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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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

THE RESCAP LIQUIDATING TRUST'S REPLY IN FURTHER SUPPORT OF ITS MEMORANDUM OF LAW IN SUPPORT OF ITS OBJECTION TO OCWEN LOAN SERVICING, LLC'S REVISED CLAIM NOTICE CONCERNING THE SERVICING ADVANCES CLAIMS

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The ResCap Liquidating Trust (the "Trust"), established pursuant to the terms of the Plan[1] in the above-captioned Chapter 11 Cases, by and through its undersigned counsel, hereby submits this reply to the response filed by Ocwen Loan Servicing, LLC ("Ocwen") [Docket No. 8865] (the "Response") to *The ResCap Liquidating Trust's Memorandum of Law in Support of Its Objection of Ocwen Loan Servicing, LLC's Revised Claim Notice Concerning the Servicing Advances Claim* [Docket No. 8771] (the "Objection") in further support of the Objection. The Trust respectfully states as follows:

REPLY

1. Ocwen's attempted amendment of the Servicing Advances Claim as made through the Revised Claim Notice is time-barred and would impermissibly expand Ocwen's rights under the APA. The parties bargained for a one-year limit on Ocwen's ability to assert any claims for breach of a Core Representation. Ocwen now attempts to deprive the Trust of the benefit of that bargain by relying on a vague reservation of rights and a misinterpretation of the APA in support of its position that it is permitted to assert new claims for breach of a Core Representation after the one-year deadline.

2. Under the express language of the APA, the Sellers made representations to the Purchaser as to ***each*** individual Servicing Advance. To the extent Ocwen asserted a breach of these representations as to any Servicing Advance, it was required to identify each such advance in its Claim Notice. Ocwen understood this requirement, as evidenced by the Initial Claim Notice, which asserted claims with respect to specifically identified Servicing Advances. Under the plain terms of the APA, any asset that Ocwen failed to identify as suffering an alleged Loss in the Initial Claim Notice can no longer be the subject of a claim by Ocwen.

[1] Capitalized terms used but not defined herein shall have the meanings ascribed to such terms in the Objection (as defined herein).

3. Ocwen's Revised Claim Notice is not, as Ocwen claims, a simple revision to the Losses identified in the Initial Claim Notice. Rather, it is an attempt to assert new claims after the Termination Date for thousands of ***additional*** Servicing Advances. Thus, even if Ocwen could amend the Servicing Advances Claim by avoiding the Second Circuit's rules governing proper amendments to administrative claims—which, due to its election to file a broad administrative claim, it cannot—the amendment as it relates to all Servicing Advances that were not identified in the Initial Claim Notice is untimely under the APA.

4. Ocwen's attempt to resuscitate its new Servicing Advance Claims through reliance on a reservation of rights in the Initial Claim Notice fares no better. Of course, Ocwen cannot reserve a right it does not have (i.e., a right to assert new claims after the Termination Date), and thus, Ocwen's purported reservation of rights in the Initial Claim Notice cannot save Ocwen from failing to timely assert indemnification claims against the Trust.

5. Finally, Ocwen's attempt in the Response to further reserve its rights to assert new and different claims under the APA to recover the allegedly defective Servicing Advances must also fail. To the extent Ocwen has theories that it believes entitle it to recovery with respect to such Servicing Advances, it was obligated to raise those theories now. Notwithstanding Ocwen's failure to support its vague assertions of potential additional claims against the Trust, the APA is clear that Ocwen's sole remedy with respect to an alleged breach of a Core Representation is through a Claim Notice issued pursuant to Article XI of the APA. Thus, any additional claims Ocwen believes it may have are also barred.

6. Accordingly, the Trust seeks the entry of an order (the "Proposed Order"), in the form attached hereto as Exhibit 1, disallowing Ocwen's amended Servicing Advances Claim except as such amendment relates to the twelve loans included on both the Initial Claim Notice

and the Revised Claim Notice, and prohibiting Ocwen from asserting any additional claims related to Servicing Advances on the basis that such claims are likewise barred.

I. THE APA BARS OCWEN FROM ASSERTING CLAIMS AS TO NEW SERVICING ADVANCES

A. Ocwen Was Required to Identify Each Servicing Advance Subject to a Claim in the Initial Claim Notice

7. Ocwen's Initial Claim Notice asserted claims for breach of the Servicing Advances "Core Representation" set forth in Section 4.9 of the APA in connection with specifically identified loans. Ocwen contends that nothing in the APA prohibits it from amending or supplementing the Initial Claim Notice after the Termination Date to assert additional claims for breach of the Servicing Advances representation related to other loans. *See* Response ¶ 24. In support of its position, Ocwen reads the APA to provide for a single representation covering all Servicing Advances, such that such an assertion of a breach of the representation as to ***any*** individual Servicing Advance would permit Ocwen to assert breaches as to ***all*** Servicing Advances transferred to Ocwen under the APA in perpetuity. *Id.* ¶ 25. This interpretation should be rejected by the Court because it is contrary to the express language of the representation itself, conflicts with other provisions of the APA, and would defeat the intent of the parties in agreeing to the Termination Date.

8. The APA expressly provides that each Servicing Advance is a separate asset as to which the Trust made a separate representation. Specifically, section 4.9 of the APA provides that "***[e]ach*** Servicing Advance is a valid and subsisting amount owing to Seller . . . and is a legal valid and binding reimbursement right." APA § 4.9(c) (emphasis added). *See also id*. § 1.1 (defining Servicing Advances to be the aggregate amount outstanding with respect to ***each*** loan). In interpreting contracts, courts are to give meaning to every word or phrase in a contract. *See, e.g.*, *JA Apparel Corp. v. Abboud*, No. 07-CV-7787, 2008 WL 2329533, at *9 (S.D.N.Y. June 5,

2008), *vacated and remanded*, 591 F. Supp. 2d 306 (2d Cir. 2009) (explaining that "pursuant to a long-standing and unassailable rule of contract interpretation, the Court is required to give meaning to every term in the Agreement."). Black's Law Dictionary defines "each" as: "A distributive adjective pronoun, which denotes or refers to ***every one*** of the persons or things mentioned; ***every one*** of two or more persons or things, composing the whole, ***separately considered***."[2] Oxford English Dictionary similarly defines "each" as: "Every (***individual*** of a number) ***regarded or treated separately***."[3] In the context of the APA, the use of the word "each" clearly identifies "Servicing Advances" as individual assets relating to individual loans, where separately identifiable rights—and potential claims—attach to each respective asset. Ocwen's interpretation of the APA reads section 4.9(c) no differently than if it referred to "all Servicing Advances" instead of "each Servicing Advance." The specific use of the word "each" must be given meaning.

