IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
	)	
AMERICAN HOME MORTGAGE HOLDINGS, INC., a Delaware corporation, et al.,	)	Case No. 07-11047 (CSS)
	)	
Debtors.	)	Jointly Administered
	)	
Credit Suisse First Boston Mortgage Capital, LLC,	)	
	)	
Plaintiff and Counterclaim Defendant,	)	Adv. No.: 07-51684 (CSS)
	)	
v.	)	
	)	
American Home Mortgage Corp., American Home Mortgage Acceptance, Inc., American Home Mortgage Servicing, Inc., American Home Mortgage Investment Corp., and American Home Mortgage Holdings, Inc.,	)	
	)	
Debtor-Defendants and Counterclaim Plaintiffs.	)	
	)	

BRIEF OF THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF AND COUNTERCLAIM DEFENDANT

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PRELIMINARY STATEMENT

The Securities Industry and Financial Markets Association ("SIFMA") submits this brief as *amicus curiae* to further inform the Court about the treatment of repurchase agreements ("Repo Agreements") under title 11 of the United States Code (the "Bankruptcy Code"), as amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"),[1] and to alert the Court to the potentially significant negative impact of this case on the capital markets.[2] SIFMA submits this brief in support of Plaintiffs' complaint for (x) declaratory relief that the Repo Agreement, inclusive of the mortgage servicing provisions, constitutes a Repo Agreement under the safe harbor provisions of Bankruptcy Code §559 and (y) injunctive relief directing the Debtors to comply with the terms of the Repo Agreement, including the immediate delivery to Credit Suisse First Boston Mortgage Capital, LLC ("CSFB") of all documents relating to the underlying mortgages, in order to facilitate CSFB's prompt liquidation of the Repo Agreement.

The central issue before the Court is whether the mortgage loan Master Repurchase Agreement among CSFB and American Home Mortgage Corp., *et al.*, dated September 13, 2006 (the "American Home Repo"), inclusive of the service provisions, is a "repurchase agreement" as defined in §101(47) of the Bankruptcy Code and therefore, covered by the safe harbor provisions of Bankruptcy Code §559.

In 2005, as part of BAPCPA, more than 20 years of case law and piecemeal statutory amendments concerning Repo Agreements were codified to expand the types of agreements that

[1] Pub. L. No. 109-8, §§1 *et. seq.*, 119 Stat. 23, *et. seq.*, (2005).

[2] SIFMA understands that this Court has ordered a consolidated trial of the issues raised in this adversary proceeding with the similar issues raised in the adversary proceedings of *Bear Stearns Mortgage Capital Corp. and EMC Mortgage Corp. v. American Home Mortgage Investment Corp., et al*. (Adv. Proc. No. 07-51701) and *Calyon New York Branch v. American Home Mortgage Investment Corp., et al*. (Adv. Proc. No. 07-51704). We submit that the financial services industry-wide policy issues addressed herein are equally applicable to both the Bear Stearns and Calyon proceedings and we request that this brief be considered by the Court in each of those proceedings.

are protected under the safe harbor provisions of the Bankruptcy Code. In so doing, Congress recognized that parties to Repo Agreements required certainty and stability and that the capital markets needed the liquidity that these complex financial transactions provide.

Repo Agreements have been utilized (i) by the Federal Reserve since 1917 to set and stabilize monetary policy, and (ii) by sophisticated institutional investors as a safe method to meet short and long term liquidity needs. Repo Agreements are a critical component not only of the U.S. capital markets, but also of the global capital markets.[3]

Indeed, current economic developments highlight the significance of Repo Agreements. For example, in the face of a global liquidity squeeze, on September 17, 2007, the U.S. Federal Reserve added $16.8 billion in temporary reserves to the banking system through overnight transactions made pursuant to Repo Agreements.[4]

SIFMA understands that the parties to these proceedings seek to protect their own economic interests. As discussed below, however, SIFMA represents a broad constituency that holds positions on multiple sides of transactions similar to those at issue here and is concerned that any decision that characterizes and enforces the American Home Repo as anything other than a Repo Agreement governed by §559 of the Bankruptcy Code may well have far reaching negative implications for the U.S. capital markets and the increasingly fragile U.S. economy.[5]

INTEREST OF THE *AMICUS CURIAE*

SIFMA was formed from the 2006 merger of the Securities Industry Association and The Bond Market Association. SIFMA brings together the shared interests of more than 650

[3] The Evolution of Repo Contracting Conventions In The 1980s, Kenneth D. Garbade, FRBNY Economic Policy Review/May 2006, pp. 27, 28 ("FRBNY Review May 2006") (A copy of this article is annexed hereto as Exhibit 1.).

[4] Business Day, September 18, 2007 (A copy of the article is annexed hereto as Exhibit 2.).

[5] Former Federal Reserve Chairman Alan Greenspan noted on September 18, 2007 that there is an increased risk of a U.S. recession predicated primarily on the current state of the housing market. (A copy of the article is annexed hereto as Exhibit 3).

securities firms, banks, asset managers, and financial intermediaries that are the gateway to the U.S. and global capital markets. SIFMA links thousands of companies to millions of investors, involving trillions of dollars in the capital markets. SIFMA members and their counterparties underwrite equity and debt offerings for domestic and foreign issuers, broker securities trades, provide financial advisory services, publish research, lend money to companies ranging from small start-ups to the Fortune 100, and make private-equity investments in large and small companies that are integral to every aspect of the U.S. and global capital markets.

SIFMA's mission is to promote policies and practices that expand markets, foster the development of new products and services, and create efficiencies for member firms. SIFMA works to represent its members' interests locally and globally through offices in New York, Washington, D.C., and its associated firm, the Asia Securities Industry and Financial Markets Association in Hong Kong. SIFMA recognizes that in order to accomplish its mission, it must work to preserve and enhance trust and confidence in the financial markets and industry.

