

**Hearing Time and Date: September 27, 2012 at 10:00 a.m. (EST)**  
**Objection Deadline: September 20, 2012 at 4:00 p.m. (EST)**

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**UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK**

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In re:	)	Case No. 12-12020 (MG)
	)	
RESIDENTIAL CAPITAL, LLC, <u>et al.</u> ,	)	Chapter 11
	)	
Debtors.	)	Jointly Administered
-----	)	
YVONNE D. LEWIS, <u>et al.</u> ,	)	Adv. Case No. 12-01731 (MG)
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
GMAC, MORTGAGE CO., LLC, <sup>1</sup>	)	
Defendant.	)	
-----	)	

**DEBTORS' MOTION FOR JUDGMENT ON THE PLEADINGS IN  
RESPONSE TO YVONNE D. LEWIS, ET AL.'S ADVERSARY  
COMPLAINT BY SURPLUS CREDITORS FOR FALSE CLAIMS AND  
RICO, 31 U.S.C.A. §§ 3729 TO 3733; 18 U.S.C. §§ 666, 1962; BR RULE 7008**

<sup>1</sup> It is unclear whether the Plaintiffs intended to name only "GMAC, Mortgage Co., LLC" or multiple Debtors as defendants. The Debtors are also uncertain as to which Debtor the Plaintiffs are referring. Out of an abundance of caution, this Motion is filed on behalf of all of the Debtors.



The debtors and debtors in possession, (collectively, the “Debtors”), by and through their undersigned counsel, hereby file this Motion for Judgment on the Pleadings (the “Motion”) pursuant to Federal Rule of Civil Procedure 12(c), made applicable to this adversary proceeding by Bankruptcy Rule 7012, in response to Plaintiffs’ Yvonne D. Lewis, et al. (the “Plaintiffs”) Adversary Complaint by Surplus Creditors for False Claims and RICO, 31 U.S.C.A. §§ 3729 to 3733; 18 U.S.C. §§ 666, 1962; BR Rule 7008 [Docket No. 1] (the “Complaint”).

In support of this Motion, the Debtors represents as follows:

### **PRELIMINARY STATEMENT**

1. The Plaintiffs have filed an incomprehensible Complaint and various related documents, which name numerous legal theories but do not clearly state a request for relief or any facts in support of such theories. Thus, the Debtors request that the Court dismiss the Complaint with prejudice in its entirety.

### **BACKGROUND**

#### **A. Chapter 11 Case Background**

2. On the date hereof (the “Petition Date”), each of the Debtors filed a voluntary petition in this Court for relief under Chapter 11 of the Bankruptcy Code. The Debtors are managing and operating their businesses as debtors in possession pursuant to Bankruptcy Code sections 1107(a) and 1108. No trustee has been appointed in these Chapter 11 cases.

3. On May 16, 2012, the United States Trustee for the Southern District of New York appointed a nine member official committee of unsecured creditors.

4. On June 20, 2012, the Court directed that an examiner be appointed, and on July 3, 2012, the Court approved Arthur J. Gonzalez as the examiner [Docket Nos. 454, 674]. The Debtors are a leading residential real estate finance company indirectly owned by Ally Financial, Inc. (“AFI”), which is not a Debtor. The Debtors and their non-debtor affiliates

operate the fifth largest servicing business and the tenth largest mortgage origination business in the United States. A more detailed description of the Debtors, including their business operations, their capital and debt structure, and the events leading to the filing of these bankruptcy cases, is set forth in the Whitlinger Affidavit. [Docket No. 6].

## **B. Adversary Proceeding Background**

5. On June 22, 2012, the Plaintiffs filed the Complaint commencing this adversary proceeding. [Docket No. 1].

6. On July 30, 2012, the Debtors filed their Answer and Affirmative Defenses to Yvonne D. Lewis, et al.'s Adversary Complaint by Surplus Creditors for False Claims and RICO, 31 U.S.C.A. §§ 3729 to 3733; 18 U.S.C. §§ 666, 1962; BR Rule 7008 (the "Answer"). [Docket No. 7].

7. On August 8, 2012, the Court held a status conference on this matter.<sup>2</sup>

8. On August 10, 2012, the Plaintiffs filed a Settlement Conference Report. [Docket No. 11].<sup>3</sup>

9. On August 23, 2012, the Plaintiffs filed a Motion for Summary Judgment Grounded on (1) Federal Preemptions for Federal Programs Under HUD (*42 U.S.C. § 3535*

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<sup>2</sup> At the status conference on August 8, 2012, the Court made several inquiries regarding the Plaintiffs' bankruptcy cases. The Debtors have determined that the Plaintiffs' bankruptcy cases were dismissed. Because the Debtors have been unable to determine the nature of the Plaintiffs' claims in this adversary proceeding, the Debtors are unable to determine whether any of the claims asserted here are (i) claims that were resolved in the Plaintiffs' bankruptcy cases, (ii) mandatory counterclaims in the Plaintiffs' foreclosure proceedings, or (iii) claims that can only be asserted by the Plaintiffs' bankruptcy estates. The Debtors' counsel here has conferred with the Debtors' counsel in the Plaintiffs' bankruptcy cases, which were Chapter 7 proceedings. The Debtors' Lewis bankruptcy counsel confirmed that certain defenses, such as standing to bring these claims, res judicata, and whether the Plaintiffs' claims here were mandatory counterclaims in the Plaintiffs' foreclosure proceedings, may be available to the Debtors here. However, because both sets of Debtors' counsel have been unable to discern the nature of the claims advanced in this adversary proceeding, counsel has been unable to determine with finality the availability of the defenses. To the extent this Motion is not granted, the Debtors reserve their rights to raise these defenses.

