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UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

AMERICAN RESIDENTIAL EQUITIES, LLC, in its own individual capacity and in Its capacity as Trustee under that certain American Residential Equities, LLC Master Trust Agreement dated August 8, 2005,	:	Adv. Proc. 12-01934 (MG)
Plaintiff,	:	
v.	:	
GMAC MORTGAGE, LLC, as successor by merger to GMAC Mortgage Company, And BALBOA INSURANCE COMPANY	:	
Defendants.	:	
In re	:	
	:	Case No. 12-12020 (MG)
RESIDENTIAL CAPITAL, LLC, *et al.*,	:	
	:	Chapter 11
Debtors	:	Jointly Administered

DEBTOR'S MOTION FOR DISMISSAL OF ADVERSARY PROCEEDING

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Defendant GMAC Mortgage, LLC ("GMACM") submits this motion to dismiss (the "Motion") the above-referenced adversary proceeding (the "Adversary Proceeding") commenced by Plaintiff American Residential Equities, LLC ("Plaintiff" or "ARE").[1] The Court should dismiss the Adversary Proceeding as contravening the automatic stay imposed by section 362(a) of title 11 of the United States Code (the "Bankruptcy Code") and the recognized claims resolution process. Alternatively, if the Court retains jurisdiction, it should dismiss the Adversary Proceeding for failure to state causes of action for which relief can be granted.

I. JURISDICTION AND VENUE

1. The Court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. §§ 157(a) and 1334(b). Venue is proper under 28 U.S.C. § 1409. This involves a non-core proceeding pursuant to 28 U.S.C. §§ 157(b)(1) and (b)(2), either in whole or part. Nonetheless, pursuant to Local Bankruptcy Rule 7012-1, GMACM consents to entry of a final order or judgment by this Court if it is determined that the Court, absent consent of the parties, cannot enter final orders or judgment consistent with Article III of the United States Constitution.

II. BACKGROUND

A. General Bankruptcy Case Background

2. On May 14, 2012 (the "Petition Date"), each of the debtors in the above-referenced cases (collectively "Debtors"), including GMACM, filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code in this Court.

3. The Debtors are a leading residential real estate finance company indirectly owned by Ally Financial Inc., which is not a debtor. As of the Petition Date, the

[1] By prior agreement, the plaintiff consented to extend GMACM's time to answer or otherwise respond to the complaint filed in the Adversary Proceed through and including February 1, 2013.

debtors and their non-debtor affiliates operated the fifth largest mortgage servicing business and the tenth largest mortgage origination business in the United States.

4. The Debtors are managing and operating their businesses as Debtors in possession pursuant to Bankruptcy Code sections 1107(a) and 1108. Their chapter 11 cases (collectively, the "Bankruptcy Case") are being jointly administered pursuant to Rule 1015(b) of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules").

5. On May 16, 2012, the United States Trustee for the Southern District of New York (the "U.S. Trustee") appointed a nine member official committee of unsecured creditors.

6. On July 3, 2012, the U.S. Trustee appointed the Honorable Arthur T. Gonzalez, former Chief Judge of this Court, as examiner (the "Examiner").

B. Events Giving Rise to the Adversary Proceeding

(i) Plaintiff's Prior Litigation

7. On June 11, 2010, Plaintiff filed a complaint (the "Florida Complaint") in the United States District Court for the Southern District of Florida (the "Florida Federal Court"), Case No. 1:10-cv-21943-ASG (the "Pending Florida Action"), against GMACM. The Complaint sought: (i) damages for various alleged breaches of contract arising out of a Servicing Agreement (the "Servicing Agreement") between Plaintiff and GMACM; (ii) an accounting; and (iii) remittances allegedly due under the Servicing Agreement. (See Complaint, attached as Exhibit A hereto.)[2] The Servicing Agreement governed the rights and obligations of GMACM and ARE with regard to over 2,600 loans that were contained in the ARE Portfolio.

[2] When ruling on a motion to dismiss for failure to state a claim upon which relief can be granted, a court must limit its consideration to the complaint, the written instruments attached to it as *exhibits, "documents incorporated into the complaint by reference, and matters of which a court may take judicial notice*." Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 323 (2007) (emphasis added).

8. Specifically, in the Pending Florida Action, Plaintiff alleged that GMACM breached the Servicing Agreement by engaging in the following conduct, among others: overinsuring or underinsuring properties; failing to maintain properties; failing to secure properties; failing to file insurance claims timely; and failing to follow an approval matrix contained in the Servicing Agreement. (Exhibit A, ¶¶ 25-28.)

9. On July 8, 2010, GMACM filed its Answer and Counterclaim, whereby it asserted claims against Plaintiff for (i) breach of contract, (ii) unjust enrichment, (iii) breach of implied duty of good faith and fair dealing, (iv) defamation, (v) conversion, and (vi) an application for injunctive relief based upon the same course of dealings between the parties. (See Answer and Counterclaims, attached as Exhibit B hereto.)

10. On October 15, 2010, Plaintiff filed a Motion for Judgment on the Pleadings as to its accounting claim. On March 8, 2011, the Florida Federal Court entered an order denying Plaintiff's motion. (See Order denying Plaintiff's 12(c) motion, attached as Exhibit C hereto.)

11. On May 17, 2012, GMACM filed its Notice of Bankruptcy and Effect of Automatic Stay ("Notice of Bankruptcy"), which was followed by GMACM's Amended Notice of Bankruptcy Filing and Supplemental Servicing Order ("Amended Notice of Bankruptcy"), clarifying that Plaintiffs' claims against GMACM were stayed in their entirety and did not fall within the relief from stay granted by this Court's Final Supplemental Servicing Order. (See Notice of Bankruptcy, attached as Exhibit D hereto, and Amended Notice of Bankruptcy, attached as Exhibit E hereto.) As a result of the Bankruptcy Case, the entire Florida Federal Court action was stayed and an Order was entered reflecting the stay on May 18, 2012.

