CADWALADER

Bank of America, N.A., et al. v. PCV ST Owner LP, et al., 10 Civ. 1178 (S.D.N.Y.):

Brief of Amici Curiarum LNR Partners , Inc., in its capacity as a special servicer of CMBS, and American Capital, Ltd., in its capacity as the controlling representative of certain of the subject trusts, in support of CWCapital Asset Management LLC's Opposition to Motion for Leave to Intervene as a party defendant filed by Appaloosa Investment L.P. I, et. al.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BANK OF AMERICA, N.A., as Trustee for the Registered Holders of Wachovia Bank Commercial Mortgage Trust 2007-C30, acting by and through its Special Servicer, CWCapital Asset Management LLC, BANK OF AMERICA, N.A., as Trustee for the Registered Holders of COBALT CMBS Commercial Mortgage Trust 2007-C2, acting by and through CWCapital Asset Management LLC pursuant to the authority granted under that certain Amended and Restated Co-Lender Agreement dated March 12, 2007 and U.S. BANK NATIONAL ASSOCIATION, as Trustee for the Registered Holders of Wachovia Bank Commercial Mortgage Trust 2007-C31, ML-CFC Commercial Mortgage Trust 2007-5 and ML-CFC Commercial Mortgage Trust 2007-6, acting by and through CWCapital Asset Management LLC pursuant to the authority granted under that certain Amended and Restated Co-Lender Agreement dated March 12, 2007,

Plaintiffs,

-against-

PCV ST OWNER LP, ST OWNER LP, TRI-LINE CONTRACTING CORP., ATLAS FIRE PROTECTION, INC., POMALEE ELECTRIC CO. INC., REFUSE SYSTEMS CORP., PRO TILE DISTRIBUTORS, INC., TRITON STONE AND MARBLE LLC, S.T.S. TRADING INC. d/b/a S.T. LUMBER & HOME CENTER, ELECTRICAL, PLUMBING, S.D. INT'L INC. d/b/a S.D. STONE DEPOT, ELBEX AMERICA OF NEW YORK INC., NEW YORK CITY DEPARTMENT OF TRANSPORTATION PARKING VIOLATIONS BUREAU, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, and FIRE DEPARTMENT OF THE CITY OF NEW YORK,

Defendants.

10 Civ. 1178 (AHK)
(ECF Case)

BRIEF OF AMICI CURIARUM LNR PARTNERS, INC. AND AMERICAN CAPITAL, LTD. IN SUPPORT OF CWCAPITAL ASSET MANAGEMENT LLC'S OPPOSITION TO MOTION FOR LEAVE TO INTERVENE AS A PARTY-DEFENDANT FILED BY APPALOOSA INVESTMENT L.P. I, PALOMINO FUND LTD., THOROUGHBRED FUND L.P., AND THOROUGHBRED MASTER LTD.

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

PAGE(S)

CASES:

OTHER CITATIONS:

PAGE(S)

Amici curiarum LNR Partners, Inc. and American Capital, Ltd. respectfully submit this Memorandum of Law in support of CWCapital Asset Management LLC's ("CWCAM") Opposition to the Motion for Leave to Intervene as a Party-Defendant (the "Motion") filed by Appaloosa Investment L.P. I, Palomino Fund Ltd., Thoroughbred Fund L.P., and Thoroughbred Master Ltd. (collectively, "Appaloosa").[1]

STATEMENT OF INTEREST

LNR Partners, Inc. ("LNR") is the country's largest special servicer of commercial real estate mortgage loans included in commercial mortgage-backed securities ("CMBS") transactions. LNR is a subsidiary of LNR Property Holdings Ltd. LNR through its subsidiaries, affiliates and joint ventures, is involved in the real estate investment, finance and management business and engages principally in: (i) acquiring, developing, repositioning, managing and selling commercial and multifamily residential real estate properties; (ii) investing in high-yielding real estate loans; and (iii) investing in, and managing as special servicer, unrated and non-investment grade rated CMBS.

