.

diversity jurisdiction. Opp. n. 13; *see* 28 U.S.C. §1441(b).[13] This argument misreads the law and ignores the facts. Section 1441(b) provides that diversity cases are removable only if no defendant is a citizen of the state where the action is brought. Wright & Miller, FPP §3723 (2012). Defendants cannot have it both ways. If this is a diversity case, it is not removable. 28 U.S.C. §1441(b). If this is not a diversity case, then the ***sole*** arguable basis for jurisdiction is "related to" bankruptcy jurisdiction, and this mandatory abstention factor is met. Rem. Br. at 14-16.[14] The action must be remanded either way. *See Bank of Am. Nat. Ass'n v. Derisme*, 743 F. Supp. 2d 93 (D. Conn. 2010) (remanding where defendant was citizen of forum state); *Cabrini Dev. Council v. LCA-Vision, Inc.*, 197 F.R.D. 90 (S.D.N.Y. 2000) (same).

B. This Action Can Be Timely Adjudicated In State Court

Defendants do not dispute the fact that the courts of New York State are currently presiding over dozens of RMBS cases, including many remanded from the Southern District of New York, and seven initiated by the same Plaintiff on substantially similar facts. *See* Rem. Br. at 4, 18. Instead, they argue that federal court is the more efficient forum. But the relevant inquiry is merely whether "the matter can be timely adjudicated in state court." *Parmalat Capital Fin. Ltd. v. Bank of Am. Corp.*, 639 F.3d 572, 581 (2d Cir. 2011); *see Prudential II*, at *7 (same). Defendants do not even attempt to meet this standard.

Instead, Defendants offer two unfounded assertions about potential discovery demands. First, even if discovery from the Debtors turns out to be necessary, Opp. 13-14, relief from the

[13] "[D]iversity jurisdiction's basic rationale" is "opening the federal courts' doors to those who might otherwise suffer from local prejudice against out-of-state parties." *Hertz Corp. v. Friend*, 130 S. Ct. 1181, 1188 (2010). Deutsche Bank "has no risk of suffering even presumptive local prejudice in a [New York] state court" and therefore, "there is no reason to provide [Deutsche Bank] the option of a federal forum." *Parekh v. Economy Premier Assurance Co.*, 2012 WL 1020426, at *3 (E.D.N.Y. Jan. 17, 2012).

[14] Defendants' cited authority confirms that this action is not removable or is inapposite. The court in *Shapiro v. Logistec USA, Inc.*, 412 F.3d 307 (2d Cir. 2005) upheld removal only because plaintiff failed to timely move to remand. The plaintiff in *MTBE* did not challenge the court's subject matter jurisdiction, and the new Second Circuit authority which was the basis for its remand motion raised no challenge to the court's bankruptcy jurisdiction. *In re MTBE Prods. Liab. Litig.*, 522 F. Supp. 2d 557, 558 (S.D.N.Y. 2007). In *WorldCom*, the court held that "Section 22(a)'s bar to removal of 1933 Act claims would not prevent an action from being removed to federal court if there was a separate, appropriate basis for removal." *In re WorldCom Inc. Sec. Litig.*, 293 B.R. 308, 328 (S.D.N.Y. 2003). Section 22(a) is not at issue here, and diversity jurisdiction is not "a separate, appropriate basis for the removal."

automatic stay is a simple application that must be made in the underlying ResCap Proceeding, regardless of whether this non-Debtor litigation is pending in state or federal court. Second, Defendants contend that "substantial discovery of foreign parties" is "likely." Opp. 14. Cases pending in the Commercial Division, including remanded RMBS cases brought by Sealink, routinely involve foreign discovery, which Defendants concede is obtainable pursuant to the Hague Convention. *Id*. Deutsche Bank's apparent desire to avoid such procedures is not a legitimate basis for removal. On the contrary, "if anything is delaying the state court from proceeding expeditiously with this case, it is Defendants' ill-fated removal to federal court." *See Prudential II*, at *7 (granting remand).