12. Prior to the commencement of the chapter 11 cases, the parties in the Pending Florida Action had engaged in extensive discovery (which included the taking of depositions and the production of over 550,000 pages of documents by GMACM), exchanged expert reports, and had also engaged in considerable motion practice, including the filing of discovery motions, Daubert motions and a motion for summary judgment by GMACM. (See Florida Federal Court Docket, attached as Exhibit F, hereto; See Daubert Motion, attached as Exhibit G, hereto; See Order Granting Sanctions, attached as Exhibit H hereto.) One of the discovery motions addressed by the Florida Federal Court was Plaintiff's Motion to Compel discovery against GMACM. The Magistrate Court entered a Report and Recommendation awarding fees and costs to GMACM in connection with that motion. Just prior to the Petition Date, ARE filed an appeal of that Report and Recommendation to the District Judge, which appeal was pending at that time. The amount of fees and costs sought by GMACM was over $20,000.00. As of the Petition Date, GMACM's Motion for Partial Summary Judgment, was also pending before the Florida Federal Court. (See GMACM's Motion for Summary Judgment, attached as Exhibit I hereto.)

(ii) The Adversary Proceeding

13. On November 9, 2012, Plaintiff filed the instant complaint (the "Adversary Complaint") initiating this Adversary Proceeding.

14. On November 16, 2012, Plaintiff also filed a proof of claim in the chapter 11 cases, designated as claim number 5718 (attached as Exhibit K hereto) which simply attaches a copy of the Adversary Proceeding complaint as an exhibit.

15. Plaintiff did not file a motion for relief from automatic stay in the chapter 11 cases.

16. The Adversary Complaint contains the same allegations against GMACM as those in the Pending Florida Action, and advances essentially identical requests for relief. Specifically, the Adversary Complaint alleges claims for (1) declaratory judgment (Adversary Complaint, ¶¶ 30-33), (2) breach of contract (Id., ¶¶ 34-39), (3) conversion (Id., ¶¶ 40-44), (4) "turnover" (Id., ¶¶ 45-48), (5) accounting (Id., ¶¶ 49-52), (6) fraud (Id., ¶¶ 53-70), and (7) unjust enrichment (Id., ¶¶ 71-74). The claims are based on the same course of conduct and arises out of the same facts and circumstances as those being litigated in the Florida Federal Court, namely the rights and obligations of GMACM and ARE under the Servicing Agreement.

17. In fact, Plaintiff's breach of contract claim in the Adversary Proceeding is virtually verbatim to the breach of contract claim alleged in the Pending Florida Action. (*See* Exhibit A, ¶¶ 3-4; 6-7). As it did in the Pending Florida Action, Plaintiff comes to this Court requesting payments allegedly due under the Servicing Agreement (turnover) (Exhibit A, ¶ 28(m)), and claiming entitlement to an accounting (a cause of action on which Plaintiff moved for judgment in the Florida Federal Court and was denied) (Exhibit A, ¶¶ 30-34). Further, Plaintiff's unjust enrichment and conversion claims in the Adversary Proceeding are nothing more than impermissible tort versions of its breach of contract in the Pending Florida Action. Plaintiff's claim for fraud is also intertwined with the breach of contract claim pending in the Pending Florida Action.

III. ARGUMENT

A. Plaintiff is Attempting to Circumvent the Bankruptcy Claims Process With This Adversary Proceeding.

18. This Adversary Proceeding, which is identical to Plaintiff's Pending Florida Action, is an impermissible attempt by Plaintiff to circumvent both the automatic stay and the orderly claims' resolution process. If Plaintiff wanted to pursue its claims in litigation,

then it should have filed a motion for relief from stay with this Court. It did not. Instead, by attempting to re-file virtually the same action in this Court, Plaintiff attempts entirely to circumvent both the stay and the bankruptcy claims' resolution process.

19. Disputes in bankruptcy cases are divided into two categories, adversary proceedings and contested matters. Bankruptcy Rule 7001 specifically differentiates those litigated matters that are adversary proceedings from those disputes which are characterized as contested matters under Bankruptcy Rule 9014. Healy/Mellon-Stuart Co. v. Coastal Grp. (In re Coastal Grp., Inc.), 100 B.R. 177, 178 (Bankr. D. Del. 1989); see also Sears, Roebuck & Co. v. Penney (In re Penney), 76 B.R. 160, 161-62 (Bankr. N.D. Cal. 1987).

20. As the court in Penney explained:

> [Bankruptcy] Rule 7001 is not . . . an open invitation to commence any sort of adversary proceeding against the debtor. Rather, it merely specifies what sort of relief properly sought under the Bankruptcy Code must be obtained by formal adversary proceeding as opposed to less formal motion or contested matter pursuant to [Bankruptcy] Rule 9014. [Bankruptcy] Rule 7001 is not an invitation to sue the debtor on a cause of action which, if brought in state court, would be a blatant violation of the automatic stay. To say that if money or property is sought it must be by adversary proceeding is not the same as granting leave to seek money or property for any reason.

In re Penney, 76 B.R. at 161.

21. A creditor asserting a pre-petition claim for money damages that is barred by the automatic stay is not entitled to file an adversary proceeding under Bankruptcy Rule 7001 to recover on such claim. See In re Ephedra Prods. Liability Litig., 329 B.R. 1 (S.D.N.Y. 2005) ("In bankruptcy, 'the only appropriate way to assert a claim against a debtor's estate is through the timely filing of a properly executed proof of claim' and not through an adversary proceeding." (citing In re Johns-Manville Corp., 53 B.R. 346, 354 (Bankr. S.D.N.Y. 1985)); see also In re Coastal Grp., Inc., 100 B.R. at 178-79; Galitz v. Edghill (In re Edghill), 113 B.R. 783,

783-84 (Bankr. S.D. Fla. 1990) (holding that Rule 7001 did not give creditor the right to sue on pre-petition, state-law claim in the bankruptcy forum); In re Penney, 76 B.R. at 161-62; Sears, Roebuck & Co. v. Willhite (In re Willhite), No. 87-00959, 1988 WL 1058216, at *1-2 (Bankr. N.D. Cal. June 28, 1988) (same). This is particularly true where the adjudication through an adversary proceeding would be "a waste of judicial resources . . . when the claims process is moving the same issues down a parallel track." Mondragon v. Circuit City Stores, Inc. (In re Circuit City Stores, Inc.), Adv. No. 09-03073, 2010 WL 120014, at *5 (Bankr. E.D. Va. Jan. 7, 2010) (citing Binford v. First Magnus Fin. Corp. (In re First Magnus Fin. Corp.), Adv. No. 07-00060, 2008 WL 348805, at *1 (Bankr. D. Ariz. Feb. 6, 2008), aff'd, 403 B.R. 659 (D. Ariz. 2009).