LNR and its affiliates have been engaged in the special servicing of commercial real estate assets for over 18 years. As of December 31, 2009, LNR and its affiliates acted as special servicer for 136 domestic CMBS pools with a then current face value in excess of $191 billion. Additionally, LNR has resolved approximately $21.2 billion of U.S. commercial and multifamily loans over the past 18 years. As a special servicer, LNR has a keen interest in the protection and the proper recognition of the legal rights and duties of a CMBS special servicer such as CWCAM and in the orderly and efficient resolution and disposition of defaulted loans in

[1] Unless otherwise defined herein, all capitalized terms shall have the meaning set forth in CWCapital Asset Management LLC's Memorandum in Opposition to the Motion for Leave to Intervene as a Party-Defendant, dated March 12, 2010 (the "Opposition Brief" or "Opp. Br.").

the best interests of all certificateholders, especially in significant foreclosure proceedings such as those before this Court.

American Capital, Ltd. ("American Capital") is a publicly traded private equity firm and global asset manager which originates and manages investments in middle market private equity, leveraged finance, real estate and structured products. American Capital has invested in 36 different CMBS pools, 18 of which have been in bonds that result in American Capital being named the Controlling Class Representative. These 18 trusts are collateralized by $55.6 billion of commercial mortgages in over 3,600 loans. Additionally, American Capital has invested in 35 below investment grade securities in 12 CMBS trusts that are collateralized by $45 billion of commercial mortgages in over 2,500 loans. American Capital has also invested in 29 investment grade securities in 17 CMBS Trusts that are collateralized by $16 billion of commercial mortgages in over 1,000 loans.

As it relates to this action, ACAS CRE-CDO 2007-1, managed by American Capital CRE Management LLC (a subsidiary of American Capital, LLC, a portfolio company of American Capital), along with LNR Securities Holdings, an affiliate of LNR, and CWCAM, are noteholders and controlling class representatives for the following trusts that hold interests in the underlying loans on the subject properties: Wachovia Bank Commercial Mortgage Trust 2007-C31; ML-CFC Commercial Mortgage Trust 2007-5; and ML-CFC Commercial Mortgage Trust 2007-6. See Opp. Br. Ex. 2 at § 3.25(a), Ex. 11.

LNR, in its capacity as a special servicer of CMBS, and American Capital, in its capacity as the controlling representative of certain of the trusts submit that allowing Appaloosa to intervene in this foreclosure action (i) raises serious public policy concerns relating to the distressed commercial real estate market, and (ii) undermines the contractual agreements established to foster effective administration of mortgage loans and to enhance recoveries on

defaulted loans. For the reasons set forth below (as well as those set out in CWCAM's Opposition Brief) Appaloosa's motion to intervene should be denied.

ARGUMENT

ALLOWING CERTIFICATEHOLDERS TO INTERVENE IN FORECLOSURE ACTIONS WOULD BE CONTRARY TO PUBLIC POLICY, PARTICULARLY IN THE CURRENT COMMERCIAL REAL ESTATE MARKET, AND IS IN DIRECT CONFLICT WITH THE EXPRESS PROVISIONS OF THE GOVERNING DOCUMENTS

The $3.5 trillion commercial real estate market is experiencing serious financial stress as billions of dollars of commercial mortgage loans mature over the next few years. See e.g., Maureen Milford, Next bubble: Commercial real estate, The News Journal, March 14, 2010 (Congressional Oversight Panel has recognized that there is a "commercial real estate crisis on the horizon . . ."). [2] As of June 2009, there were 5,315 commercial properties in default, foreclosure or bankruptcy, more than twice the number at the end of 2008. See Dawn Kopecki, Commercial Real Estate is a 'Time Bomb,' Maloney Says (Update 2), Bloomberg, July 9, 2009; [3] see also David M. Levitt, U.S. Property Investors Deem 2010 Worst Time to Sell (Update 1), Bloomberg, Nov. 5, 2009 ("The worldwide credit crisis has driven $138 billion worth of U.S. commercial properties into default, foreclosure or debt restructuring through September"). [4] As commercial real estate loans increasingly reach maturity through 2010 and beyond, defaults and foreclosures likely will increase.

