

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MASSACHUSETTS

IN THE MATTER OF:

RICHARD P. LOTFY
SHARI D. LOTFY,
Debtors

CHAPTER 13
CASE NO. 08-40106

RICHARD P. LOTFY
SHARI D. LOTFY,
Plaintiffs

v.

MORTGAGE ELECTRONIC REGISTRATION
SYSTEMS, INC.

and

INDYMAC BANK, FSB
Defendant

ADVERSARY PROCEEDING
CASE NO. 08-04071

**OPPOSITION TO DEFENDANT'S MOTION TO DISMISS PURSUANT
TO FED.R.CIV.P. 12(b)(7) FOR FAILURE TO JOIN A PARTY
PURSUANT TO FED.R.CIV.P. 19**

NOW COME the Plaintiffs, Richard P. Lotfy and Shari D. Lotfy, and respectfully request that this Honorable Court deny the Defendant's Motion to Dismiss pursuant to Fed.R.Civ.P. 12(b)(7) for failure to Join an Indispensable Party pursuant to Fed.R.Civ.P. 19.

In support of their Opposition, Plaintiffs state the following:

1. The complaint in this action was filed on May 13, 2008.
2. Defendant, IndyMac Bank, FSB, through Counsel filed an answer on July 7, 2008.
3. On July 11, 2008, the FDIC was named as conservator of IndyMac Bank, FSB.
4. On August 8, 2008, Plaintiffs' counsel received "notice to creditor – proof of claim" forms from the FDIC with a bar date of October 14, 2008.
5. Plaintiffs' counsel timely filed proof of claims with the FDIC with respect to the claims against IndyMac Bank, FSB.

6. On January 12, 2009, Plaintiffs' counsel received a "Notice of Disallowance of Claim" for the reason that the "claim was not fixed and certain at the time the FDIC was appointed Receiver".
7. The January 12, 2009 letter went on to state that "Pursuant to 12 U.S.C. Section 1821 (d)(6)...you have the right to file a lawsuit on your claim or continue any lawsuit commenced before the appointment o the Receiver".
8. The current action has continued since that time period as both parties engaged in discovery.
9. The FDIC has had notice of this proceeding and has not sought to intervene.
10. The FDIC is not an indispensable party as that term is defined in Fed.R.Civ.P. 19, made applicable here by Bankruptcy Rule 7019. Its absence in no way prevents the Court from according complete relief among those already parties. Fed.R.Civ.P. 19(a)(1).
11. Nor does its absence leave IndyMac Bank, FSB open to a substantial risk of double, multiple, or otherwise inconsistent obligations. Fed.R.Civ.P. 19(a)(2)(ii).
12. Nor does its absence from this proceeding impede their ability to protect whatever interest they may have in its subject matter. Fed.R.Civ.P. 19(a)(2)(i).
13. If the FDIC thought that it would be prejudiced by the failure to join them, it could have filed a motion to intervene or to join as a party.
14. The FDIC did not move to join or to intervene.

WHEREFORE, Plaintiffs request that the Court deny Defendant's Motion to Dismiss pursuant to Fed.R.Civ.P. 12(b)(7) for failure to Join an Indispensable Party pursuant to Fed.R.Civ.P. 19.

Respectfully submitted,
The Debtors/Plaintiffs
By their Attorney
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