22. The filing of a motion for relief from stay is not a "meaningless or ministerial act which can be dispensed with merely by suing the debtor in bankruptcy court." See In re Willhite, 1998 WL 1058216, at *2. The stay is one of the fundamental protections afforded a debtor under the Bankruptcy Code, and that purpose is not served by allowing any sort of action to be brought so long as it is commenced in the home bankruptcy court. See id. at *1-2.

23. Moreover, although courts in this Circuit have held that the commencement of an adversary proceeding does not, by definition, violate the stay, an adversary proceeding "may be dismissed if it is procedurally improper or if there is no substantive basis for asserting the cause of action at issue in bankruptcy." Prewitt v. N. Coast Vill., Ltd. (In re N. Coast Vill., Ltd.), 135 B.R. 641, 644 (B.A.P. 9th Cir. 1992). A pre-petition, state law claim for money damages is properly asserted through the bankruptcy claims process, not through an adversary proceeding, and the bankruptcy court may dismiss an adversary proceeding brought to recover on such a claim from the debtor or the debtor's property. Id. at 644 (citing In re Penney,

76 B.R. at 160); see also Robert Christopher Assocs. v. Franklin Realty Grp., Inc. (In re FRG, Inc.), 121 B.R. 710, 714-15 (Bankr. E.D. Pa. 1990) (holding that although the plaintiffs did not violate the stay by filing an adversary proceeding, the plaintiffs were not entitled to proceed with the adversary proceeding and that the adversary proceeding was due to be dismissed and the plaintiffs relegated to the bankruptcy claims process).

24. This Adversary Proceeding is clearly an attempt by the Plaintiff to circumvent both the claims process and the automatic stay. Clear grounds exist for the Court to dismiss the Adversary Complaint. The allegations in the Adversary Complaint all relate to pre-petition conduct, advancing allegations concerning the respective rights of ARE and GMACM under a Servicing Agreement that was entered into on or about July 29, 2004 and was terminated in 2009. Moreover, the Adversary Proceeding simply re-alleges the claims that were brought by the Plaintiff in the Pending Florida Action, which were stayed on the Petition Date. As stated above, Plaintiff cannot circumvent the automatic stay by recasting its claims as an adversary proceeding. Similarly, Plaintiff cannot avoid the claims process by bringing an adversary proceeding. In re First Magnus Fin. Corp., 2008 WL 348805, at *2; see also In re Ray, 46 B.R. 424, 426 (S.D. Ga. 1984) (holding that the bankruptcy can dismiss a case "where to do so perpetuates the proper use of the bankruptcy mechanism."). Pursuant to this Court's inherent powers pursuant under 11 U.S.C. § 105, the Court should dismiss this Adversary Proceeding, which is duplicative of the bankruptcy claims procedure.

25. This Court addressed similar issues in, In re Lehman Brothers Holdings, Inc., where it held that a claim for damages resulting from an alleged breach of contract was not properly brought in an adversary proceeding and could properly be brought only through the proof of claim process. Evergreen Solar, Inc. v. Barclays PLC (In re Lehman Brothers Holdings,

Inc.), Adv. No. 08-01633, 2011 WL 722582, at *7-8 (Bankr. S.D.N.Y. Feb. 22, 2011); see also DBL Liquidating Trust v. P.T. Tirtamas Majutama (The Drexel Burnham Lambert Grp., Inc.), 148 B.R. 993, 998 (S.D.N.Y. 1992) (holding that Bankruptcy Rule 7001 precluded a claim for damages resulting from the breach of a letter agreement brought in an adversary proceeding because such a claim could only properly be brought through the proof of claim process). This Court reached that decision on the basis that Bankruptcy Rule 7001 enumerates nine categories of controversies that may be brought as adversary proceedings, and that a claim for damages for a breach of contract was not included. Id.

26. Here, not only is Plaintiff attempting to circumvent the claims process and the Automatic Stay by filing this Adversary Proceeding, but Plaintiff is also engaging in impermissible forum shopping and attempting to wipe from the record the unfavorable results it achieved in the Pending Florida Action. In essence, Plaintiff is attempting to secure a "do-over" in a different forum. Before the automatic stay took effect, the Florida Federal Court denied Plaintiff's Motion for Partial Judgment on the Plaintiff's accounting claim. Additionally, a Court's Report and Recommendation awards attorneys' fees and costs to GMACM for the filing of a Motion to Compel by ARE without complying with its meet and confer obligations.

27. If the Plaintiff had moved for relief from stay and such stay had been granted, Plaintiff would be back in the Florida Federal Court facing not only a Daubert Motion, but also a Motion for Partial Summary Judgment. By filing this Adversary Proceeding instead, Plaintiff is attempting to start anew. Plaintiff, however, should not be allowed to circumvent the adverse rulings in the Prior Action by now bringing the instant Adversary Complaint cut out of the same cloth. This Court should dismiss the Adversary Proceeding.

28. The only claims in the Adversary Proceeding that Plaintiff could argue are not contained in the Pending Florida Action are Plaintiff's claims for a declaratory judgment and for "turnover." As to Plaintiff's declaratory judgment claim, although Bankruptcy Rule 7001(7) provides that adversary proceedings may include requests for injunctive or equitable relief, where that claim reduces to a money judgment, equitable relief must be denied. Dade Cnty. Sch. Dist. v. Johns-Manville Corp. (In re Johns-Manville Corp.), 53 B.R. 346, 354-55 (Bankr. S.D.N.Y. 1985) (holding that because a mandatory injunction requiring the debtor to remove asbestos would force expenditure of substantial assets, it reduced to a money judgment making adversary proceedings an inappropriate vehicle for adjudicating the claim) (citing in turn Ohio v. Kovacs, 469 U.S. 274 (1985); United States v. Robinson (In re Robinson), 46 B.R. 136 (Bankr. M.D. Fla.), rev'd on other grounds, 55 B.R. 355 (M.D. Fla. 1985)).

29. In this case, Plaintiff's declaratory judgment claim should be dismissed because it essentially seeks a money judgment, specifically the transfer of the monies (if any) held in certain "Custodial Accounts" to the Plaintiff from GMACM. The claim should further be dismissed because Plaintiff has failed to identify any assets held in GMACM's Custodial Accounts on its behalf. In fact, the Servicing Agreement makes clear that GMACM may withdraw funds from the Custodial Accounts "to clear and terminate the Custodial Account upon the termination of this Agreement." (See Servicing Agreement, attached as Exhibit J hereto, § 2.05(x), and referenced extensively in Plaintiff's Complaint.)[3] The inclusion of a declaratory judgment count in the Adversary Proceeding is simply another aspect of Plaintiff's veiled attempt to switch forums.