In light of these goals, SIFMA and its predecessors have actively addressed numerous legal and regulatory issues, including those with respect to Repo Agreements. As of September 27, 2007, Repo Agreements accounted for approximately $6.4 trillion of purchases and sales of securities.[6]

In the 1980's, SIFMA joined then Federal Reserve Chairman, Paul Volcker and private market participants to urge Congress to adopt amendments to the Bankruptcy Code following the decision in *Lombard–Wall, No. 82-8-11556,* bench op. (Bankr. S.D.N.Y. September 16, 1982).[7] These efforts ultimately resulted in amendments to the Bankruptcy Code as reflected in the

[6] N.Y. Federal Reserve Website (www.newyorkfed.org/markets/statistics/deal). A copy of the September 27, 2007 release is annexed as Exhibit 4. See also, FRBNY Review, May 2006, p.1.

[7] As discussed below, in *Lombard-Wall*, the court held that Repo Agreements were subject to the automatic stay and, thus, required the counterparty to obtain court approval in order to close out its position.

Bankruptcy Amendments and Federal Judgeship Act of 1984 (the "1984 Amendments"). In pertinent part, the 1984 Amendments were intended to provide that Repo Agreement transactions are not subject to the Bankruptcy Code's automatic stay provisions.[8]

SIFMA continues to assist market participants in the development of recommended standards for the debt capital markets by, among other things, promoting the adoption of uniform Repo Agreements trading practices and forms governing repurchase and other types of transactions.[9] Since SIFMA members may be both Repo Agreement buyers and sellers, SIFMA strives to develop practices and forms that are flexible and transaction neutral. Indeed, the advisory notes to the SIFMA master form repurchase agreement (the "MRA")[10] provide:[11]

> As with the standard form master repurchase agreement ("MRA") prepared by [SIFMA] for use in the US repo market, the Agreement provides market participants with a substantial degree of flexibility in structuring the commercial aspects of both the Agreement and transactions made under it.

Further, as part of its work in support of the capital markets, SIFMA has also filed briefs in cases of significant importance in the area of Repo Agreements. *See, e.g., County of Orange and Moorlach v. Merrill Lynch & Co., Inc., et al.*, case no. SA CV 95-0037-GLT (C.D. Ca., Brief filed 1998); *Granite Partners, L.P. v. Bear, Stearns & Co., Inc. et al.*, 17 F. Supp. 2d 275, 303 (S.D.N.Y. 1998); *Criimi Mae, Inc., v. Citicorp Securities, Inc.* Adv. P. No. 98-1637-DK (Bankr. D. Md. 1999). Indeed, in *Granite Partners, supra.*, District Judge Sweet noted:

> [SIFMA], as amicus curiae, has submitted a memorandum to enlighten the Court about repos in general and their importance to the debt capital

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[8] FRBNY Review May 2006, p.37; Bankruptcy Reform: Hearings before the Subcomm. On Courts of the Senate Comm. On the Judiciary, 98th Cong. At 307-09, 337-45 (1983) (testimony of Thomas Strauss, Public Securities Association).

[9] *See, e.g.,* www.sifma.org/services/std forms/global/masterrepurch.

[10] The SIFMA form MRA (a copy of which is attached hereto as Exhibit 5) can be found at http://archives1.sifma.org/agrees/master_repo_agreement.pdf.

[11] A copy of the SIFMA Guidance Notes is annexed hereto as Exhibit 6.

> markets. The discussion in this subsection is based primarily on [SIFMA]'s amicus curiae brief.

17 F. Supp. 2d at 298 fn. 9.

SIFMA's interest in the present litigation arises from its commitment to facilitate and maintain the liquidity, depth and efficient operation of debt capital markets in this country and abroad. The lynchpin of such efficient capital market operations is confidence in the process. Isolated disputes among parties to a particular transaction cannot be permitted to alter the fundamental ability of market participants to rely on immediate access to the liquidity of the securities underlying the repurchase transaction through a predictable, efficient, industry accepted, and legally sanctioned process to close out repo transactions. Any decision that could be interpreted as allowing the insolvency of a single party to a Repo Agreement to call into question the characterization and enforcement of Repo Agreements generally, would present transactional uncertainties that could be severely disruptive and destabilizing to the capital markets and the economy.

SUMMARY

Repo Agreements Are Protected Under Bankruptcy Laws

Beginning in at least 1984, Congress mandated that Repo Agreements be given a safe harbor to eliminate the potential for "open ended market loss arising from the insolvency of a dealer or other counter party in the repo market." *In re National Forge Company*, 344 B.R. 340, 353 (W.D. Pa. 2006). Most recently, in BAPCPA, Congress recognized that the products underlying Repo Agreements had expanded, but the list of Repo Agreements expressly protected by the safe harbor provisions of the Bankruptcy Code had not. Through BAPCPA, Congress sought to address these changing market conditions by significantly expanding the types of financial products entitled to safe harbor protections, including the mortgage loan Repo

Agreements at issue in these cases. Congress was clear in its intent. The BAPCPA amendments dealing with Repo Agreements are to be broadly construed to include all agreements and related transactions that provide for the transfer of, among other things, mortgage related securities, mortgage loans and interests in mortgage related securities or mortgage loans, against the transfer of funds by the transferee, together with a contemporaneous agreement by the transferee to retransfer such mortgage related securities, mortgage loans or interests in mortgage related securities or mortgage loans to the transferor. 11 U.S.C. §101(47).

Whether the American Home Repo is a Repo Agreement as defined in the Bankruptcy Code is a question that the Court should determine, as a matter of law, based on (i) the express definitions provided in the Bankruptcy Code and (ii) the clear intent of the parties as expressed within the four corners of the American Home Repo. It is submitted that the American Home Repo (including the servicing provisions embodied within the American Home Repo), is a single integrated Repo Agreement under the Bankruptcy Code and must be accorded the protections of Bankruptcy Code §559. Thus, the rights of the parties to the American Home Repo should not be subject to the provisions of Bankruptcy Code §§365(e)(1) and 362.