Indeed, "in 2010, approximately $475 billion of commercial real estate loans nationwide are expected to mature," see Milford, supra, and by 2014 a total of $1.4 trillion in

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[2] Available at http://www.delawareonline.com/article/20100314/business/3140360/Next-bubble-Commercial-real-estate.

[3] Available at http://www.bloomberg.com/apps/news?pid=20601087&sid=aTP9nCROB6PU.

[4] Available at http://www.bloomberg.com/apps/news?pid=20601103&sid=aHljg1MMC.MU.

commercial real estate loans will reach the end of their terms. See Paul Wiseman, Smaller Banks Could Be at Risk; Congressional Panel Fears Commercial Real Estate Trouble, USA Today, Feb. 11, 2010, at 1B.[5]

With trillions of dollars in commercial real estate mortgage loans coming due in the United States over the next few years, and with many lenders unable or unwilling to refinance them, defaults and foreclosures likely will continue to occur at a rapid rate. As commercial property values have declined and credit remains restricted, refinancing often is not available, thus resulting in increased delinquencies and foreclosures. See Vincent Fernando, Commercial Real Estate Default Rate Doubles As Banks Sit on $1.1 Trillion in Loans, The Bus. Insider, Feb. 24, 2010 (According to Bloomberg, "[t]he default rate for loans on office, retail, hotel and industrial properties surged to 3.8 percent from 1.6 percent a year earlier").[6]

The statistics regarding risks associated with potential upcoming maturity defaults are staggering. And these statistics do not take into account the loans that have or will go into default during their term because of the inability of the borrowers to meet their monthly debt service requirements. The current economic environment has seriously impacted the ability of these properties to meet cash flow requirements necessary to operate and maintain the property as well as service the mortgage debt.

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[5] Available at http://www.usatoday.com/printedition/money/20100211/banks11_st.art.htm?loc=interstitialskip.

[6] Available at http://www.businessinsider.com/commercial-real-estate-default-rates-suddenly-double-2010-2. See also Wiseman, supra, at 1B ("Deutsche Bank estimates that more than 65% of commercial real estate loans might not qualify for refinancing because banks have tightened underwriting standards and property values have collapsed"); see also Commercial Mortgage Alert, CMBS Credit Quality Continues to Plunge, Mar. 5, 2010, available at http://www.cmalert.com/headlines.php? hid=68826. ("In many cases, property values have fallen below the levels when the loans were originated . . . . Because of that and tighter credit standards, borrowers are having a hard time refinancing the full amount of current loans. Fitch expects that maturing loans originated within the last five years will continue to play a big part in boosting the CMBS delinquency rate").

Nationally, CMBS loans represent approximately 20% of commercial property debt. Marc Wieder, Securitized Mortgages in Commercial Real Estate Signal Trouble Ahead, Real Estate Weekly, Jan. 20, 2010.[7] As this Court is aware, CMBS, like those issued by the Trusts at issue here, are securities backed by commercial real estate which are sold to numerous different investors with varying appetites for risk. Upon the occurrence of certain events of default, including a monetary default, the administration of the commercial loans underlying the CMBS is transferred from the master servicer to the special servicer.[8] The special servicer is then solely responsible for servicing and administering the loan in accordance with the Servicing Standard and the terms of the applicable pooling and servicing agreement. Opp. Br. at 4.

Accordingly, as defaults in commercial real estate loans have and will continue to increase, loans backing CMBS increasingly have been transferred to special servicing. According to a special report issued by Fitch Ratings earlier this week, "CMBS special servicers resolved $8.7 billion loans in 2009," but this figure reflects only 11% of the amount in special servicing at the end of last year. Stephanie Petosa, et al., CMBS YE 2009 Servicing Update, Fitch Ratings, Mar. 15, 2010.[9] "The number of loans transferring to the special servicer is growing exponentially." Id. "At the end of February, $76.6 billion of the $722 billion of outstanding CMBS loans in the U.S. were in special servicing." See Commercial Mortgage Alert, supra ("The net amount of loans in special servicing climbed by 8.5%, or $4.3 billion, [in February 2010 and] [t]here was a net increase of 341 loans, bringing the total [of commercial

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[7] Available at http://www.allbusiness.com/banking-finance/banking-lending-credit-services/13856172-1.htmls.