[3] Plaintiff's Adversary Complaint actually purports to attach the Servicing Agreement as an Exhibit thereto, but Plaintiff apparently failed to do so.

30. Similarly, Plaintiff's turnover claim should be dismissed. This "turnover" claim appears to be based on Plaintiff's allegation that GMACM is holding certain unidentified assets for ARE. Plaintiff does not identify any such assets. Plaintiff also does not attach the alleged "Trust Agreement" referenced in the Adversary Complaint and does not even identify the parties or beneficiaries to any such alleged Trust Agreement. Moreover, even if any such assets exists, a court ordered "turnover" of the property allegedly held in trust,[4] would, in effect, provide preferential treatment to the detriment of all other creditors of the estate who are awaiting their own recovery in the context of the larger claims process, amounting to a claim for damages for a breach of contract as discussed in the above-cited cases. The turnover claim amounts to a claim for monetary damages and is an inappropriate request in an adversary proceeding.

31. Plaintiff did not file a motion for relief from stay to pursue the Pending Florida Action. Plaintiff's breach of contract claim is categorically not included in the list of claims that may be brought in an adversary proceeding. Plaintiff should not be allowed to avoid both the stay and the claims process by filing a suit containing identical allegations as those asserted in the Pending Federal Action. Allowing Plaintiff to advance identical claims for damages will vitiate the protection provided by the stay. Simply put, Plaintiff must assert its pre-petition claim for monetary damages through the bankruptcy claim process, not this Adversary Proceeding.

[4] GMACM notes that an action for Turnover actually belongs to a bankruptcy trustee as provided by 11 U.S.C. § 542 and involves delivery of property to the bankruptcy estate. Here, Plaintiff's "turnover" allegations ask that Property be excluded from the bankruptcy estate on the basis that it is held in trust by GMACM for Plaintiff's benefit. (Adversary Complaint, ¶¶ 45-48). GMACM construes this as a claim under 11 U.S.C. § 541(d), which involves property to which the debtor holds only legal title and not an equitable interest. See 11 U.S.C. § 541(d) (2012).

B. Plaintiff's Claims Should be Dismissed for Failure to State a Claim Upon Which Relief Can be Granted.

32. Bankruptcy Rule 7012 incorporates by reference Rule 12(b)-12(i) of the Federal Rules of Civil Procedure ("FRCP"). FRCP 12(b) provides that a party may assert specified defenses by motion, including failure to state a claim upon which relief can be granted under FRCP 12(b)(6), and that a motion asserting any of these defenses may be made before pleading.

33. The Adversary Proceeding should be dismissed pursuant to Bankruptcy Rule 7012(b)(6) because Plaintiff has failed to state a claim upon which relief can be granted.

34. For FRCP 12(b)(6) purposes, a court must accept a plaintiff's factual allegations as true, drawing all reasonable inferences in the plaintiff's favor. Bernheim v. Litt, 79 F.3d 318, 321 (2d Cir. 1996). The regular standard for determination of a motion to dismiss under FRCP 12(b)(6) is made applicable to bankruptcy adversary proceedings by Bankruptcy Rule 7012(b). A complainant's factual allegations are presumed true, and are construed in favor of the pleader. Metro-Goldwyn-Mayer Home Entm't, Inc. v. Ames Dep't Stores, Inc. (In re Ames Dep't Stores, Inc.), 322 B.R. 238, 241 (Bankr. S.D.N.Y. 2005). Dismissal is warranted "when the plaintiff's allegations, taken as true, along with any inferences that flow from them, are insufficient as a matter of law." Dibbern v. Adelphia Commc'ns Corp. (In re Adelphia Commc'ns Corp.), 325 B.R. 89, 98 (Bankr. S.D.N.Y. 2005) (citing Sykes v. James, 13 F.3d 515, 519 (2d Cir. 1993). On a motion to dismiss, courts may consider certain documents in addition to the complaint, including the contents of any documents attached to the complaint or incorporated by reference, or matters as to which it can take judicial notice. ABF Capital Mgmt. v. Kidder Peabody & Co. (In re Granite Partners, L.P.), 210 B.R. 508, 514 (Bankr. S.D.N.Y. 1997); Brass v. Am. Film Techs., Inc., 987 F.2d 142, 150 (2d Cir. 1993); See also, FED. R. EVID. 201(b) & (d)

(stating that: a judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned . . . . [A] court shall take judicial notice if requested by a party and supplied with the necessary information.); Norris v. Hearst Trust, 500 F.3d 454, 461 n.9 (5th Cir. 2007), ("[I]t is clearly proper in deciding a 12(b)(6) motion to take judicial notice of matters of public record."); Hirsch v. Arthur Andersen & Co., 72 F.3d 1085, 1088, 1092 (2d Cir. 1995) (noting that, in connection with a motion to dismiss, a court may consider all papers appended as well as matters of judicial notice).

(i) ***Plaintiff's accounting claim should be dismissed because there is an adequate remedy at law and is moot given the Pending Florida Action.***

35. Under Pennsylvania Law,[5] an accounting is available only when there is no adequate legal relief or when the legal relief will cause loss, inconvenience, or embarrassment to one of the parties. See e.g. Penn. Ship Supply, Inc. v. Fleming Int'l, Ltd., 113 F. Supp. 2d 760, 763 (E.D. Pa. 2007) (dismissing the plaintiff's accounting claim because documents were readily attainable through the discovery process.) Here, Plaintiff has adequate legal relief in the form of

[5] In deciding what state laws are applicable to a dispute, courts apply the choice of law rules of the forum state. Here, there is a choice-of-law provision in the governing Servicing Agreement that states: "This agreement shall be construed in accordance with the laws of the Commonwealth of Pennsylvania and the obligations, rights and remedies hereunder shall be determined in accordance with the substantive laws of the Commonwealth of Pennsylvania (without regard to conflicts of laws principles), except to the extent preempted by Federal law." (See Servicing Agreement §13.07, annexed as Exhibit J hereto.). Such choice-of-law provisions are uniformly upheld under New York law. See Klock v. Lehman Bros. Kuhn Loeb Inc., 584 F. Supp. 210, 215 (S.D.N.Y. 1984) (interpreting New York law on choice-of-law provisions in actions rooted in contract.) Thus any contractual dispute is governed by the laws of Pennsylvania. Pennsylvania substantive law also likely applies to Plaintiff's common-law claims, to the extent that they are extra-contractual because the alleged torts occurred, in part, in Pennsylvania, where GMACM has its principal place of business. Alternatively, Florida law applies because the alleged harm was directed at Florida, where Plaintiff has its principal place of business.

damages and Plaintiff has already received the documents necessary to do an accounting through discovery in the Pending Florida Action. Thus, the accounting claim is subject to dismissal.

