

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

SEGREGATED ACCOUNT OF AMBAC)	Case No.: Case No. 3:13-cv-00325
ASSURANCE CORPORATION)	
)	
Plaintiff,)	
)	
v.)	
)	
ONEWEST BANK, FSB)	
)	
Defendant.)	
_____)	

ANSWER

OneWest Bank, FSB (“OneWest”) hereby answers the allegations in support of, and raises affirmative defenses in response to, the above referenced action, which (a) the Commissioner of Insurance of the State of Wisconsin, as Rehabilitator (“Rehabilitator”) of the Segregated Account (“Segregated Account”) of Ambac Assurance Corporation (“Ambac”), commenced against OneWest by and through an April 5, 2013 Notice of Motion and Motion for an Order Confirming Authority to Terminate Residential Mortgage Loan Servicer and Appoint Successor Servicer (“Petition”) in the proceeding *In the Matter of the Rehabilitation of: Segregated Account of Ambac Assurance Corporation*, Dane County Circuit Court, Case No. 10 CV 1576 (“Ambac Rehabilitation Proceeding”); and (b) OneWest removed from the Ambac Rehabilitation Proceeding to this Court on May 9, 2013 (Dkt. No. 1). Unless expressly admitted herein, OneWest denies each and every allegation of the Petition.

SPECIFIC ADMISSIONS AND DENIALS

1. OneWest admits that by the Petition the Rehabilitator seeks to reform and terminate OneWest's contractual rights to service the mortgage loans pooled in trusts for two residential mortgage-backed securitizations ("RMBS") -- IndyMac Certificate Trust 2004-2 and IndyMac Residential Asset-Backed Trust, Series 2004-LH1 (the "Trusts"). OneWest admits that Ambac served as the financial guarantor for those two RMBS under two separate insurance policies (the "Policies"); the precise scope of Ambac's obligations is defined by the Policies themselves. OneWest admits that the Policies were placed in Ambac's Segregated Account, which is the subject of the Ambac Rehabilitation Proceeding. Based on a lack of information and belief, OneWest denies the remaining factual allegations of Paragraph 1 of the Petition, including those regarding the Rehabilitator's purpose for his Petition or beliefs regarding the effect of the relief that he seeks. OneWest denies that the Rehabilitator is entitled to any of the relief sought in his Petition.

2. OneWest admits that Deutsche Bank National Trust Company ("Deutsche Bank") is the trustee for the Trusts (the "Trustee"). OneWest admits that the Trustee's monthly remittance reports for the Trusts speak for themselves with respect to the reported number of mortgage loans and aggregate unpaid principal balance on mortgages held by the Trusts. Based on a lack of information and belief, OneWest denies any other factual allegations contained in Paragraph 2 of the Petition.

3. OneWest admits that, in a conventional RMBS, the trusts into which mortgage loans are pooled will enter into a pooling and servicing agreement, which establishes (along with various federal regulations) the rights and obligations of a loan servicer and appoints an initial

loan servicer. A financial guarantor of the RMBS will stand as a third-party beneficiary to that agreement. OneWest denies each and every remaining allegation in Paragraph 3 of the Petition.

4. OneWest admits that it was not an original party to the pooling and servicing agreements entered into by the Trusts, but that it obtained those rights by assignment approximately four years after they were executed. The Trusts entered into the September 1, 2004 Pooling and Servicing Agreement and the December 1, 2004 Sales and Servicing Agreement (the “Servicing Agreements”) with IndyMac Bank, F.S.B. (“IndyMac Bank”), which was the original servicer of the loans pooled in the Trusts. OneWest admits that the Servicing Agreements speak for themselves. On July 11, 2008, IndyMac Bank was placed in receivership by its regulator, the Office of Thrift Supervision (“OTS”). The OTS appointed the Federal Deposit Insurance Corporation (“FDIC”) to be the Receiver of IndyMac Bank and approved the formation of a newly chartered federal savings bank, IndyMac Federal Bank, FSB (“IMFB”), as to which the FDIC was appointed Conservator and by the time of the sale of IMFB’s assets also as its Receiver. OneWest further admits that the FDIC as Receiver of IndyMac Bank transferred certain of IndyMac Bank’s assets, including the mortgage servicer rights under the Servicing Agreements, and certain of its liabilities to IMFB. OneWest further admits that it later acquired those mortgage servicer rights, as the successor servicer by assignment, in a transaction with the FDIC as Receiver for IMFB that occurred on March 19, 2009. OneWest further admits that this transaction was formalized via various written agreements, including the March 19, 2009 Servicing Business Asset Purchase Agreement (“SBAPA”) By and Between the Federal Deposit Insurance Corporation as Receiver for IndyMac Federal Bank, FSB and OneWest Bank, FSB.