[8] Cadwalader notes for the record that it also advises Wachovia Bank N.A., now part of Well Fargo N.A. ("Wells"), in its capacity as Master Servicer of this Trust. Wells is not a party to this foreclosure action, as CWCAM acts as Special Servicer.

[9] Available at http://cmbs.informz.net/cmbs/data/images/fitch_cmbsye2009.pdf.

real estate loans in special servicing] to 4,332");[10] see also Milford, supra ("Fitch anticipates delinquencies on loans in commercial mortgage-backed securities will reach 6 percent by the first quarter of this year and could reach 12 percent by 2012");[11] Wieder, supra ("Bloomberg recently reported that the rate of defaults and late payments on real estate loans packaged as commercial mortgage-backed securities increased by more than five times in the third quarter of 2009").

LNR, like all special servicers in the industry, experienced an exceptionally high inflow of new special servicing volume in 2009, which has continued into 2010. Accordingly, LNR and special servicers nationwide must, in accordance with the Servicing Standard and the terms of the applicable pooling and servicing agreement, administer and service thousands of defaulted commercial real estate loans in the best interests of the certificateholders taken as a whole, and, where appropriate, exercise remedies available to the lender under the loan documents upon default of the loan, including foreclosure.

Courts should not permit individual certificateholders (such as Appaloosa) to intervene in routine foreclosure actions, particularly in the current economic environment, where intervention by a holder acting solely in its own self interest would be detrimental to other investors in the same trust fund. Intervention here would be inconsistent with a number of important public policy considerations and the express contractual provisions of the governing documents.

First, intervention would set an undesirable precedent that could open the court system to a flood of litigation by investors acting for their self interested economic gain. The

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[10] Available at http://www.cmalert.com/headlines.php?hid=68826.

[11] Available at http://www.delawareonline.com/article/20100314/business/3140360/Next-bubble-Commercial-real-estate.

special servicer is the party who is designated to serve on behalf of all certificateholders precisely to avoid conflicts among holders who may be differently impacted by actions taken by the special servicer. The special servicer's duty is to act for all the certificateholders, and in their best interests taken as a whole. Individual holders such as Appaloosa act only for their own interest. In a complex multi-class capital structure like these CMBS, if each holder were free to argue for a loan resolution strategy that favored its position in the payment priority structure, chaos would result. The number of intervention motions that could be filed as a result of one foreclosure could clog up the court systems and create gridlock in the efficient resolution of defaulted mortgage loans, allowing distressed properties to further deteriorate in value. See generally Friedman v. Chesapeake & Ohio Ry. Co., 261 F. Supp. 728, 731 n.7 (S.D.N.Y. 1966), aff'd, 395 F.2d 663 (2d Cir. 1968), cert. denied, 393 U.S. 1016 (1969). And in the end, it is the assets of the trust fund itself, the source of repayment to all certificateholders, which will bear the cost of litigation involving challenges to the special servicer's recommended course of action.

If each bondholder had the right to intervene in a foreclosure of a mortgage without the required consent of other bondholders, a single foreclosure could result in numerous individual intervention motions. Here, given that the PSA specifically addresses the mechanics and requirements for action by certificateholders, compliance with these provisions would provide for an orderly manner for investors to take action if they so desire.

This Court has recognized that "'[i]f in a mortgage securing thousands of bonds every holder of a bond or bonds were free to sue at will for himself and for others similarly situated, the resulting harassment and litigation would be not only burdensome but intolerable.'" Friedman, 261 F. Supp. at 731 n.7 (quoting Quirke v. St. Louis-San Francisco Ry. Co., 277 F.2d

705, 709 (8th Cir.), cert. denied, 363 U.S. 845 (1960)); see also Central States Life Ins. Co. v. Koplar Co., 80 F.2d 754, 758 (8th Cir. 1935), cert. denied, 298 U.S. 687 (1936).