<sup>3</sup> The Settlement Conference Report contains several inaccuracies. In particular, the Debtors dispute the allegedly "settled" issues and the agreement to mediate. No settlement was ever reached between the parties.

(i)(I)) and US DOT (49 U.S.C. § 47502); and “Separation of Powers” of Federal Agencies on 09/08/2011 in State Court Case No. 05-CV-4555, FR. CNTY., Ohio. [Docket No. 12].<sup>4</sup>

10. On August 27, 2012, the Plaintiffs filed a Request for Admissions of Specific Documents and Facts. [Docket No. 13].

### **ARGUMENT**

#### **A. The Complaint Should be Dismissed for Failure to State a Cause of Action**

11. The Court should dismiss the Complaint pursuant to Rule 12(c) of the Federal Rules of Civil Procedure because the Complaint fails to articulate any claim or cause of action upon which relief can be granted.

12. In deciding a Rule 12(c) motion, courts apply the same standard that is applicable to a motion under Rule 12(b)(6). *See Hayden v. Paterson*, 594 F.3d 150, 160 (2d Cir. 2010); *Johnson v. Rowley*, 569 F.3d 40, 43 (2d Cir. 2009) (per curiam); *see also* Fed. R. Civ. P. 12(h)(2) (“Failure to state a claim upon which relief can be granted ... may be raised ... by a motion under Rule 12(c)...”). When considering a motion to dismiss under Rule 12(b)(6) or 12(c), the Court must accept the facts alleged in the complaint as true and draw all reasonable inferences in favor of the plaintiff. *Koppel v. 4987 Corp.*, 167 F.3d 125, 133 (2d Cir. 1999); *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 323 (2007).<sup>5</sup> However, the Court is not bound to accept as true legal conclusions couched as factual allegations. *Papasan v. Allain*, 478 U.S. 265, 286 (1986). To survive a motion to dismiss, the plaintiff must “*plausibly* suggest an entitlement to relief.” *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1951 (2009) (emphasis added). “A claim has facial

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<sup>4</sup> The Motion for Summary Judgment was improperly filed because the Plaintiffs did not first seek a pre-motion conference as required by Local Rule 7056-1.

<sup>5</sup> On a motion to dismiss, the Court may consider (i) the allegations in the complaint, (ii) exhibits attached to the complaint or incorporated therein by reference, (iii) matters of which judicial notice may be taken, and (iv) documents of which plaintiff has notice and on which it relied in bringing its claim or that are integral to its claim. *See, e.g., Enron Corp. v. Granite Constr. Co. (In re Enron Corp.)*, No. 01-16034 (AJG), Adv. Pro. No. 03-93172 (AJG), 2006 Bankr. LEXIS 4650, at \*9-10 (Bankr. S.D.N.Y. May 11, 2006) (citing *Brass v. Am. Film Techs., Inc.*, 987 F.2d 142, 150 (2d Cir. 1993)).

plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007)).

13. The Complaint and related documents filed by the Plaintiffs in the adversary proceeding are a disorganized, incomprehensible collection of statements, ramblings, and jargon. Within those documents, the Plaintiffs identify various legal concepts without explaining how such concepts relate to these Chapter 11 cases or the Debtors. The Plaintiffs have not pleaded any factual content that allows this Court to make a reasonable inference that the Debtors are liable for any misconduct.

14. The Plaintiffs initially state that “[t]his is an adversary action to aver allegation on behalf of the United States of America under the False Claims act” and in the next sentence state that “this action is to avoid Debtor GMAC’s preferential transfers to Fannie Mae on June 4, 2012 by virtue of a ‘Writ of Possession’ by the State Court, and to Fortress Investment Company on May 18, 2012 by virtue of an Interim Order (Barclays DIP Order) under 11 U.S.C. §§ 547 and 550.” (Complaint at 3.) The following pages of the Complaint assert, among other things, (i) jurisdictional concerns (“Ohio Plaintiffs do not consent to entry of final New York bankruptcy court orders under 11 U.S.C. 363(m) for the ‘at issue’ seized and uncompensated subdivision aviation easements for said Lots 11 and 17”), (ii) issues related to “takings” (“the Federal Aviation Administration (FAA) issued its order as a Record of Approval (ROA) for ‘takings’ of private aviation easements for noisy aircraft with designated ‘track flights’ ... The Bankruptcy Judge in this proceeding would be forced to ‘alter’ the September 25, 1987 FAA, ROA and ‘dispossess’ the City of Columbus of absolute ‘Fee-Simple’ acquired interest in an ongoing ‘Federal Program’ by the Secretary of Transportation under ANSA”), and (iii) defects of

personal jurisdiction (“Plaintiffs hereby request Transfer of this case to OHIO pursuant to 28 U.S.C. § 1406 due to the fact that Debtor GMAC concealed the ‘set-off’ of claims, ‘repurchase agreement by Huntington National Bank”, and ‘unpaid transfer gain taxes’ in the Ohio BR cases ‘so as to cure a defect of personal jurisdiction over the defendants’”) (Complaint at 4).