Whether CSFB, as transferee under the American Home Repo will be permitted under Bankruptcy Code §559 to enforce the full panoply of its contractual rights, including obtaining all mortgage loan servicing documents in furtherance of its right to promptly liquidate its position, is being scrutinized by the financial community. Thus, a decision in this case should take into consideration the potential impact upon the financial markets that engage in over $6 trillion of these transactions.[12]

DISCUSSION

Repo Agreements Are Protected Under the Bankruptcy Code

[12] FRBNY Review May 2006, pp. 34-36.

A Repo Agreement is defined in the Bankruptcy Code as a single agreement with two components. First, there must be a transfer of specified securities or property by a transferor to a transferee, against the transfer of funds by the transferee to the transferor. Second, there is a contemporaneous agreement by the transferee to transfer back to the transferor the same or equivalent securities or property, against a transfer of funds by the transferor to the transferee (which funds equate to the original transfer of funds, plus an additional amount usually representing interest).[13]

The District Court in *Granite Partners, supra,* recognized that Repo Agreements were unique in the market, and did not neatly fit under the label of a sale or a financing:

> Repos are creatures of the capital markets. Their purchase-and-sale form reflects a value-for-value exchange designed as such for use explicitly in those markets. The legal status of repo agreements is not easily subject to characterization-the purchase-and-sale framework incorporates characteristics of other transactional forms, including financings. For example, as in a financing, the repurchase price for the securities reflects the time value of the cash obtained by the repo seller in the initial sale. However, the repo structure is distinct from that of a loan in other respects. Unlike a lender taking collateral for a secured loan, a repo buyer "take[s] title to the securities received and can trade, sell or pledge them."

17 F. Supp 2d at 298-99.

The District Court in *Granite* further held that even though Repo Agreements are unique instruments, it could determine, as a matter of law, that the clear intent of the parties (based on the four corners of the agreement they entered into), was to enter into a purchase and sale under an industry accepted Repo Agreement. *Id.* at 300-304. The court recognized that the treatment as a purchase and sale is consistent with caselaw:

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[13] Repo Agreements may involve a variety of Treasury and other securities, provided that the essential character (i.e. risk, maturity, interest rates, etc.) of the securities is comparable, or specifically designated securities that the parties are required to transfer – such as mortgage loan portfolios. *See* Repurchase Agreements with Negative Interest Rates, Current Issues in Economics and Finance, Federal Reserve Bank of New York, Vol. 10, No. 5, April 2004 (A copy of this Article is annexed hereto as Exhibit 7.). (www.newyorkfed.org/research_currentissues).

> Furthermore, the instant ruling is consistent with case law. In contexts such as commercial law and the antifraud provisions of the federal securities law, repos generally are viewed as purchases and sales. See *In re Bevill*, 67 B.R. 557, and *Drysdale*, 785 F.2d 38. For other purposes, such as taxes, they are typically viewed as financings. See *Nebraska Dep't of Revenue v. Loewenstein*, 513 U.S. 123, 115 S.Ct. 557, 130 L.Ed.2d 470 (1994). For accounting purposes, they are viewed either way, depending upon particular factors. In yet other circumstances, such as under Section 559 of the Bankruptcy Code, repo transactions have been assigned a distinct legal status which acknowledges their unique attributes.
>
> *Id.* at 304.

Consistent with the analysis in *Granite*, *supra*, and in recognition of the need for uniformity and certainty in connection with Repo Agreements, SIFMA's standard form MRA includes provisions whereby the parties, among other things, (i) are denominated "Buyer" and "Seller"; (ii) explicitly agree that they "intend that all Transactions hereunder be sales and purchases and not loans"; (iii) agree that on a "Purchase Date" for a transaction, the "Purchased Securities" will be transferred to the "Buyer" against payment of the "Purchase Price" and on the "Repurchase Date," this process occurs in reverse; and (iv) acknowledge the differences between their repurchase agreement transactions and conventional indebtedness by agreeing that each Transaction is a "repurchase agreement" and a "securities contract" under the Bankruptcy Code.

Repo Agreements in the Marketplace

Repo Agreements play a crucial role in the U.S. securities markets. In a recent article, Kenneth Garbade noted the pervasiveness of Repo Agreements in finance:

> Securities dealers use repos to finance market-making and risk management activities, and the agreements provide a safe and low-cost way for mutual funds, corporations, and others to lend both money and securities. At the end of 2004, primary dealers with a trading relationship with the Federal Reserve Bank of New York were borrowing a total of $3.2 trillion on repos and lending a total of $2.4 trillion. Repurchase agreements also play an important role in the implementation of monetary policy-the Federal Reserve uses them to dampen transient fluctuations in the supply of reserves available to the banking system. In 2004, the New

> York Fed's Trading Desk arranged 192 overnight repos, with an average size of $5.9 billion.

FRBNY Review May 2006, p. 1. *See also* Department of the Treasury, Sec. and Exch. Comm'n, and Bd. of Governors of the Fed. Reserve Sys., Joint Report on the Government Securities Market at A-11 (Jan. 1992); Government Securities Act Amendments of 1993, H.R. Rep. No 255, at 10-11 (1993), reprinted in 1993 U.S.C.C.A.N. 2996, 2997; 1983 Senate Repo Amendments Report at 45-46 (by maximizing the ease and flexibility with which dealers can acquire and hold inventories of treasury securities, repo transactions contribute significantly to the depth and liquidity of the secondary market for Treasury securities); *In re Bevill*, 878 F. 2d at 745; *Granite Partners*, 17 F. Supp. 2d at 299.