Except as expressly admitted, OneWest denies each and every remaining allegation in Paragraph 4 of the Petition.

5. OneWest admits that Section 7.01 of the Servicing Agreements outlines “Events of Servicing Termination” under which Ambac, as a third-party beneficiary, would have the right to terminate the loan servicer for the Trusts. OneWest admits that Section 7.01 speaks for itself. OneWest denies each and every remaining allegation in Paragraph 5 of the Petition.

6. OneWest admits that Section 7.01 of the Servicing Agreements speaks for itself. Based on a lack of information or belief, OneWest denies each and every remaining allegation in Paragraph 6 of the Petition, including that Section 7.01(ix) of the Servicing Agreements contains a clear drafting error and that, under the intended meaning for Section 7.01(ix), Ambac would have a current right to terminate OneWest as servicer for the loans pooled in the Trusts.

7. OneWest admits that Section 11.04 of the Servicing Agreements states: “This Agreement shall be governed and construed in accordance with the laws of the state of New York and the obligations, rights and remedies of the parties hereunder shall be determined in accordance with such laws, without giving effect to principles of conflicts of law (other than Section 5-1401 of the New York General Obligations Law).” The remaining allegations of Paragraph 7 of the Petition constitute legal contentions and/or conclusions to which no response is required.

8. OneWest denies each and every allegation in Paragraph 8 of the Petition.

9. Based on a lack of information or belief, OneWest denies the allegations of Paragraph 9 of the Petition, including its allegations about the original intent of IndyMac Bank,

the Trustee and Ambac with respect to the meaning of Section 7.01(ix) of the Servicing Agreements.

10. OneWest admits that Section 8.01(i) of the Chevy Chase 2006-2 Pooling and Servicing Agreement speaks for itself. OneWest denies each and every remaining allegation in Paragraph 10 of the Petition.

11. OneWest admits that Section 7.01 of the Servicing Agreements speaks for itself. OneWest denies each and every remaining allegation in Paragraph 11 of the Petition.

12. OneWest admits that the trustee's monthly remittance reports speak for themselves. OneWest denies each and every remaining allegation in Paragraph 12 of the Petition.

13. OneWest is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 13 of the Petition, and on that basis denies the allegations.

14. OneWest admits that the papers accompanying the Petition, including the Second Affidavit of Iain Bruce, speak for themselves. OneWest is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 14 of the Petition, and on that basis denies the allegations.

15. OneWest admits that Deutsche Bank, in its capacity as trustee, has taken no position on the proper construction of Section 7.01(ix) of the Servicing Agreements. OneWest is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in Paragraph 15 of the Petition, and on that basis denies the allegations.

16. OneWest is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 16 of the Petition, and on that basis denies the allegations.

17. OneWest admits that it contests that Ambac has the right, under Section 7.01(ix), to terminate OneWest's rights under the Servicing Agreements. OneWest further admits that it was served with a copy of the Petition and supporting documents. OneWest denies each and every remaining allegation in Paragraph 17 of the Petition.

18. OneWest admits that it services certain mortgage loans for properties located in the State of Wisconsin. OneWest further admits that the Rehabilitator mailed to it copies of certain filings made by the Rehabilitator on March 24, 2010 in the state court action from which this proceeding was removed. OneWest further admits that it did not object to the state court's entry of a permanent injunction in the Rehabilitation Proceeding. OneWest denies each and every remaining allegation in Paragraph 18 of the Petition.

19. OneWest denies each and every allegation in Paragraph 19 of the Petition.

20. OneWest denies that the Rehabilitator, or the Segregated Account, has suffered any injury or incurred any damages as a result of any act or omission by OneWest as alleged in the Petition and further denies that the Rehabilitator, or the Segregated Account, is entitled to any relief under any theory or by any means of the allegations set forth in the Petition. OneWest further requests judgment in OneWest's favor along with costs, fees and any further and additional relief which the Court deems just and appropriate.