9. Even if Ocwen's understanding is correct—namely, that a breach as to any Servicing Advance amounts to a breach of the entire Core Representation covering all Servicing Advances—this does not allow Ocwen to escape the fact that the Debtors made a representation as to ***each*** Servicing Advance. Under Article XI of the APA, in order to assert a timely indemnification claim, Ocwen was required to identify each Servicing Advance that it believed was the subject of a Loss ***in reasonable detail*** as of the Termination Date. Specifically, the APA makes clear that Ocwen is permitted to assert an indemnification claim as to an alleged breach of a "Core Representation" only to the extent it provided notice of such claim by the Termination Date. *See* APA § 11.6 (providing, among other things, that Core Representations—which include

[2] Black's Law Dictionary 455 (5th ed. 1979) (emphasis added).

[3] Each Definition, oed.com, *available at* http://www.oed.com/view/Entry/58924?redirectedFrom=each& (last visited July 13, 2015) (emphasis added).

representations relating to Servicing Advances—survive for one year past the Closing Date, as provided in Section 11.1(b)). The APA further requires that any notice identify claims and Losses associated with such claims "in reasonable detail," including providing the dollar amount (or method of computation) of Losses associated with each claim as of the Termination Date, if then known. *See id*. §§ 11.1, 11.2; SoF ¶ 5. To the extent Ocwen failed to identify a Loss in reasonable detail in the Initial Claim Notice, its right to assert such a Loss has expired. Ocwen plainly understood this requirement, because Ocwen complied with it by providing a schedule of the individual Servicing Advances it asserts breached the Sellers' representations in the Initial Claim Notice. Losses with respect to Servicing Advances not included in the Initial Claim Notice were clearly not identified "in reasonable detail" and cannot now be the subject of indemnification claims by Ocwen.

10. The Debtors bargained to indemnify Ocwen only for claims brought within one year of the Closing Date—not claims brought after the Termination Date, let alone ***over two years*** after the Closing Date. Ocwen's interpretation of the APA should be rejected because it would deprive the Trust of the benefit of this bargain and would render the provisions of Article XI of the APA superfluous, defeating the finality the Termination Date was intended to impose.[4] *See Beth Isr. Med. Ctr. v. Horizon Blue Cross & Blue Shield of N.J., Inc.*, 448 F.3d 573, 580 (2d Cir. 2006) (stating that, under New York law, courts must enforce contract provisions clearly expressing the parties' intent); *see also Innophos, Inc. v. Rhodia, S.A.*, 882 N.E.2d 389, 392 (N.Y. 2008) (stating that, under New York law, "the fundamental, neutral precept of contract interpretation is that

[4] Ocwen argues that the Trust, upon receipt of the Initial Claim Notice, never responded that Ocwen was prohibited from amending its Initial Claim Notice. *See* Response ¶ 24. At no time did the Trust believe that Ocwen had the right to amend anything but the ***existing*** claims as alleged in the Initial Claim Notice. Notwithstanding Ocwen's statements to the contrary, the Trust informed Ocwen of this position in a letter it sent to Ocwen, dated August 20, 2014, relating to, among other things, the Servicing Advances Claim. *See* SoF ¶ 13; letter dated August 20, 2014, attached hereto as Exhibit 2, at 2.

agreements are construed in accordance with the parties' intent, and that the best evidence of what parties to a written agreement intend is what they say in their writing.") (citation and internal citations omitted).

11. Accordingly, the Trust's interpretation of the APA—which requires Ocwen to have identified with specificity the individual Servicing Advance as to which the Debtors are alleged to have breached the applicable representation in a Claim Notice as of the Termination Date in order to preserve an indemnification claim with respect to such Servicing Advance—is the clear intent of the APA and bars any amendment of the Initial Claim Notice that adds new Servicing Advances.

B. The APA Does Not Permit Ocwen's Amendment of the Servicing Advances Claim

12. Analyzing the Revised Claim Notice under the applicable APA provisions plainly demonstrates that Ocwen's amendment of the Servicing Advances Claim is improper. The APA contemplates that a permitted amendment may be to "the amount or the method of computation of the amount of such claim" if such amount of method of computation is not known as of the Termination Date. *See* APA § 11.2(a). Thus, while amendments could result in the revision of alleged Losses as to claims specifically identified in a Claim Notice, such amendments are limited to Losses already specified by the Termination Date. The Trust is ***not*** arguing that the APA prohibits Ocwen from amending the dollar amount of alleged Losses associated with the Servicing Advance Claims already identified as of the Termination Date (i.e., Losses associated with the twelve loans identified in both the Initial Claim Notice and the Revised Claim Notice). The Trust maintains only that the APA does not permit Ocwen to "amend" its Claim Notice to add claims for newly identified Servicing Advances that were not detailed in the Initial Claim Notice. *See id.*

C. Ocwen's Purported Reservation of Rights in the Initial Claim Notice Cannot Expand Its Rights Under the APA

13. Ocwen argues that general language in the Initial Claim Notice purporting to reserve its rights to amend each of the specified claims also gave it the open-ended right to identify additional Servicing Advances giving rise to indemnification claims. Ocwen's reliance on the reservation of rights is misplaced, however, because a party cannot reserve a right it does not have. *See, e.g., Winshall v. Viacom Int'l Inc.*, C.A. No. 6074-CS, 2012 WL 6200271, at *8 (Del. Ch. Dec. 12, 2012) (finding claim raised in purchaser's indemnification claim notice letter, sent nearly three months after the 18-month claim notification period had elapsed, was time-barred and "placeholder" language in notice letter "in which it reserved its rights to 'seek indemnification for any other claims or matters . . . by other third parties' . . . constitute[d] a unilateral rewriting of the contract and [was] impermissible."). For the reasons discussed above, Ocwen may have the ability under the APA to reserve rights to amend claims with respect to assets it actually identified in the Initial Claim Notice, but it cannot reserve the right to assert additional indemnification claims after the Termination Date as it is now attempting to do. Such a reservation would impermissibly expand Ocwen's rights under the APA by allowing it to circumvent the express provisions of the APA requiring that it identify all claims for breach of a Core Representation in reasonable detail by the Termination Date.