Second, intervention would allow an individual certificateholder to circumvent the administrative structure of CMBS transactions and the agreements and undertakings of all certificateholders, who contracted to vest in the special servicer the sole responsibility for administering defaulted mortgage loans. As the United States Bankruptcy Court for the Southern District of New York recently stated in the Chrysler Chapter 11 case:

> Restricting enforcement to a single agent to engage in unified action for the interests of a group of lenders, based upon a majority vote, avoids chaos and prevents a single lender from being preferred over others.

In re Chrysler LLC, 405 B.R. 84, 103 (Bankr. S.D.N.Y. 2009), aff'd, 576 F.3d 108 (2d Cir. 2009), cert. dismissed 78 USLW 3107 (2009). A certificateholder with the economic resources to pursue legal action should not be permitted to contravene the agreements to which its securities are subject in order to advance its own interests over those who abide by the contractual terms of such agreements.

Here, affiliates of LNR and American Capital, like Appaloosa, each hold certificates issued by the trusts. LNR and American Capital additionally represent the controlling class for certain of the trusts and possess certain consultation rights here afforded to the controlling class in the trusts. Despite such rights and interests, however, under the PSA, all certificateholders have vested in CWCAM (as Special Servicer), the sole responsibility for administering the Loan and have respected and adhered to the terms of the PSA.

Third, intervention would allow certificateholders to ignore "no-action" clauses by which they are contractually bound, to the detriment of other certificateholders. As noted in CWCAM's Opposition Brief, section 11.03 of the PSA at issue here contains a standard "no-

action" clause that prohibits certificateholders with less than 25% of the voting rights to "institute any suit, action or proceeding." See Opp. Br. at 8. "No-action" clauses are designed to prevent individual noteholders from seeking to exercise enforcement remedies or interfere with such remedies following default.[12] Such clauses are typical in PSAs governing CMBS transactions, and they are typical in corporate bond and other indentures. These clauses are "intended for the security of all the bondholders." See Quirke, 277 F.2d at 710 (quoting Home Mortg. Co. v. Ramsey, 49 F.2d 738, 743 (4th Cir. 1931)). They are included for just such a case as here, "where one bondholder, or a small minority, is determined upon action which a large majority believe hostile to their interests." Id.; see also Rossdeutscher v. Viacom, Inc., 768 A.2d 8, 22 (Del. 2001).

The American Bar Association has long recognized the importance of "no action" clauses:

> The major purpose of this Section is to deter individual debenture-holders from bringing independent law suits for unworthy or unjustifiable reasons, causing expense to the Company and diminishing its assets. The theory is that if the suit is worthwhile, 25% of the debentureholders would be willing to join in sponsoring it. The 25% figure is standard. An additional purpose is the expression of the principle of law that would otherwise be implied that all rights and remedies of the indenture are for the equal and ratable benefit of all the holders.

See American Bar Foundation, Commentaries on Model Debenture Indenture Provisions (1971), at 232.

[12] Thus, the issue here is not whether Appaloosa could sue the Trustee or the Issuer, but whether Appaloosa can exercise or interfere with the exercise of the enforcement remedies by the Special Servicer against the Borrowers, which it specifically agreed it would not do.

CONCLUSION

Individual certificateholders such as Appaloosa have no contractual right to seek to challenge or override the actions of a CMBS special servicer or to second guess through intervention the special servicer's exercise of remedies, including foreclosure upon default. Nor should an individual certificateholders such as Appaloosa be permitted to intervene to assert defenses to foreclosure when all certificateholders, including those with rights of consultation, have delegated the power to exercise remedies to the special servicer. Allowing Appaloosa to intervene in this action would spawn satellite litigation that will clog the courts and impair recoveries to CMBS bondholders.

For the foregoing reasons, and for the reasons set forth in CWCAM's Opposition Brief, Appaloosa's Motion for Leave to Intervene as a Party-Defendant should be denied.

Dated: New York, New York
March 19, 2010

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