36. The Plaintiff has all the documents it needs to conduct its own accounting. As part of the discovery conducted in the Pending Florida Action GMACM produced to Plaintiff over 550,000 pages of documents covering the over 2,600 loans in the ARE Portfolio and which are at issue in this litigation. Those documents ranged from payment and servicing histories, to call notes, to insurance documents. The documents produced were the documents contained in GMACM's loan file. In fact, in the Pending Florida Action, before the case was stayed, GMACM had produced substantially all the documents Plaintiff claimed it needed to provide to its expert to perform its own accounting. Accordingly, this Court should dismiss Plaintiff's accounting claim.[6] Thus, the accounting claim is moot.

37. Moreover, in the Pending Florida Action, ARE moved for judgment on its contractual accounting claim and the Florida Federal Court denied the motion, finding that ARE had not proven that it had requested an accounting prior to the termination of the Servicing Agreement and that ARE had no right to an accounting after the termination of the Servicing Agreement. ARE is simply trying to circumvent that order (in hopes of a more favorable order) by re-asserting its accounting claim in this action.

(ii) ***Plaintiff's conversion claim is barred by the gist-of-the-action doctrine.***

38. "[T]he 'gist-of-the-action' doctrine . . . operates to preclude a plaintiff from re-casting ordinary breach of contract claims into tort claims." Vives v. Rodriguez, 849 F.

[6]Under Florida law, a party must allege that "the contract demands between litigants involve extensive or complicated accounts and it is not clear that the remedy at law is as full, adequate and expeditious as it is in equity." Bankers Trust Realty, Inc. v. Kluger, 672 So. 2d 897, 898 (Fla. Dist. Ct. App. 1996) (quoting F.A. Chastain Constr., Inc. v. Pratt, 146 So. 2d 910, 913 (Fla. Dist. Ct. App. 1962)). Because Plaintiff has not alleged such, the accounting claim is due for dismissal under Florida law.

Supp. 2d 507, 516 (E.D. Pa. 2012) (citing Hart v. Arnold, 884 A.2d 316, 336 (Pa. Super. Ct. 2005)). Thus, where a tortious claim for conversion is based solely on the failure to perform under a contract, it is barred by the gist of the action doctrine. Pittsburgh Constr. Co. v. Griffith, 834 A.2d 572, 584 (Pa. Super. Ct. 2003) (observing that "the basis of the duty allegedly breached by [defendants], their duty to pay [plaintiff] according to the draw schedule, was created by and defined by the contract itself . . . . [W]e will not permit [plaintiff] to interject a claim for tortious conversion into an action that is decidedly contractual."); see also Brown & Brown, Inc. v. Cola, 745 F. Supp. 2d 588, 623-24 (E.D. Pa. 2010) (applying the gist-of-the-action doctrine to bar a conversion claim).

39. Here, Plaintiff's conversion claim is premised entirely on GMACM's failure to remit funds allegedly due "per its contractual obligations." (Adversary Complaint, ¶ 41). Allegations related to contractually provided payments are categorically contractual in nature and should be addressed in a breach-of-contract action, not an action sounding in tort. As such, the gist-of-the-action doctrine bars this Court from entertaining Plaintiff's conversion claim.

(iii) ***Plaintiff's fraud claim is insufficiently pled, barred by the statute of limitations, and barred by the gist-of-the-action doctrine.***

40. Under FRCP 9(b), which is applicable to these proceedings pursuant to Bankruptcy Rule 7009, Plaintiff must "state with particularity the circumstances constituting fraud or mistake" in the fraud pleadings. Fed. R. Civ. P. 9(b). Each fraud claim must be pled with particularity as to each defendant. Shane v. Marceca (In re Marceca), 127 B.R. 328, 332 (Bankr. S.D.N.Y. 1991) (citing Ouaknine v. MacFarlane, 897 F.2d 75, 779 (2d Cir. 1990). Plaintiff's fraud claim, however, is premised entirely on conclusory allegations relating to an alleged "kick-back scheme" between Balboa and GMACM. Plaintiff does not allege any other facts about the fraud, such as the what, who, when, where or how that is required by FRCP 9(b).

Plaintiff has not pled its claims for fraud with the requisite specificity and, accordingly, its fraud claims should be dismissed.

41. Additionally, Plaintiff's fraud claim is barred by Pennsylvania's two-year statute of limitations. 42 PA. CONS. STAT. ANN. § 5524(7).[7] Although the discovery rule tolls the time for bringing a fraud action, the plaintiff must exercise due diligence to learn the existence of a claim. JNA-1 Corp. v. Uni-Marts, LLC (In re Uni-Marts, LLC), 404 B.R. 767, 779 (Bankr. D. Del. 2009) (applying Pennsylvania's 2-year statute of limitations period to a plaintiff's fraud claim).

42. Plaintiff has not alleged any facts that would support a tolling argument, nor could it. Plaintiff alleges fraud arising out of a contractual relationship that was terminated more than 2 years ago.[8] Any allegedly tortious conduct would have necessarily occurred on or before that date. The exercise of due diligence should have revealed the existence of the alleged fraud more than two years from the assertion of the instant fraud claim. This is particularly true given the extensive discovery produced by GMACM in the Pending Florida Action, which action commenced in June 2010, more than 2 years prior to the filing of this Adversary Proceeding. Had Plaintiff wished to assert a fraud claim, it should have amended its complaint in the Pending Florida Action. Accordingly, Plaintiff's fraud claim is barred by the statute of limitations and should be dismissed.