Repo Agreement transactions perform similar functions with respect to a broad array of fixed income securities. *Granite Partners*, 17 F. Supp 2d at 299. As a relevant example, collateralized mortgage obligations ("CMOs") are securities where cash flows from a securitized mortgage pool are repackaged into classes of interests with different projected maturities and principal repayment schedules that appeal to a broad range of investors with specific investment needs and objectives. *Id.* CMOs allow investors to pursue yield, credit, diversification, and other characteristics of residential and commercial mortgage debt instruments while reducing many of their perceived burdens, particularly those relating to individual mortgage obligations, including prepayment uncertainty and potential illiquidity. *Id.* The ultimate beneficiaries of CMOs and other mortgage backed securities are residential home buyers and other mortgagors who are able to obtain lower-cost mortgages as a result of the cheaper cost of funds to originators. *Id.* As Congress has recognized, the CMO market, including the repurchase agreement market for CMOs, enables CMO dealers to fund their inventory and make markets in these types of securities; and is therefore important to the national economy. *Id.*

The effective functioning of the repo market, which generates the depth of stability and liquidity upon which institutional investors, state and local governments, public and private pension funds, money market and other mutual funds, banks, thrift institutions, and large corporations rely as a vital cash management tool, can be assured only if the complex interrelated transactions are insulated from the credit risk of the parties to individual contracts. *In re National Forge*, 344 B.R. at 353.

This is not to say that Repo Agreements are risk-free. Repo participants accept the risks related to short term fluctuations in the market value of the underlying securities. To the extent that the market value of such securities declines below the principal amount paid, the liquidation of the securities may not yield sufficient proceeds for the repurchase. To address such risks, parties generally build in a margin deficit provision to their agreement in order to protect against deviations beyond an agreed upon amount. (FRBNY Review May 2006, p. 29).

The capital markets, however, cannot accept the risk that the insolvency of a party to a Repo Agreement will implicate the automatic stay and render a counterparty unable promptly, to close out transactions outside a bankruptcy proceeding. *In re Bevill*, 878 F 2d at 747-49. Indeed, as reflected in the 1983 Senate Report, Congress determined, in response to the decision in *Lombard Wall Inc.*, No. 82-8-11556, bench op. (Bankr. S.D.N.Y. September 16, 1982), that:

> The effective functioning of the repo market can only be assured if repo investors will be protected against open-ended market loss arising from the insolvency of a dealer or other counter-party in the repo market… A collapse of one institution involved in repo transactions could start a chain reaction, putting at risk hundreds of billions of dollars and threatening the solvency of many additional institutions.

These risks are not overstated. The inherent nature of Repo Agreements is to provide short term liquidity. Linking the ability to close such transactions to often protracted and complex bankruptcy court proceedings is antithetical to this purpose. Indeed, history has shown

that the ripple effect from a single ruling which calls into question the certainty of the repo markets could have grave repercussions.[14]

The Reforms Under BAPCPA

For more than 20 years, Congress attempted to protect market participants from the risk that a counterparty would become insolvent and seek protection under the Bankruptcy Code.[15] Indeed, following *Lombard-Wall,* the overarching purpose of the Congressional amendments had been to expand the types of transactions covered by the various safe harbor provisions of the Bankruptcy Code. Insulating the market from the ripple effects and systemic risk to which a party and, in fact, the capital markets would be susceptible should a counterparty file for bankruptcy was at the heart of the effort.[16] Congress accomplished this by specifically excluding such transactions from the scope of the automatic stay and permitting parties to promptly close out of such transactions according to standard industry practices.

Finally, in 2005, as part of BAPCPA, Congress comprehensively addressed Repo Agreements. Repo Agreements were broadly defined in a manner consistent with their use in the

[14] For example, in 1982–1983, when repo transactions were measured in the hundreds of millions of dollars, as opposed to the current volume of over 6 trillion dollars, for the 12 month period following the decision in *Lombard-Wall, supra*, repo transactions stagnated and the growth shortfall was not made up until mid 1985, following the 1984 Amendments. FRBNY Review May 2006, pp. 34-36.

[15] At the time of the passage of the 1982 amendments, Congress was concerned about the volatile nature of the commodities and securities markets, and decided that certain protections were necessary to prevent "the insolvency of one commodity or security firm from spreading to other firms and possibly threatening the collapse of the affected market." H.Rep. No. 97-420, 97th Cong., 2d Sess. 1 (1982); *In re Bevill*, 878 F 2d at 747-48.

[16] In August 1982, approximately one month after the 1982 amendments became effective, the court in *In re Lombard-Wall, supra*, ruled that the holder of securities under a Repo Agreement was subject to the automatic stay and was precluded from closing out its position with the debtor without court approval. Congress responded with the 1984 amendments which included express safe harbor protections for Repo Agreements (Bankruptcy Code §559). Numerous courts thereafter discussed the treatment of Repo Agreements and found the 1984 amendments to be clear as to what products were protected. *See e.g. In re Bevill, supra* (repo agreement should be viewed as a purchase and sale not a loan); *In re Comark*, 971 F. 3d 322 (9th Cir. 1992) (reverse repo agreement involving government backed mortgage securities); *Granite Partners, supra* (government backed Fannie Mae and Freddie Mac securities under a repo agreement); *In re Residential Resources Mortgage Investments Corp.*, 98 B.R. 2, 23-24 (repo agreements involving mortgage backed securities under a standard repo agreement). However, in *In re Criimi Mae, Inc*., 251 B.R. 796 (Bankr. D. Md. 2000), the court ordered an evidentiary hearing to determine whether a Repo Agreement involving mortgage pass through certificates and mortgage loan trust certificates was intended to be a secured financing or a purchase/sale. (The parties settled on July 21. 2000. *www.criimimaeinc.com.*)

financial markets, and regardless of their economic reality, were afforded special protection from bankruptcy delays in order to preserve their inherent short term liquidity and to prevent disruption to the financial markets.

Congress significantly expanded the types of financial contracts and parties covered by the safe harbor provisions of the Bankruptcy Code. The definition of a Repo Agreement was expanded to include a description of the product, a list of related transactions, including derivations of the product, combinations of the product, options to enter into an agreement for that product and master and security agreements related to the product.