14. Further, Ocwen's arguments that the estates would "reap a windfall" if Ocwen is prevented from asserting its full claim for alleged breaches by the Sellers are without merit. *See* Response ¶ 30. Ocwen agreed to limit its right to seek indemnification to only those claims it identified in reasonable detail by the Termination Date, which was factored into the Purchase Price it paid for the Debtors' assets. Ocwen's failure to timely identify the full universe of

potential indemnification claims is no one's fault but its own, as the relevant accounts and records were in Ocwen's sole custody and control.

II. APPLICABLE SECOND CIRCUIT PRECEDENT LIKEWISE BARS OCWEN'S AMENDMENT TO THE SERVICING ADVANCES CLAIM

15. Ocwen asserts that the Trust improperly conflates Ocwen's Administrative Claim Requests with its "unrelated" indemnification claims listed in the Initial Claim Notice. *See* Response ¶ 31. This argument disregards the plain language of Ocwen's Administrative Claim Request, which contains an extremely broad claim for alleged breaches of the APA that clearly incorporates the Servicing Advances Claim. *See* Administrative Claim Request [Docket No. 6297] ¶ 28 ("assert[ing] a contingent Administrative Claim in an unliquidated amount for any and all amounts with respect to breaches of the Ocwen APA," including a reservation of its right to enforce any breaches of Section 4.9 (Mortgage Servicing Portfolio; Servicing Agreements; the Business) against the "Indemnity Escrowed Funds"); SoF ¶ 9; *see also* Initial Claim Notice ¶ 2.b. (asserting a breach of the APA relating to the Servicing Advances); SoF ¶ 10. Therefore, Ocwen's filing of the Administrative Claim Request subjected these indemnification claims to the administrative claims reconciliation process and the related standards governing such claims, which include the Second Circuit's rules regarding when the amendment of administrative expense claims is permissible.

16. The Second Circuit requires courts to engage in a two-step inquiry to determine whether to allow a post-bar date amendment of an administrative expense claim. *See Midland Cogeneration Venture Ltd. P'ship v. Enron Corp. (In re Enron Corp.)*, 419 F.3d 115, 133 (2d Cir. 2005) ("[T]he court must subject post bar date amendments to careful scrutiny to assure that there was no attempt to file a new claim under the guise of [an] amendment.") (internal citation and quotation omitted). The initial inquiry concerns whether the amendment "relates back" to a timely

filed claim, where a court considers factors such as whether the claimant corrects a defect in form, describes the claim with greater particularity, or pleads a new theory of recovery based on the facts set forth in the original claim. *See id.* If the "relation back" test is satisfied, the court examines equitable considerations to allowing the amendment, including, among other things, whether the amendment would unduly prejudice the opposing party and whether the late-filing claimant can justify its delay. *Id.*

17. Based on these standards, Ocwen's attempt to amend the Servicing Advances Claim through the Revised Claim Notice is, at best, only proper as to its modification of the alleged Losses associated with the twelve loans that were also included in the Initial Claim Notice. To the extent the amendment purports to add claims related to thousands of newly identified Servicing Advances, it fails the "relation back" inquiry, as these new advances neither correct a defect in form, nor describe the original list of alleged Servicing Advances with greater particularity, nor plead a new and valid theory of recovery on the Servicing Advances Claim.

18. Since Ocwen's amendment fails the "relation back" test, the Court need not address any equitable considerations. However, even if the Court were to address such considerations, they would weigh heavily in the Trust's favor. Ocwen argues that the Trust will suffer no prejudice should Ocwen be permitted to litigate all newly identified Servicing Advances in the Revised Claim Notice, on the basis that there has not yet been any litigation with respect to the demand for indemnity with respect to the Servicing Advances, and, as a result, there would be no back-tracking or duplication required by the Trust in reconciling the claims. *See* Response ¶ 32. This argument is simply incorrect—the parties have fully briefed the Trust's objection to Ocwen's administrative claims, including the Servicing Advances Claim. *See* Objection ¶¶ 42, 47. That process began over five months ago. Requiring the Trust to now begin the review and objection process in connection with thousands of new indemnification claims ***would unquestionably*** result

in additional expense, litigation costs, and delay, all due to Ocwen's dilatory behavior. Moreover, the Trust is prejudiced by being unable to access the undisputed escrowed funds currently residing in the Indemnity Escrow Account.[5]

19. Likewise, Ocwen cannot justify its delay. Ocwen had all of the information necessary to conduct a full review of the Servicing Advances prior to the Termination Date as required by the APA. The Trust should not have to bear the consequences of Ocwen's failure to perform such a review. Accordingly, Ocwen's amendment of its Administrative Claim Request is improper and barred under applicable Second Circuit law governing the amendment of administrative expense claims.[6]

III. OCWEN IS NOT PERMITTED TO BRING ANY ADDITIONAL CLAIMS AGAINST THE TRUST

20. In the Response, Ocwen purportedly reserves the right to assert additional bases under which it can pursue claims related to the Servicing Advances Claim against the Trust, including under theories based on breach of contract or unjust enrichment. *See* Response n.4. This reservation is ineffective for two reasons. First, pursuant to the *Stipulation and Order Between the ResCap Liquidating Trust and Ocwen Loan Servicing, LLC Regarding the Servicing Advances Dispute* [Docket No. 8673] (the "Stipulation"), Ocwen was required to address in its

[5] *See* APA § 11.4 ("If at any time after the Termination Date the amount of the Indemnity Escrowed Funds then held by the Indemnity Escrow Agent exceeds the sum of any amounts subject to Outstanding Claims, ResCap and Purchaser shall execute and deliver a certificate requesting the Indemnity Escrow Agent to deliver such excess amount to Sellers . . . ."). Accordingly, contrary to Ocwen's contention (*see* Response n.10), these various forms of prejudice that would befall the Trust, which stem from Ocwen's unreasonable and unjustified delay (as discussed herein), should preclude Ocwen's amendment of the Servicing Advances Claim.