[7] "Section 5524 provides that: [t]he following actions and proceedings must be commenced within two years: . . . . (7) Any other action or proceeding to recover damages for injury to person or property which is founded on negligent, intentional, or otherwise tortious conduct or any other action or proceeding sounding in trespass, including deceit or fraud…."

[8] See Order on 12(c) Motion, p. 8, fn. 5, Exhibit C hereto. (discussing the termination of the servicing agreement and noting GMACM's instance that, at the latest, the agreement was terminated on November 30, 2009).

43. Moreover, Plaintiff's fraud claim is barred by the economic loss doctrine because it is premised entirely on facts forming the basis of Plaintiff's breach of contract claim. Pennsylvania case law clearly establishes that a breach of contractual terms may not form the basis for a claim in tort seeking recovery of economic losses. Duquesne Light Co. v. Westinghouse Elec. Corp., 66 F.3d 604, 618 (3d Cir. 1995); Brunson Commc'ns, Inc. v. Arbitron, 239 F. Supp. 2d 550, 579 (E.D. Pa. 2002); Harris v. O'Connor Truck Sales, Inc., 153 F. Supp. 2d 584 (E.D. Pa. 2001); Moore v. Pavex, Inc., 514 A.2d 137 (Pa. Super. Ct. 1986). Thus, the gist-of the-action doctrine can bar recovery on a fraud claim flowing from strictly a contractual relationship. Vives v. Rodriguez, 849 F. Supp. 2d at 520. The Court must determine whether the "the fraud concerned the performance of contractual duties, [and] if so, then the alleged fraud is generally held to be merely collateral to a contract claim for breach of those duties." Id. at 518; (citing eToll, Inc. v. Elias/Savion Adver., Inc., 811 A.2d 10, 20 (Pa. Super. Ct. 2002)).

44. Here, Plaintiff's fraud claims relate exclusively to duties imposed under the Servicing Agreement (Adversary Complaint, ¶ 54.). In fact, the fraud claim (which is based on Plaintiff's allegation that GMACM unnecessarily insured property because it got a kick back from Balbo) is nothing more than a re-casting of Plaintiff's breach of contract claim, which includes allegations that GMACM "overinsured" the properties in the ARE Portfolio. Clearly, the Plaintiff's fraud claim is contractual in nature, and, thus, is barred as a matter of law.[9] This

[9] The result is similar under Florida law. "Where damages sought in tort are the same as those for breach of contract, a plaintiff may not circumvent the contractual relationship by bringing an action in tort." Ginsberg v. Lennar Fla. Holdings, Inc., 645 So. 2d 490, 494 (Fla. Dist. Ct. App. 1994); see also Casa Clara v. Charley Toppino & Sons, Inc., 620 So. 2d 1244 (Fla. 1993) (purely economic losses are not recoverable in tort); AFM Corp. v. S. Bell, 515 So. 2d 180 (Fla. 1987) (absent personal injury or property damage contract law is more appropriate than tort law in economic loss cases); Aetna Life & Cas. Co. v. Therm-O-Disc, Inc., 511 So. 2d 992, 994 (Fla.

Court should dismiss Plaintiff's fraud claims as procedurally deficient, time-barred, and/or barred by the gist-of-the-action/ economic loss doctrine.

(iv) ***Plaintiff's unjust enrichment claim fails as a matter of law because it is premised on alleged breaches of the Servicing Agreement.***

45. Unjust enrichment is an equitable doctrine pursuant to which the court implies the existence of a contract between the parties, when one does not otherwise exist, by requiring the defendant to pay the plaintiff the value of the benefit conferred. First Wis. Tr. Co. v. Strausser, 653 A.2d 688 (Pa. Super. Ct. 1995). The doctrine of unjust enrichment, however, is inapplicable when the relationship between the parties is founded upon a written agreement or express contract because parties in contractual privity are not entitled to the remedies available under a judicially imposed quasi-contract. Umbelina v. Adams, 34 A.3d 151 (Pa. Super. Ct. 2011); Braun v. Wal-Mart Stores, Inc., 24 A.3d 875 (Pa. Super. Ct. 2011); Wilson Area Sch. Dist. v. Skepton, 895 A.2d 1250 (Pa. Super. Ct. 2006); Mitchell v. Moore, 729 A.2d 1200, 1203 (Pa. Super. Ct. 1999); Roman Mosaic & Tile Co. v. Vollrath, 313 A.2d 305 (Pa. Super. Ct. 1973).

46. Thus, as a matter of law, Plaintiff's unjust enrichment claim should be dismissed because it is based entirely on whether GMACM acted within its rights under the Servicing Agreement when it purchased insurance coverage on the properties in the ARE Portfolio. In fact, in Paragraph 72 of the Adversary Complaint, Plaintiff states that "**Pursuant to**

1987) (no cognizable tort damages are sustained absent personal injury or physical property damage); Fla. Power & Light Co. v. Westinghouse Elec. Corp., 510 So. 2d 899, 900 (Fla. 1987) (contract principles are more appropriate than tort principles for resolving economic losses, Florida law does not allow recovery in tort without a claim for personal injury or property damage); Weimar v. Yacht Club Point Estates, Inc., 223 So. 2d 100, 103 (Fla. 1969) (where defendant has not committed a breach of duty apart from breach of contract there can be no action in tort); Swaebe v. Sears World Trade, Inc., 639 So. 2d 1120, 1121 (Fla. Dist. Ct. App. 1994) (absent a separate and independent tort, breach of contract may not be converted into a tort action).

the Servicing Agreement, GMAC was to act as ARE's agent to obtain insurance coverage on properties securing the ARE loans in the event the borrower(s) failed to keep property insurance in place." (Adversary Complaint, ¶ 72) (emphasis added). Plaintiff's unjust enrichment claim is clearly based on GMACM's conduct under the Servicing Agreement, an express contract between the parties. Consequently, Plaintiff's unjust enrichment claim is not an actionable claim.[10]

IV. CONCLUSION

Accordingly, for the reasons set forth herein the GMACM respectfully requests that the Court dismiss the Adversary Proceeding with prejudice and grant such other and further relief as it deems just and proper.