AFFIRMATIVE DEFENSES

OneWest sets forth the following Affirmative Defenses without waiving OneWest's right to put the Rehabilitator to its proofs and without assuming any burden of proof not otherwise imposed upon OneWest.

**FIRST AFFIRMATIVE DEFENSE
(Lapse of Statute of Limitations)**

21. The Rehabilitator's Petition is barred, in whole or in part, by the applicable statute of limitations. As the Rehabilitator acknowledges, the Servicing Agreements at issue are "governed by New York law." Petition at ¶ 7. Under New York law, a reformation action is subject to a six-year limitations period. N.Y. C.P.L.R. § 213(6). Here, the statute of limitations began running on September 1, 2004, and December 1, 2004, the dates on which the relevant Servicing Agreements were executed, and therefore the dates on which the alleged mistakes were made. On information and belief, OneWest alleges that Ambac has been in possession of the Servicing Agreements containing the alleged mistakes since the dates of execution, and therefore cannot toll the applicable six-year statute of limitations. *See Federal Deposit Ins. Corp. v. Five Star Mgmt*, 258 A.D.2d 15, 20 (N.Y. App. Div. 1999) ("[T]he requisite diligence necessary to . . . toll the limitations period [for a reformation claim] is not present here, when the lender possessed the very document containing the mistake."). Accordingly, the six-year statute of limitations ran as of September 1, 2010, and December 1, 2010, respectively. The Rehabilitator did not file its action seeking reformation of the Servicing Agreements (i.e., the Petition) until April 5, 2013, more than three years beyond the running of the applicable statute of limitations period.

**SECOND AFFIRMATIVE DEFENSE
(Unclean Hands)**

22. The Rehabilitator's Petition is barred, in whole or in part, by the equitable defense of unclean hands.

**THIRD AFFIRMATIVE DEFENSE
(Waiver and Ratification)**

23. The Rehabilitator's Petition is barred, in whole or in part, by the equitable defense of waiver and ratification.

**FOURTH AFFIRMATIVE DEFENSE
(Laches)**

24. The Rehabilitator's Petition is barred, in whole or in part, by the equitable defense of laches.

**FIFTH AFFIRMATIVE DEFENSE
(Negligence)**

25. The Rehabilitator's Petition is barred, in whole or in part, by the equitable defense of inexcusable neglect.

**SIXTH AFFIRMATIVE DEFENSE
(Knowledge of Contract Term to be Reformed)**

26. The Rehabilitator's Petition is barred, in whole or in part, by facts showing that Ambac was made aware of provisions of the Servicing Agreements that the Rehabilitator seeks to reform.

**SEVENTH AFFIRMATIVE DEFENSE
(Failure to Read Contract)**

27. The Rehabilitator's Petition is barred, in whole or in part, by facts showing that Ambac had the opportunity to, but did not, read the provision of the Servicing Agreements that the Rehabilitator seeks to reform before approving of the form of the Servicing Agreements and issuing insurance policies to the Trusts in reliance on those Servicing Agreements.

**EIGHTH AFFIRMATIVE DEFENSE
(Preemption)**

28. The Rehabilitator's Petition is barred by federal law giving the FDIC the power to transfer any asset of financial institutions for which it acts as conservator (*i.e.*, 12 U.S.C. § 1821(d)(2)(G)), because the Rehabilitator now seeks material changes to the rights under the Servicing Agreements that the FDIC, as IMFB's conservator, transferred to OneWest.

PRAYER FOR RELIEF

WHEREFORE, OneWest prays as follows:

1. That -- because OneWest was not an original signatory to the contracts at issue and because OneWest lacks knowledge and information regarding many facts alleged in the Petition and material to the Rehabilitator's claims and OneWest's defenses -- further proceedings, including discovery, legal briefing and resolution of any factual disputes, shall take place in this matter before any resolution on the merits;
2. That the Rehabilitator take nothing by reason of its Petition and that judgment be rendered in favor of OneWest;
3. That OneWest be awarded its costs and fees of suit incurred in defense of this action; and
4. For such other relief which the Court deems just and appropriate.

Dated: June 13, 2013.

Respectfully submitted,

GODFREY & KAHN S.C.

/s/ James A. Friedman

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