15. The Plaintiffs, however, do not set forth any facts that could allow the court to draw a reasonable inference that the Debtors are liable for any misconduct. Indeed, the Complaint barely alleges any facts at all, much less facts sufficient to support any of the above-mentioned legal theories. Notably, the Complaint fails to set forth any of the actions by the Debtors pursuant to which the Plaintiffs seek relief in this adversary proceeding. Accordingly, the Plaintiffs have failed to satisfy the pleading standard established by *Ashcroft*, and their Complaint should be dismissed.

**B. The Complaint Fails to Comply with the Pleading Standards of Rule 7008**

16. The Complaint also fails to comply with the pleading standards of Federal Rule of Procedure 8, which are made applicable to this adversary proceeding by Federal Rule of Bankruptcy Procedure 7008.<sup>6</sup>

17. Rule 8(a) requires a plaintiff to provide “a short and plain statement of the claim showing that the pleader is entitled to relief” and “a demand for the relief sought...” 28 U.S.C. 8(a)(2)-(3). Further, the pleading standards of Rule 8(a) are qualitative, not quantitative. “[T]he pleading standard Rule 8 announces does not require ‘detailed factual allegations,’ but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation.” *Ashcroft*,

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<sup>6</sup> In addition, to the extent the Plaintiffs are alleging fraud or mistake, the Plaintiffs have not met the heightened pleading requirements of Rule 9(b) of the Federal Rules of Civil Procedure, made applicable to this adversary proceeding by Federal Rule of Bankruptcy Procedure 7009, which require the Plaintiffs to state their claims with particularity. The plaintiffs “must still plead the events which they claim give rise to an inference of knowledge” and conclusory allegations of knowledge or scienter will be insufficient to withstand a motion to dismiss. *See Devaney v. Chester*, 813 F.2d 566, 568 (2d Cir. 1987). Here, the Complaint is wholly lacking any allegations of knowledge, scienter, or any other allegation suggesting that a fraud has been committed.

129 S. Ct. at 1949 (quoting *Twombly*, 550 U.S. at 555). “A pleading that offers ‘labels and conclusions’ or ‘a formulaic recitation of the elements of a cause of action will not do.’ Nor does a complaint suffice if it tenders ‘naked assertion[s]’ devoid of ‘further factual enhancement.’” *Id.* (quoting *Twombly*, 550 U.S. at 555, 557).

18. Here, the Plaintiffs have not clearly articulated the relief requested and have not provided any facts supporting their request for relief. In fact, even the Plaintiffs’ goal in this adversary proceeding remains unclear. The Debtors are unable to understand the charges against them and cannot determine whether the Plaintiffs are seeking monetary damages, equitable damages, or both. Indeed, following the list of legal theories espoused by the Plaintiffs, they conclude with the following statement: “It follows that GMAC’s filing of a voluntary petition in the United States Bankruptcy Court for the Southern District of New York is ‘not equivalent to service’ of summons and complaint (by affidavit) in the state court foreclosure case to obtain a ‘writ of possession’ of the alleged Mortgagee’s interest held under a FAA Order Id. § 47504(a)(2)(D)&(E) in connection with the “Truth in Lending Act”. (53 FR 2800).” (Complaint at 5.)

19. The Complaint does not clearly indicate the relief sought and does not show facts entitling the Plaintiffs to relief. Thus, the Court should dismiss the Complaint as a matter of law. *See First Nationwide Bank v. Gelt Funding Corp.*, 27 F.3d 763, 772 (2d Cir. 1994) (“The methodology employed ... is so defective, and the conclusions reached so defy logic, that no ‘reasonable inferences’ can be drawn therefrom. No amount of detail can save [the] complaint when the detail is based on flawed and unreasonable methodologies that lead to unsupported conclusions.”); *Sassower v. Alito (In re Sassower)*, No. 05-23150, Adv. Pro. No. 05-8730, 2007 Bankr. LEXIS 1579, at \*6-7 (Bankr. S.D.N.Y. May 3, 2007) (“the complaint does not allege any

facts demonstrating or even suggesting that any of the defendants engaged in any conduct which had any economic or other impact on [the plaintiff] which could possibly give rise to any legal or equitable claim in favor of [the plaintiff] against any defendant ... Because there is no viable claim alleged or even intimated, the complaint in [the adversary proceeding] must be dismissed for failure to state a claim.”).

*[Remainder of page intentionally left blank]*



**CONCLUSION**

For the reasons set forth above, the Court should dismiss the Complaint with prejudice in its entirety, and grant such other relief as is just and proper.

Dated: New York, NY  
September 12, 2012

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