[6] Ocwen asserts that the Trust has not established, nor does the SoF support, any element of the Trust's equitable estoppel claim. *See* SoF ¶ 33. The Trust disagrees because: (i) Ocwen's withholding from the Trust, until ***over two years*** post-Closing Date, Ocwen's intention to add new Servicing Advances to the Servicing Advances Claim while the parties completed briefing on the Trust's objection to the Administrative Claim Requests and Initial Claim Notice amounts to a concealment of material facts; (ii) Ocwen intended for the Trust to rely on the claims information submitted as of the Termination Date for the Trust's purpose of analyzing the validity of such claims; and (iii) Ocwen possessed all information required to include all alleged Servicing Advances in its Initial Claim Notice, which provided additional detail to its Administrative Claim Request, but failed to do so.

Response all claims related to whether Ocwen has the right to revise the Servicing Advances Claim through the Revised Claim Notice. Specifically, the Stipulation provided that the first phase of litigating the Servicing Advances Claim required that the parties address the issues raised by the Revised Claim Notice; the parties reserved their respective rights to later address the merits of the Servicing Advances Claim as necessary. *See* Stipulation at 3-4. If Ocwen believed that other claims (either under the APA or on equitable grounds) supported its revision of the Initial Claim Notice, it should have asserted such theories in its Response, as part of the first phase of these proceedings. Ocwen failed to explain those theories and is now barred from doing so in the future.

21. Regardless of what additional theories for recovery Ocwen believes it may have, any other claims are barred under the clear terms of the APA. Pursuant to Section 11.7 of the APA, the ***sole and exclusive remedy*** for any breach of a Core Representation is through the indemnification mechanism provided in Article XI of the APA. *See* APA § 11.7. Section 11.7 makes clear that this limitation is intended to cover any claim related to such an alleged breach, "whether under this Agreement or arising under common law or any other Law. . . ." *Id.* Thus, other claims for breach of contract or unjust enrichment that relate to an alleged breach of a Core Representation (as Ocwen acknowledges any such claims would) are expressly barred by the APA.

WHEREFORE, the Trust respectfully submits that the relief requested in the Objection should be sustained in its entirety, and that the Court enter the Proposed Order and any other relief it deems just.

Dated: July 23, 2015

/s/ Todd M. Goren

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Counsel to the ResCap Liquidating Trust

Exhibit 1

Proposed Order

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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

ORDER GRANTING THE RESCAP LIQUIDATING TRUST'S OBJECTION TO OCWEN LOAN SERVICING, LLC'S REVISED CLAIM NOTICE CONCERNING THE SERVICING ADVANCES CLAIM

Upon the objection [Docket No. 8771] (the "Objection")[1] of the ResCap Liquidating Trust (the "Trust"), as successor to Residential Capital, LLC, and its affiliated debtors and debtors in possession (collectively, the "Debtors"), to the amendment of Ocwen Loan Servicing, LLC's ("Ocwen") Servicing Advances Claim through the Revised Claim Notice, all as more fully set forth in the Objection; and the Court having jurisdiction to consider the Revised Claim Notice and the Objection and the relief requested therein pursuant to 28 U.S.C. §§ 157 and 1334; and consideration of the Objection and the relief requested therein being a core proceeding pursuant to 28 U.S.C. § 157(b); and venue being proper pursuant to 28 U.S.C. §§ 1408 and 1409; and due and sufficient notice of the Objection having been provided; and upon consideration of the Objection, Ocwen's response to the Objection [Docket No. 8865], and the Trust's reply in support of the Objection [Docket No. ___]; and the Court having determined that the legal and factual bases set forth in the Objection establish just cause for the relief granted herein; and it appearing that the relief requested in the Objection is in the best interests of the Trust, the Trust's

[1] Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the Objection.

beneficiaries, the Debtors, their estates and other parties in interest; and after due deliberation and sufficient cause appearing therefore, it is hereby

ORDERED, ADJUDGED, AND DECREED THAT:

1. Ocwen's amendment of the Servicing Advances Claim as made through the Revised Claim Notice is barred under the APA and applicable Second Circuit precedent, except as to its modification of the alleged Losses associated with twelve alleged Servicing Advances that were also included on the Initial Claim Notice.

2. Ocwen's Servicing Advances Claim is capped at $63,691.94, the alleged Losses set forth in the Revised Claim Notice with respect to those twelve loans.

3. Ocwen is not authorized to raise any new and different claims under the APA or under any common law theory against the Debtors' estates arising under, or related to, any alleged breach of a Core Representation, including, but not limited to, any breach of contract or unjust enrichment claim related to the Servicing Advances. Any such claims are barred pursuant to the terms of the APA. The Trust and Ocwen shall promptly meet and confer regarding resolution of the remaining Servicing Advances Claim, including to determine what issues, if any, remain to be litigated with respect to the Revised Claim Notice, and to set a reasonable schedule for the resolution of such remaining issues, including any appropriate discovery with respect thereto, to the extent necessary. The parties shall also meet and confer regarding the prompt release of undisputed funds from the Indemnity Escrow Account as a result of this Order.

4. Entry of this Order is without prejudice to the Trust's right to object to the remaining Servicing Advances Claim in the Chapter 11 Cases.

5. The Trust is authorized and empowered to take all actions as may be necessary and appropriate to implement the terms of this Order.

6. The terms and conditions of this Order shall be immediately effective and enforceable upon its entry.

7. This Court shall retain jurisdiction to hear and determine all matters arising from or related to the interpretation or implementation of this Order.

Dated: _____, 2015
New York, New York

THE HONORABLE MARTIN GLENN
UNITED STATES BANKRUPTCY JUDGE

Exhibit 2

Letter

PRIVILEGED & CONFIDENTIAL
SUBJECT TO FRE 408

RESCAP
LIQUIDATING TRUST

August 20, 2014

Jennifer L. Scoliard
V.P., Assistant General Counsel
Ocwen Financial Corporation
Mail Code: 190-FTW-L95
1100 Virginia Drive
Fort Washington, Pennsylvania 19034

Re: Ocwen Indemnification Claims and Administrative Expense Claims

Dear Jennifer:

This letter is in response to certain correspondence (collectively, the "Correspondence")[1] from Ocwen Loan Servicing, LLC ("Ocwen") to the ResCap Liquidating Trust (the "Trust"), the most recent being your email to me, dated July 11, 2014, in connection with Ocwen's asserted indemnification claims and administrative expense claims in the Residential Capital, LLC, *et al.* bankruptcy cases, Case No. 12-12020 (the "Chapter 11 Cases"). The Trust will address each claim in turn below, and reserves all rights under the APA[2] and the Sale Order to assert counterclaims and/or defenses in connection with the estates' purported liability for each.