Prior to BAPCPA, "repurchase agreement" was defined as:

> [A]n agreement … which provides for the transfer of certificates of deposit, eligible bankers' acceptances, or securities that are direct obligations of, or that are fully guaranteed as to the principal and interest by, the United States or any agency of the United States…[17]

Following the implementation of BAPCPA, the definition of "repurchase agreement" encompasses a far more detailed list of products, including:

> (i) an agreement, including related terms, which provides for the transfer of one or more certificates of deposit, mortgage related securities (as defined in section 3 of the Securities Exchange Act of 1934), mortgage loans, interests in mortgage related securities or mortgage loans, eligible bankers' acceptances, qualified foreign government securities (defined as a security that is a direct obligation of, or that is fully guaranteed by, the central government of a member of the Organization for Economic Cooperation and Development), or securities that are direct obligations of, or that are fully guaranteed by, the United States or any agency of the United States against the transfer of funds by the transferee of such certificates of deposit, eligible bankers' acceptances, securities, mortgage loans, or interests, with a simultaneous agreement by such transferee to transfer to the transferor thereof certificates of deposit, eligible bankers' acceptance, securities, mortgage loans, or interests of the kind described in

[17] This was the definition which troubled the Court in *Criimi Mae*, since the definition did not expressly include mortgage related interests as part of the products entitled to safe harbor protections. *In re Criimi Mae*, 251 B.R. at 804.

> this clause, at a date certain not later than 1 year after such transfer or on demand, against the transfer of funds;
>
> (ii) any combination of agreements or transactions referred to in clauses (i) and (iii);
>
> (iii) an option to enter into an agreement or transaction referred to in clause (i) or (ii);
>
> (iv) a master agreement that provides for an agreement or transaction referred to in clause (i), (ii), or (iii)…
>
> (v) any security agreement or arrangement or other credit enhancement related to any agreement or transaction referred to in clause (i), (ii), (iii), or (iv)…

It is significant that under BAPCPA, Congress expressly included "mortgage loans", "mortgage related securities", and "interests in mortgage loans and mortgage related securities" in the new definition of "repurchase agreement", representing Congressional intent to protect this multi-billion dollar market.[18] Congress recognized that mortgage loan Repo Agreements are distinct from the more traditional government backed obligations underlying certain Repo Agreements. Unlike government backed Repo Agreements, where the underlying securities are fungible and the risks and returns may be measured by standard indices, mortgage loan Repo Agreements are idiosyncratic, often packaged in a unique blend of individual mortgage products, which must be serviced to preserve the financial integrity of the Repo Agreement for the transferee. *Expert Report of Mark H. Adelson* dated September 24, 2007 (a copy of which is annexed hereto as Exhibit 8). Thus, in recognition of the fact that each mortgage Repo Agreement has peculiar underwriting risks based upon the composition of the underlying products, it is standard for mortgage Repo Agreements to require the transfer and retransfer of exactly the same mortgage loans, and to limit the ability of the transferee to freely sell some or all of the mortgage loans prior to the occurrence of an event of default. *Id.*

[18] *Supra* at footnote 6.

Equally unique to a mortgage loan Repo Agreement is the servicing component. Again, unlike traditional government backed security Repo Agreements, mortgage loan Repo Agreements are dependant upon the continued performance of the mortgage loans and the mandatory servicing thereof. Such performance includes the timely collection of mortgage payments from obligors and the payment of tax and insurance obligations from escrowed funds held by the servicer on behalf of the obligors. The task of servicing the hundreds of underlying mortgages may be ministerial, but it is integral to the value of the mortgage loans' underlying Repo Agreements. Any interruption in such servicing could result in tax delinquencies, foreclosures, etc., and will directly affect the value of the mortgage loans and consequently, the value of the Repo Agreements. To minimize the risk of disrupting the cash flow from the mortgage loans, Repo Agreements, which are required to be less than one year in duration and are usually measured in a few months or less, generally provide that the servicing of the mortgages will remain with the existing servicing agent for the benefit of the transferee.

This arrangement recognizes that it would be a practical impossibility to do anything else. Notice would need to be provided to hundreds of mortgagors, new accounts would need to be opened, payments would need to be redirected and back office operations would need to be altered – not once, but twice within, at most, a year. The expense of the exercise and the risk that payments will be misdirected, simply makes no economic sense (*Expert Report of Mark H. Adelson* at p. 3). Thus, the standard mortgage loan Repo Agreement allows the existing servicer to service the underlying mortgages for the benefit of the transferee until such time as the transferee instructs otherwise, typically upon an event of default.

The servicing provisions of mortgage loan Repo Agreements are an integral component of the entire agreement and directly affect the ability to liquidate the Repo Agreement or sell the underlying mortgage loans.

A prospective purchaser interested in purchasing mortgage loans would require the ability to control the servicing rights of such loans (and consequently, the value thereof) rather than be compelled to use a servicer it did not select nor may not want administering its loans. Simply, mortgage loans sold without the servicing rights have a significantly diminished value and are much less marketable. Mortgage loans which are burdened by a servicer in bankruptcy also have a depressed value.

Nevertheless, servicing provisions and restrictions on a transferee's ability to sell mortgage loans prior to default do not affect the characterization of that agreement as a Repo Agreement. To the contrary, Congress clearly understood that "mortgage loans", "mortgage related securities" and interests therein are unique forms of property which are the subject of Repo Agreements under the Bankruptcy Code. The consequence of a contrary decision would extend across an entire industry, since the Repo Agreement used by the parties to this case is substantially similar to those found throughout the mortgage loan repo market.[19]

The Clear Meaning of the Bankruptcy Code

As described above, prior to BAPCPA, courts considered whether they should engage in detailed economic analyses in an effort to determine whether agreements were sale or loan transactions and whether the safe harbor provisions of the Bankruptcy Code applied. *See, e.g. Criimi Mae,* 251 B.R. 796; *In re Comark*¸ 145 B.R. 47; *Granite Partners,* 17 F. Supp.2d 275.