III. Alternatively, This Court Should Abstain From Hearing This Case

In the alternative, this action should be remanded "on any equitable ground." *See* 28 U.S.C. §1452(b) & §1334(c)(1). Defendants argue that the inapplicable *Colorado River* factors weigh against withdrawal, citing the wrong standard yet again.[15] Permissive abstention "is left to the bankruptcy court's discretion" and "can be warranted in the interest of justice, or in the interest of comity with State courts or respect for State law." *In re Petrie Retail, Inc.*, 304 F.3d 223, 232 (2d Cir. 2002). None of the factors relevant to the Court's equitable remand determination weigh in favor of retaining federal jurisdiction here.[16]

A. This Action Will Not Impact The Administration Of The Remote And Unrelated ResCap Chapter 11 Proceeding (Factors 1, 6 and 9)

As discussed above, this action is not "related to" the ResCap Chapter 11 Proceeding. Indeed, Debtors originated a ***mere 2.4%*** of the loans that comprise the RMBS at issue in this litigation. *See* Wales R.D. Exs. A-B. In apparent recognition of the fact that the role of any Debtor in connection with Sealink's RMBS is *de minimus*, Defendants offer nothing more than a

[15] The *Colorado River* doctrine is a judicially created doctrine that is relevant only where parallel litigation is ongoing in both state and federal courts to determine the rights of parties with respect to the same question of law. *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817-18 (1976).

[16] Courts may take into account any equitable consideration when determining remand, and have looked at times to all twelve factors cited by Defendants. Opp. 15. Those include the seven key factors that courts generally focus on (Rem. Br. at 17) (factors 1-4, 6, & 10-11); two factors which have no application to non-core proceedings such as this action (factors 7 & 8); and three additional factors that all weigh in favor of remand here (factors 5, 9 & 12).

theoretical possibility as support for the relatedness of this action. Specifically, Defendants assert that ***if Deutsche Bank*** is found liable for fraud, then other investors ***might*** sue the ***Debtors***, and the Debtors ***might*** have to indemnify all of the investors in every security issued by the ResCap trusts. Opp. 16. Clearly, "[t]he degree of relatedness to the bankruptcy cases is slim and there is just no good logical reason for [this case] to be in federal court." *See* Wales Decl. Ex. 5, at 21; *Allstate Ins. Co. v. CitiMortgage, Inc.*, 2012 WL 967582, at *6 (S.D.N.Y. Mar. 13, 2012).

B. All Of The Remaining Equitable Factors Weigh In Favor Of Remand

Defendants concede that New York state law claims predominate, arguing only that the federal courts ***could*** adjudicate those claims, and that the state court has not yet invested time in the action. Opp. 17-18. Neither of these considerations changes the fact that Factors 2, 3 and 4 favor remand where, as here, "neither of the parties is in bankruptcy; the case is based purely on state law; many of the underlying loan issuers are *not* in bankruptcy;…there are nearly identical cases already pending in the [] state court where this case will be remanded to; [and] proceeding in federal court would cause great duplication of judicial resources." *Prudential II*, at *9; *see also* Rem. Br. at 19.[17] Nor is diversity jurisdiction an independent basis for federal subject matter jurisdiction (Factor 5), *supra* at §II(A).

Last, Defendants argue that a plaintiff's right to a jury trial (Factor 9) is not impacted by removal. Opp. 18. However, numerous courts have concluded that a plaintiff's right to a jury trial could be sufficient reason, standing alone, to remand a non-core proceeding. *See, e.g.*, *FHLB of Seattle v. Deutsche Bank Sec., Inc.*, 736 F. Supp. 2d 1283, 1290-01 (W.D. Wash. 2010). All of the relevant factors support equitable abstention, and the action should be remanded.

[17] Defendants' cited cases support remand, *Williams v. Shell Oil Co.*, 169 B.R. 684, 693 (S.D. Cal. 1994), or are inapposite because they involve (a) federal claims: *Stichting Pensioenfonds*, 447 B.R. at 312 ("a federal securities action at its core"); *Abbatiello v. Monsanto Co.*, 2007 WL 747804, at *4 (S.D.N.Y. Mar. 8, 2007) (state law claims arguably preempted by federal law); (b) foreign laws: *Rahl v. Bande*, 316 B.R. 127, 135 (S.D.N.Y. 2004) (Bermuda law); or (c) other distinguishable grounds for remand: *In re Adelphia Commc'ns Corp.*, 285 B.R. 127, 129 (Bankr. S.D.N.Y. 2002) (remand of certain claims against non-debtor defendants only while debtor claims remained under core bankruptcy jurisdiction); *Senorx, Inc. v. Coudert Bros., LLP*, 2007 WL 1520966, at *3 (N.D. Cal. May 24, 2007) (same); *Kirshner ex rel. Refco Private Actions Trust v. Bennett*, 2008 WL 1990669, at *8 (S.D.N.Y. May 7, 2008) (claims assigned to plaintiff through the confirmed bankruptcy plan).

CONCLUSION

For the foregoing reasons and the reasons stated in Plaintiff's opening brief, the action should be remanded to New York Supreme Court.

Dated: February 13, 2013
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