Framework for Discussion

The framework for this discussion on liability for Ocwen's asserted claims is based on the fact that the transaction between Ocwen and the Debtors (the "Sale") is an "As is, Where is" transaction.[3] Accordingly, Ocwen cannot assert claims for anything beyond alleged indemnification claims for breaches of Core Representations raised within the one-year period past the February 15, 2013 closing date of the Sale (the "Closing Date"). The only exception to this general rule is administrative expense claims brought pursuant to Paragraph 35 of the Sale Order for indemnification claims brought by RMBS Trustees[4] that are (i) paid by Ocwen, (ii)

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1 The Correspondence includes: (i) December 16, 2013 Letter from Eric Spett (Ocwen) to Tammy Hamzehpour (Trust); (ii) February 14, 2014 Letter from John Britti (Ocwen) to Tammy Hamzehpour (Trust); and (iii) July 11, 2014 Email from Jennifer Scoliard (Ocwen) to Tammy Hamzehpour (Trust).

2 The "APA" means the Asset Purchase Agreement, dated as of November 2, 2012 and as amended from time to time, between Ocwen and certain of the Debtors pursuant to which the Debtors sold substantially all of their mortgage servicing assets. The APA was approved by order of the Court on November 21, 2012 [Docket No. 2246] (the "Sale Order").

3 *See* APA § 2.14.

4 Capitalized terms used but not defined herein shall have the meaning ascribed to such terms in the APA or the Sale Order.

which have not been reimbursed by the applicable RMBS Trust after Ocwen made a reimbursement request, and (iii) which were asserted by Ocwen prior to the administrative claim bar date (*i.e.* January 16, 2014).

In addition, while Ocwen arguably raised a number of claims within the one-year period past the Closing Date,[5] Ocwen is not permitted to hold open indefinitely its ability to (i) bring claims for breaches of Core Representations or provide evidence substantiating these claims, and (ii) reserve its right to bring claims not yet discovered beyond this one-year period. Ocwen's possession of such a right of open-ended duration was not the parties' intent when entering into the APA, and would eviscerate the carefully negotiated deadlines in the APA and Sale Order for asserting such claims. Thus, the Trust objects to Ocwen's attempt to assert contingent or unliquidated claims not yet identified.

Lastly, after reviewing Ocwen's purported bases for asserting claims against the Debtors' estates, the Trust fundamentally disagrees with Ocwen's application of the Sale Order's and APA's respective "no successor liability" provisions. Specifically, in a number of instances, Ocwen uses the "no successor liability" provisions to assert claims against the Trust for reimbursement for payments made by Ocwen (or potential payments Ocwen *may* make) to claimant counter-parties on account of certain obligations purportedly owed to said parties. If Ocwen chooses, for its own purposes, to settle or otherwise subject itself to possible liability rather than extract itself from the claim as it is entitled to do under the Sale Order, it must bear the consequences of that decision. To do otherwise would effectively transform an otherwise unsecured claim against Debtors by a plaintiff into a "full money" claim that can instead be made by Ocwen against the Debtors' estates. This is neither supported by the APA's language nor the intent of the APA. The intent behind the "no successor liability" provisions was to allow Ocwen to inform a claimant counter-party that Ocwen is not liable for those claims and the counter-party can assert claims, if at all, against the Debtors. Neither the Sale Order nor the APA provides a basis for Ocwen to assert claims against the Trust if Ocwen chooses to pay obligations for which Ocwen is not liable.

With this framework in mind, the Trust will first address claims that fall under the "indemnification claim" category, and then the remaining claims that are asserted as administrative expense claims.

Indemnification Claims

1. Secure Axcess

Ocwen notified the Trust of the lawsuit that Secure Axcess, LLC ("Secure Axcess") filed against Ocwen on December 16, 2013 (the "Secure Axcess Lawsuit") for which Ocwen is seeking indemnification from the Trust pursuant to Section 11.1 of the APA. All of Ocwen's

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[5] *See* APA § 11.6 (providing that all representations and warranties, other than "Core Representations," expire on the Closing Date).

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SUBJECT TO FRE 408

indemnification claims relating to the Secure Axcess Lawsuit, as set forth in the Correspondence,[6] are without merit.

In the Correspondence, Ocwen states that: (a) Ocwen acquired from Residential Capital, LLC ("ResCap") certain contracts, rights and licenses under the APA that relate to certain multi-factor authentication technology (the "MFA Technology") and used by the gmacmortgage.com site and certain private label sites; (b) Secure Axcess alleges in the complaint filed in the Secure Axcess Lawsuit (the "Complaint") that the MFA Technology infringes upon Secure Axcess' patent rights set forth in United States Patent Number 7,631,191 B2 (the "'191 Patent"); and (c) the Trust must indemnify Ocwen pursuant to the provisions of Section 11.1 of the APA because the Secure Axcess Lawsuit arises from ResCap's breach of its representations and warranties set forth in Sections 4.6, 4.7 and 4.15 of the APA.

First, the basic structure of the APA makes clear that there is no breach here. Specifically, Section 4.15 of the APA is the Core Representation that deals with the representations and warranties of the Debtors in connection with Transferred IP Assets, including, relevant to this dispute, that the Debtors have not received any notice of infringement. Notably, at no point did the Debtors represent that none of the Transferred IP Assets infringed on any patent. Ocwen's attempt to broaden the Debtors' representation relating to the Secure Axcess claim to other sections of the APA to shoehorn in IP claims was not contemplated by the parties, nor was it their intent, given that a separate provision was created to specifically deal with such IP-related issues. Accordingly, neither Section 4.6 nor Section 4.7 applies in this instance.

Moreover, none of the Correspondence sufficiently describes in reasonable detail, as required by Section 11.2 of the APA, how the representations and warranties in Sections 4.6, 4.7 and 4.15 of the APA were in fact breached. Regardless, consistent with the basic structure of the APA discussed above, the Trust will demonstrate why none of these representations and warranties has been breached.