[19] At the August 16, 2007 hearing before this Court, Bruce Kaiserman testified that CSFB was currently party to 31 master repurchase agreements with an outstanding amount available of $7.5 billion and that the American Home Repo was substantially similar to those used by competitors and other companies similarly situated to CSFB (August 16 Hearing Transcript pg. 35, 54-55).

The BAPCPA amendments have taken the courts out of the business of economic analysis since Repo Agreements are specifically defined in Bankruptcy Code §101(47) and the statute is precise and clear. When such is the case, the "Supreme Court has repeatedly instructed: "courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54, 112 S.Ct. 1146, 1149, 117 L.Ed.2d 391 (1992)(quoting *Rubin v. United States*, 449 U.S. 424, 430, 101 S.Ct. 698, 701, 66 L.Ed.2d 633 (1981)).

As set forth above, a "repurchase agreement" means "an agreement, including related terms, which provides for the ***transfer*** of one or more certificates of deposit, mortgage related securities (as defined in section 3 of the Securities Exchange Act of 1934), mortgage loans, interests in mortgage related securities or mortgage loans…" (emphasis added). Thus, all that is required is a transfer and retransfer of identified property within a specified time. To that end, Congress has defined "transfer" in Bankruptcy Code §101(54) to include:

> (A) the creation of a lien;
> (B) the retention of title as a security interest;
> (C) the foreclosure of a debtor's equity of redemption; or
> (D) each mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with –
> i. property; or
> ii. an interest in property (emphasis added)

Congress could have, but did not limit itself to the words purchase or sale. Accordingly, whether the Debtors (i) created a lien for the benefit of CSFB; (ii) disposed of merely an interest in property for the benefit of CSFB; or (iii) disposed of property for the benefit of CSFB, there was an agreement to transfer and retransfer mortgage loans, which must be treated as a Repo Agreement.

The American Home Repo clearly identifies the intent of the parties to enter into a Repo Agreement and satisfies the definition of "repurchase agreement", under Bankruptcy Code §101(47).

The American Home Repo provides:

> From time to time the parties hereto may enter into transactions in which Sellers agree to transfer to Buyer Mortgage Loans[20] … against the transfer of funds by Buyer, with a simultaneous agreement by Buyer to transfer to Sellers such Mortgage Loans … at a date certain or on demand against the transfer of funds by Seller. (Section 1).
>
> From time to time, Buyer will purchase from the Sellers certain Mortgage Loans or LLC Interests that have been either originated by any Seller or purchased by any Seller from other originators. (Section 3).
>
> The Sellers shall repurchase the related Purchased Assets from Buyer on each related Repurchase Date. (Section 4).

While it is clear that the American Home Repo fits within Bankruptcy Code §§559 and 101(47), the Court could also apply the safe harbor protections of Bankruptcy Code §§555 and 741(7). Bankruptcy Code §555 is a catch-all for repurchase transactions that may not fit squarely within §§559 and 101(47).

Bankruptcy Code §555 exempts "securities contracts" from the automatic stay protections of §365(e)(1) and refers to §741(7), which specifically defines "securities contract" to include:

> a contract for the purchase, sale, or loan of a security, a certificate of deposit, a mortgage loan or any interest in a mortgage loan, a group or index of securities, certificates of deposit, or mortgage loans or interests therein (including an interest therein or based on the value thereof), or option on any of the foregoing, including an option to purchase or sell any such security, certificate of deposit, mortgage loan, interest, group or index, or option, and including any repurchase or reverse repurchase

[20] "Mortgage Loans" is defined in the American Home Repo as "any Sub-Prime Mortgage Loan, Repurchased Mortgaged Loan, Jumbo Mortgage Loan, Alt-A Mortgage Loan, 30/40 Mortgage Loan, Second Lien Mortgage Loan, HELOC, Pay-Option ARM or Conforming Mortgage Loan which is a fixed or floating-rate, one-to-four-family residential mortgage or home equity loan evidenced by a promissory note and secured by a mortgage…"

> transaction on any such security, certificate of deposit, mortgage loan, interest, group or index, or option… [or] any other agreement or transaction that is similar to an agreement or transaction referred to in this subparagraph. (emphasis added)

Accordingly, any repurchase or reverse repurchase transaction or any other agreement that is similar to a repurchase transaction or a reverse repurchase transaction is protected. This definition leaves no room for judicial interpretation of the underlying economics of the transaction and removes any need to scrutinize the subtleties between the terms of one Repo Agreement and that of another.[21] Any transaction, such as the American Home Repo, that bears the markings of a securities contract is protected.[22]

Indeed, the House report published in connection with BAPCPA unambiguously provides:

> The reference [in the definition of "securities contract"] to "repurchase and reverse repurchase transactions" is intended to eliminate any inquiry under section 555 and related provisions as to whether a repurchase or reverse repurchase transaction is a purchase and sale transaction or a secured financing. Repurchase and reverse repurchase transactions meeting certain criteria are already covered under the definition of "repurchase agreement" in the Bankruptcy code. Repurchase and reverse repurchase transactions on all securities (including, for example, equity securities, asset-backed securities, corporate bonds and commercial paper) are included under the definition of "securities contract."[23] (emphasis added).

Simply put, whether or not the American Home Repo fits within §559 because of the nuances of mortgage loan transactions, the essence of the transaction, as evidenced by, among

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[21] "[I]f anything is clear from the new Code, it is that judges are strongly discouraged from engaging in the functional analysis of financial contracts. The Code's protections encompass contracts or combinations of contracts that differ little in substance from unprotected transactions, such as secured loans. They are protected because they are *recognized in financial markets* as financial contracts. Any judicial effort to distinguish protected and unprotected contracts based on their " substance" is doomed to failure and can only generate significant uncertainty in the very markets the Code seeks to protect. By relying on broad market definitions, the Act gets judges out of the (largely futile) business of second-guessing financial contracts." *Beneath the Surface of BAPCPA*, A.B.I. Law Rev., Winter 2005, Edward Morrison and Joerg Riegel, p.4 ("ABI Law Review"). (A copy of this article is annexed hereto as Exhibit 9)

[22] *Id*. at p. 4, 6.

[23] H.R. Rep. 109-31 at 130.

other things, the express words of the American Home Repo, is that of a Repo Agreement, which would fall under the safe harbor protections of Bankruptcy Code §555.[24]

The Express Terms of the American Home Repo

It is a fundamental tenet of contract law that parties be held to the agreement they negotiated. *W.W.W. Associates, Inc., v. Giancontieri*, 77 N.Y.2d 157, 162, 566 N.E.2d 639, 642 (N.Y. 1990) ("when parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms"). To that end, Courts must look to the express words of underlying agreements in determining the intent of the parties thereto. *Sayers v. Rochester Tel. Corp. Supplemental Mgmt. Pension Plan*, 7 F.3d 1091, 1094 (2d Cir. 1993); *Seiden Assocs., Inc. v. ANC Holdings, Inc.*, 959 F.2d 425, 428 (2d Cir. 1992) (the primary objective is to give effect to the parties' intent as revealed in the language that they used). Where the words of a contract are clear, the secret or subjective intent of the parties is irrelevant. *Klos v. Polskie Linie Lotnice*, 133 F.3d 164, 168 (2d Cir.1997); *accord Nycal Corp. v. Inoco PLC*, 988 F.Supp. 296, 301 (S.D.N.Y. 1997); *Brown Bros. Elec. Contractors, Inc. v. Beam Construction Corp.*, 41 N.Y.2d 397, 393 N.Y.S.2d 350, 361 N.E.2d 999, 1001 (N.Y. 1977). *Marketing/Trademark Consultants, Inc. v. Caterpillar, Inc.*, No. 98 Civ. 2570, 1999 WL 721954, at *2 (S.D.N.Y. Sept. 16, 1999)).

The initial determination of whether a contract is ambiguous is a question of law. *Bailey v. Fish & Neave*, 8 N.Y.3d 523, 837 N.Y.S.2d 600, 603, 868 N.E.2d 956 (N.Y.2007); *Garza v.*

[24] It should be noted that the parties entitled to receive the safe harbor protections under §559 differ from those under §555. The protections under §559 are provided to any repo participant (defined as an entity that, at any time before the filing of the petition, has an outstanding repurchase agreement with the debtor – Bankruptcy Code §101(46)) or financial participant. "[F]inancial participant", is defined as, among other things, an entity that entered into a swap, commodity contract, securities contract, repurchase agreement or forward contract worth at least $1 billion in notional or actual principal amount outstanding (or $100 million in mark-to-market value) at some point during the preceding 15 months. Bankruptcy Code §101(22). On the other hand, §555 provides safe harbor to stockbrokers, financial institutions, securities clearing agencies, as well as, the above described financial participants. CSFB is a repo participant under §559 and would be considered as one or more of the protected parties under §555.

Marine Transp. Lines, Inc., 861 F.2d 23, 27 (2d Cir. 1988); *Bailey*, 837 N.Y.S.2d at 603 (contracts "should be read as a whole to ensure that undue emphasis is not placed upon particular words and phrases."). If the agreement is not ambiguous, the court is not permitted to consider parol evidence to create an ambiguity. *Readco, Inc. v. Marine Midland Bank*, 81 F.3d 295, 299 (2d Cir.1996); *Burger King Corp. v. Horn Hardart Co.*, 893 F.2d 525, 527 (2d Cir.1990).

As discussed above, similar rules of statutory interpretation apply here. As the Supreme Court has repeatedly instructed: "courts must presume that a legislature says in a statute what it means and means in a statute what it says there. [Citations omitted.] When the words of a statue are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54, 112 S.Ct. 1146, 1149, 117 L.Ed.2d 391 (1992)(quoting *Rubin v. United States*, 449 U.S. 424, 430, 101 S.Ct. 698, 701, 66 L.Ed.2d 633 (1981)).

There can be no doubt that, as a matter of law, the American Home Repo is a "repurchase agreement" as defined under the Bankruptcy Code. The American Home Repo is clear and unambiguous and fits within the express words used by Congress to define Repo Agreements.

- The agreement is identified as a Master Repurchase Agreement.
- The parties are identified as Buyer and Seller.
- The transaction is described as a transfer from Seller to Buyer of securities in connection with certain Mortgage Loans and LLC Interests and a simultaneous agreement by Buyer to transfer to Seller at a date certain the same securities (Sec. 1, 3 and 4).
- The agreement includes a margin percentage (Sec. 6).
- The parties stated that the transactions thereunder be treated as "sales and purchases and not loans" (Sec. 8).
- Each party's rights to liquidate assets delivered to it under the agreement is a contractual right as described in §§555 and 559 (Sec. 26(b)).

- The parties stated that each transaction is a repurchase agreement or a securities contract under the Bankruptcy Code, including under Bankruptcy Code §§101, 741, 555 and 559 (Sec. 26(e)).

Indeed, the Debtors' Chairman, Chief Executive Officer and President, Michael Strauss description of the American Home Repo, in his August 6, 2007 declaration (Docket No. 2), fits squarely within the definition of "repurchase agreement" as set forth in Bankruptcy Code §101(47):

> Most of the arrangements are documented under committed Master Repurchase Agreement facilities. Pursuant to these facilities, the loans are sold to an institution for a purchase price that is generally thought to be less than the fair market value of the loans. The sale is subject to an obligation of the Debtors to repurchase the loans at a price equal to the original purchase price, plus a differential representing the time value of money and is subject to an obligation on the part of the purchaser to resell the loan to the Debtors at that price. The Master Repurchase Agreements generally permit the purchaser to periodically mark the purchased loans to market and, if the value of the loans has declined, to demand additional margin payments. If the Debtors fail to meet a margin call, the purchasers are entitled to declare an event of default and accelerate the Debtors' obligation to repurchase, thus extinguishing that right.