- Section 4.6: ResCap did not breach Section 4.6 of the APA because ResCap transferred good, valid and marketable title to the Purchased Assets. The MFA Technology was not a Purchased Asset. The MFA Technology was licensed to Ally Financial Inc. ("AFI") and ResCap did not have a separate license to use the MFA Technology. The Trust's understanding is that Ocwen obtained the right to use the MFA Technology via a separate agreement into which Ocwen entered with AFI.

- Section 4.7: Pursuant to Section 4.7 of the APA, ResCap represented and warranted that, except for the Excluded Assets listed on Schedule Q of the APA and any services to be provided by Sellers under the Transition Services Agreement, and by AFI under the AFI

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[6] In the December 16, 2013 Letter, Ocwen asserted that ResCap is obligated to indemnify Ocwen for the Secure Axcess Lawsuit because Secure Axcess' claims arise from a breach of "a legal, valid and binding obligation of each Seller that is a party to a "Material Contract" and/or the APA's Schedule P of material contracts (including, but not limited to, contracts with RSA Security entitled "Master Software License Agreement" and/or "Professional Services Agreement") . . ." and such breach constitutes a breach of ResCap's representations and warranties set forth in Section 4.10 of the APA. Given that Ocwen didn't raise this allegation in the succeeding Correspondence, the Trust presumes that Ocwen realized that this allegation is meritless and abandoned it. If Ocwen decides to reassert this claim, the Trust reserves its right to dispute it.

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Transition Services Agreement, the Purchased Assets comprise all of the assets, properties and rights used by ResCap as of the date of the APA (*i.e.* November 2, 2012) and necessary to conduct ResCap's business in the manner conducted as of that date. ResCap did not breach Section 4.7 of the APA because, as mentioned above, the Trust's understanding is that Ocwen did in fact obtain the right to use the MFA Technology via a separate agreement into which Ocwen entered with AFI and such right was the same right to use the MFA Technology that ResCap had as of the date of the APA (*i.e.* November 2, 2012). Section 4.7 does not require ResCap to obtain any assets, properties and/or rights that ResCap did not own or have the right to use as of November 2, 2012. Moreover, given that Ocwen discontinued using the MFA Technology shortly after the February 15, 2013 Closing Date, the MFA Technology likely is excluded from this representation and warranty for not being "necessary to conduct of the ResCap's business". In other words, if the MFA Technology was necessary to the conduct of ResCap's business, Ocwen wouldn't have discontinued its use shortly after the February 15, 2013 Closing Date.

- Section 4.15: ResCap did not breach Section 4.15 of the APA because not only did ResCap not receive any written notice of infringement from Secure Axcess, ResCap was unaware of any such patent infringement claim by Secure Axcess. While ResCap is not obligated to indemnify Ocwen for any third party intellectual property infringement claims arising from Ocwen's use of the MFA Technology, Ocwen should review its agreement with AFI to determine whether AFI and/or RSA, the security division of EMC Corporation from whom AFI licensed the MFA Technology, is/are obligated to indemnify Ocwen for such claims.

2. Trustee Reimbursement Claims

These claims, raised by Ocwen under Paragraph 35 of the Sale Order, relate to the following matters: (i) *People of California v. Deutsche Bank National Bank & Trust Co.*; (ii) US Bank, as RMBS Trustee, indemnification claim; and (iii) *King v. Bank of New York Mellon*. Pursuant to Paragraph 35, Ocwen is only entitled to assert RMBS Trustee claims against the Debtors' estates where Ocwen (i) has paid any amounts to the RMBS Trustees on account of these claims, and (ii) such amounts are not reimbursed to Ocwen by the applicable RMBS Trust under the applicable Servicing Agreements after seeking reimbursement therefor from the applicable RMBS Trusts.

In each of the aforementioned matters, it appears as though Ocwen has neither paid any amounts to the applicable RMBS Trustee, and accordingly, has not yet attempted to seek reimbursement by the applicable RMBS Trust for said payments. Moreover, we believe that all of the asserted amounts would be properly reimbursable through the RMBS Trusts. For these reasons, there is no basis to assert these claims at this time.

Notwithstanding this point, the Trust requests that within sixty (60) days following the receipt of this letter, Ocwen provides the Trust with notice of all amounts actually paid to the RMBS Trustee, if/when it has sought reimbursement for those amounts, and, if applicable, whether such reimbursement request was denied. In the event these claims are not resolved by the end of this 60-day period, the Trust believes Ocwen must seek estimation of these claims as required by Paragraph 35 of the Sale Order. Ocwen cannot hold these claims open indefinitely. There is no

basis to seek payment of contingent/unliquidated claims, particularly those that were not identified by the administrative claim bar date, under the Sale Order.

3. New Jersey Show Cause Matter

Ocwen claims that the Debtors breached Section 4.14 of the APA in connection with curing certain defective notice practices. New Jersey's Fair Foreclosure Act ("FFA") provides for certain requirements relating to notices of intention to foreclose ("NOI"), and subsequent court decisions found that a failure to identify a lender in an NOI renders the NOI defective. The court provided that a servicer could file an order to show cause ("OTSC") allowing it to cure all defective NOIs. The Trust disagrees that filing an OTSC and remediating loans to correct the NOI constitutes a breach of Section 4.14 of the APA. First, these matters do not qualify under 4.14(i) as an "action, suit, demand, inquiry, proceeding, claim, cease and desist letter, hearing or investigation by or before any Government Entity pending, . . . or threatened."[7] Even if the filing of the OTSC by the Debtors were to arguably fall under Section 4.14(i), it would have to "materially and adversely affect the ability of the Sellers to complete the transactions contemplated" by the APA to be a breach. The amounts in connection with this claim, approximately $66,684.41, are clearly not material in the context of this matter, and thus cannot possibly amount to a breach of Section 4.14(i).

With respect to Section 4.14(ii), until an Order is actually entered by a court of competent jurisdiction, a Purchased Asset is not subject to said Order. For this reason, the OTSC is not an Order that existed as of the date of the APA (*i.e.* November 2, 2012) or the Closing Date (*i.e.* February 15, 2013), as the New Jersey Supreme Court only issued it after the Closing Date (*i.e.* April of 2013). Accordingly, since no Purchased Asset was subject to the OTSC as of the Closing Date, the Debtors were also not in breach of Section 4.14(ii) of the APA.

4. REO Code Violation

It appears that Ocwen is asserting that the Debtors are liable to Ocwen for amounts Ocwen paid to remediate certain REO property code violations purportedly caused by the Debtors, and therefore owe Ocwen an indemnity. Here, Ocwen again misconstrues the meaning of "no successor liability," as this provision permits Ocwen to inform other claimant counter-parties that it is not liable for certain claims, whereby those parties could then turn to the Debtors' estates to seek relief.

Further, REO code violations do not fall within the parameters of Section 4.14 of the APA, as codes and code violations do not amount to an "action, suit, demand, inquiry, proceeding, claim, [and/or] cease and desist letter" as contemplated by this provision. Additionally, similar to the NJ NOI claim discussed above, even if code violations could apply to Section 4.14(i), these matters clearly do not "materially and adversely affect the ability of the Sellers to complete the transactions contemplated" by the APA. Moreover, with respect to Section 4.14(ii), there is no reference to a court Order, only a violation of certain codes. The Debtors did not include as part of their Core Representations a "compliance with codes" representation. Thus, there was no breach by the Debtors, and accordingly, this claim has no merit.

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[7] *See* APA § 4.14.

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5. Servicing Advances

Ocwen claims that the Debtors have breached of Section 4.9(c) of the APA relating to certain Servicing Advances. Section 4.9(c) provides that each Servicing Advance is a "valid and subsisting amount" owing to a Debtor, "and is a legal, valid and binding reimbursement right" entitled to be paid. Yet, nowhere in this provision do the Debtors represent or provide a guarantee of the *collectability* of these Servicing Advances.

Since the Debtors did not provide a guarantee of collectability of Servicing Advances, Ocwen has not provided sufficient information to substantiate this claim. Accordingly, as I requested on our last call on this claim, the Trust requests that Ocwen promptly provide the Trust with detail as to (i) why each Advance has been deemed uncollectible, and (ii) how the purported uncollectibility renders the Debtors in breach of a specific Core Representation of the APA.

6. Montgomery County (Taggart) Litigation

Ocwen contends that the Debtors should indemnify Ocwen for any amounts paid in connection with litigation involving Taggart before the Court of Common Pleas, Montgomery County, PA, Case No. 09-25338 (the "Taggart Litigation"), if the Taggart Litigation is decided in Taggart's favor. Ocwen's description of this claim appears to come directly from the complaint filed by Kenneth Taggart ("Taggart"). As you are aware, as former counsel to the Debtors, the Debtors and the Trust as successor to the Debtors dispute these allegations.

At present, the Taggart Litigation is pending, but stayed due to the Chapter 11 Cases. Specifically, Ocwen has dismissed the foreclosure action, but Taggart's counterclaims are still pending. Ocwen claims that the Trust would be liable for any amounts that need to be written off to correct Mr. Taggart's Ginnie Mae Loan account and bring his loan current, as well as the cost of repurchasing the loan, if necessary. GMAC Mortgage, LLC ("GMACM") finds Taggart's allegations in the Taggart Litigation, which include purported wrongful force-placed insurance, accounting, and foreclosure errors (all of which allegedly occurred before the Closing Date) to be overstated and subject to numerous defenses. The ResCap Borrower Claims Trust expects to file in the near term an objection to Taggart's claims in the Chapter 11 Cases.

Taggart's claims against the Debtors involve the 2008 refinancing of a mortgage note of one of Taggart's investment properties and a subsequent 2009 foreclosure proceeding. Initiation of the foreclosure proceeding was proper under Pennsylvania law, and was the result of Taggart's failure to make his mortgage payments for extended periods of time. In addition to Taggart's prolonged payment breaches that forced GMACM to properly initiate a foreclosure proceeding, Taggart fails to identify any contractual obligation that GMACM allegedly breached by putting lender-placed insurance on Taggart's investment property. Even accepting Taggart's allegations (which amass to more than 60 claims for relief in several courts) as true, the Trust does not believe that the Debtors breached any Core Representations of the APA.

First, Ocwen's argument that the "no successor liability" provisions of the APA and Sale Order give rise to a claim is wrong. In addition to the reasons noted above, the APA's definition of "Assumed Liabilities" includes, among other things, all Liabilities relating to MSRs for Agency

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Loans guaranteed by Ginnie Mae, whether arising prior to or after the Closing."[8] Thus, Ocwen must identify a breach of a Core Representation to assert a claim with respect to the Taggart Litigation. For the reasons set forth below, none exist.

Contrary to Ocwen's contentions, the existence of this pending litigation does not constitute or otherwise establish a breach of the representations and warranties set forth in Section 4.17(a), (f), or (j) of the APA. As an initial matter, none of these subsections of Section 4.17 presents a guarantee that as of the Closing Date, there is no pending litigation involving (i) potential deficiencies with respect to compliance with underwriting policies, (ii) potential setoff rights, and/or (iii) instances where the repurchase of any such Ginnie Mae Loan may be required. With respect to Section 4.17(a), this provision states that all Ginnie Mae Loans comply in material respects with the Debtors' underwriting requirements and that the origination, servicing, and sale of such loans comply with certain applicable requirements in all material respects. Here, the Debtors materially complied with all applicable servicing requirements with respect to Taggart's Ginnie Mae Loan. The Debtors believe that should a court identify any non-compliance, such non-compliance would be non-material, and thus, would not amount to a breach under Section 4.17(a) of the APA.

With respect to Section 4.17(f), which states that any Ginnie Mae Loan is not subject to rescission, setoff, etc., for the reasons set forth in the objection to the Taggart proof of claim in the Chapter 11 Cases, the Trust does not believe a right of rescission or offset will be available to Taggart. Nor does the Trust believe that Section 4.17(j) is implicated by the Taggart litigation. Taggart makes many unfounded claims. The Debtors had no basis to believe that repurchase or indemnity would be required with respect to the Taggart loan as of the Closing Date, nor does the Trust believe so today.