Just as in *Granite, supra*, the express words of the American Home Repo demonstrate that sophisticated parties with sophisticated counsel intended to enter into a Repo Agreement and understood that in the event that the Debtors or CSFB became insolvent, the safe harbor provisions of the Bankruptcy Code would apply to permit the closing of positions. A contrary finding would undercut the clear intent of the parties and the protections of the Bankruptcy Code.

The Severance Provisions of the American Home Repo Cannot be Stripped Out of the Agreement

The Debtors' attempt to treat the servicing provisions of the Repo Agreement as a separate contract, subject to the rights of a debtor to assume or reject under Bankruptcy Code §365, is a construction that runs contrary to the principles that contracts must be read as a whole

and that no one provision should be read in a manner which renders another meaningless. *Pramco III, LLC v. Partners Trust Bank*, 2007 WL 1118380 at *4 (February 23, 2007)("a construction which makes a contract provision meaningless is contrary to basic principles of contract interpretation"); *citing Lawyer's Fund for Client Protection of The State of New York v. Bank Leumi Trust Co. of NY*, 94 N.Y.2d 398, 404, 706 N.Y.S.2d 66, 727 N.E.2d 563 (2000); *Columbus Park Corp. v. Dept. of Housing Pres. And Dev. of City of NY*, 80 N.Y.2d 19, 31, 586 N.Y.S.2d 554, 598 N.E.2d 702 (1992).

The industry-accepted and widely used MRA is a standardized form Repo Agreement designed to provide a "substantial degree of flexibility in structuring the commercial aspects of both the Agreement and transactions made under it."[25] CSFB and the Debtors negotiated the American Home Repo using the MRA as a base form, and modified the agreement to include servicing provisions that are essential to a mortgage loan Repo Agreement. (*See, e.g.*, American Home Repo Sections 12 and 16(1)(c) and (d)). These terms are not unique to this transaction but are, in fact, substantially similar to those found throughout the mortgage loan repo market.[26] As discussed above, the servicing component of mortgage backed Repo Agreements is integral to the ability of a party to close its position. Further evidence that these services are directly linked to the underlying Repo Agreements is that the servicing agent is required to turn over to the transferee all servicing rights and underlying mortgage loan documents upon the occurrence of an event of default, as defined in the Repo Agreement (See American Home Repo Sections 12(e) and 16(c) and 16(d)). The transferee, which bears the economic risks of the transactions, must be granted the express right to terminate the servicing arrangement and take possession of all relevant mortgage loan documents upon the occurrence of an event of default under the Repo

[25] SIFMA Guidance Notes, supra at 11.
[26] Supra at 19.

Agreement (*See, e.g.*, American Home Repo Sections 12(e), 16(c) and 16(d)). If these provisions are somehow stripped out of the agreement and made subject to Bankruptcy Code §§362 or 365, the safe harbor provisions of Bankruptcy Code §559 would be rendered meaningless.

The Debtors must not be permitted to impose a construction of the Repo Agreement which allows the ministerial servicing provisions to hold the entire agreement hostage.

CONCLUSION

For the foregoing reasons, SIFMA as amicus curiae urges the Court to find that consistent with the BAPCPA amendments and other provisions of the Bankruptcy Code, the American Home Repo is a repurchase agreement as such term is defined in the Bankruptcy Code.

Dated: October 12, 2007
Wilmington, Delaware

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File a Court document:

07-51684-CSS Credit Suisse First Boston Mortgage Capital LLC et v. American Home Mortgage Corp. et al

Type: ap Office: 1 (Delaware) Lead Case: 07-11047-CSS
Judge: CSS Case Flag: NONPREF, SVCDue

U.S. Bankruptcy Court

District of Delaware

Notice of Electronic Filing

The following transaction was received from Simon, Christopher Page entered on 10/12/2007 at 6:18 PM EDT and filed on 10/12/2007

Case Name: Credit Suisse First Boston Mortgage Capital LLC et v. American Home Mortgage Corp. et al
Case Number: 07-51684-CSS
Document Number: 53

Docket Text:
Opening Brief *of the Securities Industry and Financial Markets Association as Amicus Curiae in Support of Plaintiff and Counterclaim Defendant* Filed by Securities Industry and Financial Markets Association. (Attachments: # (1) Exhibit 1A# (2) Exhibit 1B# (3) Exhibit 1C# (4) Exhibit 2# (5) Exhibit 3# (6) Exhibit 4# (7) Exhibit 5# (8) Exhibit 6A# (9) Exhibit 6B# (10) Exhibit 6C# (11) Exhibit 7# (12) Exhibit 8# (13) Exhibit 9# (14) Exhibit 1D# (15) Unreported Cases# (16) Certificate of Service) (Simon, Christopher)

The following document(s) are associated with this transaction:

Document description: Main Document
Original filename:\\Cs-s01\client files\SIFMA\Scanned Documents\Amicus Brief - Final III 10.12.07.pdf
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Document description: Exhibit 1A
Original filename:\\Cs-s01\client files\SIFMA\Scanned Documents\Exhibit 1A - Evolution of Repo Contracting.pdf
Electronic document Stamp:
[STAMP bkecfStamp_ID=983460418 [Date=10/12/2007] [FileNumber=5918357-1
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Document description: Exhibit 1B
Original filename:\\Cs-s01\client files\SIFMA\Scanned Documents\Exhibit 1B - Evolution of Repo Contracting.pdf
Electronic document Stamp:
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Document description: Exhibit 1C
Original filename:\\Cs-s01\client files\SIFMA\Scanned Documents\Exhibit 1C - Evolution of Repo Contracting.pdf
Electronic document Stamp:
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