7. Mack Claim/DB Trust

Ocwen did not raise this claim in its email communications with the Trust, but previously included it as part of its other Correspondence to the Trust. Ocwen asserts an indemnification claim in connection with a lawsuit, styled *Deutsche Bank Trust Company of the Americas as Trustee for RALI 2007 QS3 v. Barry F. Mack*, before the Circuit Court for the Twentieth Judicial District in and for Collier County, Florida (the "Florida Court"). In 2009, GMACM filed a foreclosure action on behalf of Deutsche Bank against Mack. On May 5, 2011, the Florida Court entered a final judgment that dismissed the foreclosure action and found in favor of Mack regarding Mack's counterclaims against Deutsche Bank. On July 13, 2011, Deutsche Bank moved to set aside the final judgment, but only received partial relief by the Florida Court's final order. On February 26, 2013, the Florida Court entered its final order, which reduced the amount of the judgment entered in Mack's favor but kept the final judgment intact. The parties cross-appealed the final order, but on October 18, 2013, the final order was ultimately upheld by the Florida appellate court.

Ocwen asserts a protective indemnification claim pursuant to Sections 4.14 and 11.1 of the APA, as well as pursuant to Paragraph 35 of the Sale Order, for the amount of the judgment in favor of

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[8] *See* APA § 1.1.

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Mack, as well as in the event the court determines Deutsche Bank is liable for Mack's attorney fees.

The Trust disagrees that Ocwen has any reason to assert this claim against the Debtors' estates. Importantly, Ocwen has not, and will not likely, suffer a loss in connection with this matter, as Mack has already been paid under a bond that was guaranteed by Ally. Thus, it does not appear that Deutsche Bank could suffer any losses in connection with this claim that would entitle it to indemnification. All that remains is a potential claim by Ally, which Ally will assert either against Ocwen or the Trust. Ally – not Ocwen – will pursue this claim, so there is no basis for Ocwen to assert a claim against the Debtors. To the extent Ally pursues a claim against Ocwen, Ocwen should be able to defend such a claim by pointing to the no successor liability language in Sale Order. Thus Ocwen does not appear to be at risk of loss with respect to the Mack Claim. Neither Paragraph 35 of the Sale Order nor any provision of the APA supports an indemnification claim here. Notwithstanding these points, the Trust requests that within sixty (60) days following the receipt of this letter, Ocwen provides the Trust with notice of all amounts actually paid on account of this matter, if/when it has sought reimbursement for those amounts, and, if applicable, whether such reimbursement request was denied.

8. Robinson Section 363(o) Claims

Ocwen did not raise this claim in recent email communications with the Trust, but previously included it as part of its other Correspondence to the Trust. The Trust understands that Ocwen has settled this matter with Simona Robinson ("Robinson"), and Robinson's loan modification and settlement documents have been executed. Further, Robinson's motion relating to such requested relief has been withdrawn from the Chapter 11 Cases. As this newly documented modification resolved all of Robinson's issues with both Ocwen and the Debtors, and since these documents contained standard release clauses, the Trust believes that there is no risk of any future claim to be asserted by Robinson.[9]

9. Records Management SOW / Iron Mountain

The parties have already had exhaustive communications laying out their positions on this issue, which need not be repeated in detail herein. Suffice it to say, the Trust believes that this claim for indemnification is without merit.

Administrative Expense Claims

While the Trust does not see any basis to assert administrative expense claims above and beyond the indemnification claims asserted under the APA or Sale Order discussed above (and believes it is too late to attempt to recast these claims as indemnification claims at this late stage, well past the deadline in the APA), the Trust will briefly respond substantively to such claims.

[9] Robinson did not file a proof of claim in the Chapter 11 Cases, which also bars her from now raising any claims against the Debtors' estates.

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1. Kasork

In its latest Correspondence, Ocwen suggests that Kasork's vendor claim against Ocwen, which seeks fees incurred for pulled listings under a contract amendment, will be withdrawn. In the event that this matter is not resolved, the Trust maintains that it is not liable for this asserted administrative expense claim. Further, this claim does not appear to constitute a breach by the Debtors of an obligation under the APA that would give rise to a right to indemnity. As in other instances, Ocwen misinterprets the scope of the "no successor liability" clauses, and cannot use those provisions as a basis to assert this claim against the Debtors to seek reimbursement for any amounts Ocwen pays to Kasork.

2. SAS

This administrative expense claim is based on amounts Ocwen claims it erroneously paid to the Debtors in connection with the SAS Institute Inc.'s ("SAS") software license. Ocwen asserts that even though the SAS license was assumed and assigned to Ocwen pursuant to the APA and was Ocwen's property, ResCap wrongfully charged Ocwen for amounts owed in connection with the use of the license. According to Ocwen, this resulted in Ocwen's "double payment" for the use of the licensed software, as it made a payment to ResCap for its *pro rata* use of the software, and subsequently made a separate payment to SAS under a separate agreement for such use. SAS has apparently also asserted a claim against Ocwen in connection with purported unauthorized use of the SAS license by the Debtors, AFI, and ditech in connection with certain transition services agreements. Accordingly, Ocwen reserves its rights and seeks reimbursement from the Trust for the amounts paid to the Debtors by Ocwen on account of SAS's claim.

The Trust and Ocwen reached an understanding whereby the Debtors following the Closing Date would pay SAS for the cost of using the SAS software license for the benefit of Ocwen so long as Ocwen agreed to repay the Debtors. The SAS license agreement was properly assumed and assigned to Ocwen under the APA, and both Ocwen and SAS received notice of the assumption and assignment (*see* Docket No. 924, p. 63 of 81.); Schedule O to APA. Thus, we believe the amounts paid by Ocwen to the Trust were properly paid and consistent with the parties' understanding. If SAS incorrectly convinced Ocwen that it was required to enter into a new license or separately pay it for a license, that circumstance does not give rise to a claim against the Debtors.

Conclusion

While the Trust believes it has no liability on any of these claims, and therefore, the full amount set aside under the Indemnity Escrow Agreement should be released promptly to the Trust, the Trust believes the parties should meet to determine whether a comprehensive resolution of the Ocwen claims is possible. We propose that the parties work to schedule such a meeting for mid-September. The Trust believes such a meeting would be most productive if Ocwen provides the additional diligence requested herein (particularly with respect to the Advance Claims) in advance of the meeting.

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We look forward to hearing from you on these matters.

Sincerely yours,

RESCAP LIQUIDATING TRUST

Tammy Hamzehpour
Chief Business Officer

Cc: Jeffrey A. Brodsky
Jill Horner
John Ruckdaschel
Lauren Delehey
Todd Goren
Meryl Rothchild