[10] Similarly, an action for unjust enrichment fails under Florida law upon a showing that an express contract exists. See Williams v. Bear Stearns & Co., 725 So. 2d 397, 400 (Fla. Dist. Ct. App. 1998); see also Ocean Commc'ns, Inc. v. Bubeck, 956 So. 2d 1222, 1225 (Fla. Dist. Ct. App. 2007) ("a plaintiff cannot pursue an equitable theory, such as unjust enrichment . . . to prove entitlement to relief if an express contract exists."). Plaintiff's unjust enrichment claim is not actionable because the relationship between the parties is governed by the Servicing Agreement as supported by Plaintiff's own allegations. (See e.g. Adversary Complaint, ¶ 72).

Dated: February 1, 2013
New York, New York

/s/ Norman S. Rosenbaum

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Hope T. Cannon (pending *pro hac* admission)
D. Brian O'Dell

Co-Counsel for the Debtor Defendant GMAC Mortgage, LLC

Hearing Date: March 5, 2013 at 10:00 a.m. (ET)
Objection Deadline: February 11, 2013 at 4:00 p.m. (ET)

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UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

AMERICAN RESIDENTIAL EQUITIES, LLC, in its own individual capacity and in Its capacity as Trustee under that certain American Residential Equities, LLC Master Trust Agreement dated August 8, 2005, Plaintiff, *v.* GMAC MORTGAGE, LLC, as successor by merger to GMAC Mortgage Company, And BALBOA INSURANCE COMPANY Defendants.	Adv. Proc. 12-01934 (MG)
In re RESIDENTIAL CAPITAL, LLC, *et al.*, Debtors	Case No. 12-12020 (MG) Chapter 11 Jointly Administered

NOTICE OF DEBTOR'S MOTION FOR DISMISSAL OF ADVERSARY PROCEEDING

PLEASE TAKE NOTICE that on February 1, 2013, Defendant GMAC Mortgage, LLC ("GMAC Mortgage"), a debtor and debtor in possession in the above-captioned chapter 11 cases (collectively with all affiliated debtors and debtors in possession, the "Debtors"), filed the Debtors' Motion for Dismissal of Adversary Proceeding (the "**Motion**") with the United States Bankruptcy Court for the Southern District of New York (the "**Bankruptcy Court**") in the above-captioned adversary proceeding. A hearing to consider the Motion is scheduled for **March 5, 2013 at 10:00 a.m. (prevailing Eastern Time)** before the Honorable Martin Glenn, United States Bankruptcy Judge, in Courtroom 501 at the Bankruptcy Court, One Bowling Green, New York, New York 10004.

PLEASE TAKE FURTHER NOTICE that any objection to the Motion must be in writing, conform to the Federal Rules of Bankruptcy Procedure, the Local Bankruptcy Rules for the Southern District of New York, and the Notice, Case Management, and Administrative Procedures approved by the Bankruptcy Court [Docket No. 141], be filed electronically by registered users of the Bankruptcy Court's electronic case filing system, and be served, so as to be received no later than **February 11, 2013 at 4:00 p.m. (prevailing Eastern Time)**, upon (a) counsel for the Debtors, Morrison & Foerster LLP, 1290 Avenue of the Americas, New York, NY 10104 (Attn: Stefan W. Engelhardt and Norman S. Rosenbaum); (b) the Office of the United States Trustee for the Southern District of New York, 33 Whitehall Street, 21st Floor, New York, NY 10004 (Attn: Tracy Hope Davis, Linda A. Riffkin, and Brian S. Masumoto); (c) the Office of the United States Attorney General, U.S. Department of Justice, 950 Pennsylvania Avenue NW, Washington, DC 20530-0001 (Attn: US Attorney General, Eric H. Holder, Jr.); (d) Office of the New York State Attorney General, The Capitol, Albany, NY 12224-0341 (Attn: Nancy Lord, Esq. and Neal Mann, Esq.); (e) Office of the U.S. Attorney for the Southern District of New

York, One St. Andrews Plaza, New York, NY 10007 (Attn: Joseph N. Cordaro, Esq.); (f) counsel for Ally Financial Inc., Kirkland & Ellis LLP, 153 East 53rd Street, New York, NY 10022 (Attn: Ray Schrock and Richard M. Cieri); (g) counsel to Barclays Bank PLC, as administrative agent for the DIP lenders, Skadden, Arps, Slate, Meagher & Flom LLP, Four Times Square, New York, NY 10036 (Attn: Ken Ziman & Jonathan H. Hofer); (h) counsel for the committee of unsecured creditors, Kramer Levin Naftalis & Frankel LLP, 1177 Avenue of the Americas, New York, NY 10036 (Attn: Kenneth Eckstein & Greg Horowitz); (i) counsel for Ocwen Loan Servicing, LLC, Clifford Chance US LLP, 31 West 52nd Street, New York, NY 10019 (Attn: Jennifer C. DeMarco and Adam Lesman); (j) Internal Revenue Service, P.O. Box 7346, Philadelphia, PA 19101-7346 (if by overnight mail, to 2970 Market Street, Mail Stop 5-Q30.133, Philadelphia, PA 19104-5016); and (k) Securities and Exchange Commission, New York Regional Office, 3 World Financial Center, Suite 400, New York, NY 10281-1022 (Attn: George S. Canellos, Regional Director).

PLEASE TAKE FURTHER NOTICE that if an objection to the Motion is not timely filed and served, the Bankruptcy Court may enter an order granting the relief requested in the Motion without further notice or opportunity to be heard afforded to any party.

Dated: February 1, 2013
New York, New York

/s/ Norman S. Rosenbaum

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Hope T. Cannon (pending *pro hac* admission)
D. Brian O'Dell

Co-Counsel for the Debtor Defendant GMAC Mortgage, LLC

Exhibit A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

CASE NO.

AMERICAN RESIDENTIAL EQUITIES, LLC,

Plaintiff,

v.

GMAC MORTGAGE, LLC, successor by merger to GMAC Mortgage Corporation,

Defendant.
_____/

COMPLAINT

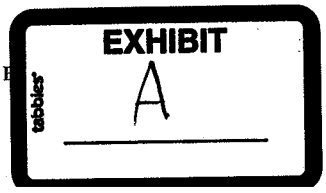
Plaintiff, American Residential Equities, LLC ("ARE"), sues Defendant, GMAC Mortgage, LLC, successor by merger to GMAC Mortgage Corporation ("GMACM"), and states:

Parties, Jurisdiction, and Venue

1. This is an action for damages for breach of contract and for specific performance of a contract.

2. ARE is a Delaware limited liability company with its principal place of business in Miami, Florida.

3. GMACM is a Delaware limited liability company with its principal place of business in Horsham, Pennsylvania.



4. Jurisdiction in this Court is proper pursuant to 28 U.S.C. § 1332 because ARE and GMACM are diverse in citizenship and the amount in controversy exceeds $75,000.00, exclusive of interest, fees, and costs.

5. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(a) because (i) a substantial part of the events or omissions giving rise to the causes of action herein occurred in the Southern District of Florida; and (ii) the impact of GMACM's misconduct occurred in the Southern District of Florida.

General Allegations

6. ARE is in the business of acquiring, holding and ultimately liquidating pools of non-performing residential mortgage loans which are secured by real property (the "Mortgaged Properties").

7. Upon acquiring such mortgage loans, ARE typically retains a company to "service" the loans, *i.e.*, hold the loan files and mortgage loan documents; communicate with the borrowers; collect mortgage payments; administer, carry out and advance payments for the lender's obligations under the mortgage loan documents; ensure that the Mortgaged Properties are inspected, maintained, and insured; ensure that the borrowers' obligations under the mortgage loan documents are carried out; initiate collection activity, including but not limited to, mortgage foreclosure proceedings upon borrowers' defaults; acquire and subsequently sell Mortgaged Properties recovered through foreclosure proceedings ("REO Properties"); and remit payments and report to the lender in connection with the Mortgaged Properties.

ARE Retains GMACM as a Servicer

8. GMACM is in the business of, among other things, servicing mortgage loans.

9. On or about July 29, 2004, ARE and GMACM entered into a Servicing Agreement pursuant to which GMACM agreed to service ARE's mortgage loans (the "Mortgage Loans"). A copy of the Servicing Agreement is attached as Exhibit 1.

10. The Servicing Agreement was subsequently amended by amendments dated January 1, 2006, February 1, 2007, May 31, 2007, April 10, 2008, and February 6, 2009, copies of which are attached as composite Exhibit 2.[1]

GMACM Fails to Properly Service the Mortgage Loans and REO Properties

11. GMACM failed to comply with the terms of the Servicing Agreement and mismanaged the Mortgage Loans and REO Properties in numerous ways, including but not limited to:

(a) maintaining, inspecting and/or reporting on the wrong property securing the Mortgage Loans;

(b) failing to properly secure Mortgaged Properties and/or REO Properties from damage due to the elements and/or vandals;

(c) failing to properly maintain Mortgaged Properties and/or REO Properties, thereby subjecting them to violations of law and governmental fines;

(d) servicing Mortgaged Properties and/or REO Properties that were deemed a total loss as though they were in good condition;

(e) selling REO Properties in violation of the Servicing Agreement;

[1] The Servicing Agreement and Amendments are collectively referred to herein as the "Servicing Agreement."

(f) over-insuring Mortgaged Properties and/or REO Properties;

(g) failing to timely file insurance claims;

(h) failing to exclude ARE's assets from the Homeowner's Affordability and Stability Plan despite ARE's written demand to exclude its assets from the program; and

(i) failing to follow the approval matrix set forth in the Fourth Amendment to the Servicing Agreement.

12. In addition, GMACM continually refused or failed to timely provide required reports and other information requested by ARE on the Mortgage Loans, the Mortgaged Properties and/or the REO Properties.

GMACM Purports to Terminate the Servicing Agreement

13. On April 20, 2009, GMACM sent a letter to ARE purporting to terminate the Servicing Agreement, without cause, effective no later than July 31, 2009 (the "April 2009 Letter"). A true and correct copy of the April 2009 Letter is attached as Exhibit 3.

14. Less than two weeks later, on May 1, 2009, GMACM issued another letter to ARE, this time purporting to extend the termination date up to an additional four months, through November 30, 2009 (the "May 2009 Letter"). A true and correct copy of the May 2009 Letter is attached as Exhibit 4.

15. While the May 2009 Letter offered no explanation for the purported four-month extension, ARE learned that Georgia State Representative Joe Heckstall ("Rep. Heckstall") contacted GMACM regarding a mortgage loan to Rep. Heckstall's brother, Cornelius Heckstall (the "Heckstall Loan"). Rep. Heckstall requested GMACM to enter into a second modification of the Heckstall Loan after Cornelius Heckstall allegedly failed to comply with the first modification.

16. ARE had previously denied GMACM's multiple requests for a second modification of the Heckstall Loan in part because Cornelius Heckstall had failed to comply with the first modification, the terms of which were virtually identical to the proposed second modification.

17. Nevertheless, GMACM pressured ARE to approve the second modification. ARE reluctantly agreed to the second modification only after GMACM agreed to extend the purported termination date of the Servicing Agreement to enable ARE to arrange for a successor servicer.

GMACM Refuses an Audit of its Books and Records

18. In an effort to better understand the scope of GMACM's mismanagement of the Mortgage Loans and REO Properties, and to assess the amounts owed to it under the Servicing Agreement, ARE demanded an audit of GMACM's books and records relating to the Mortgage Loans and REO Properties pursuant to Section 4.06 of the Servicing Agreement.

19. GMACM refused ARE's demand for an audit.

20. GMACM told ARE not only that its books, records, and information on ARE's Mortgage Loans and REO Properties would not be made available, but that ARE's auditors would not be allowed inside GMACM's buildings.

GMACM fails to follow Transfer Instructions

21. On April 1, 2010, pursuant to Section 6.0 of the Servicing Agreement, ARE sent GMACM a letter demanding that it cease servicing the Mortgage Loans and REO Properties immediately. A copy of the April 1, 2010 letter is attached as Exhibit 5.

22. The April 1, 2010 letter also set forth, pursuant to Sections 6.02 and 7.01 of the Servicing Agreement, specific instructions for transferring the servicing files on the Mortgage Loans and REO Properties (the "Servicing Files") to Acqura Loan Services ("ALS"), the successor servicer.

23. Sections 6.02 and 7.01 of the Servicing Agreement, as well as the April 1, 2010 letter, required that GMACM deliver to ALS, as the successor servicer, all Mortgage Loan files and related documents in connection with the Servicing Files.

24. GMACM failed to furnish complete mortgage files to ALS pursuant to the Servicing Agreement and the transfer instructions by ARE in its April 1, 2010 letter, and failed to pay ARE the April, 2010 remittance pursuant to Section 3.01 of the Servicing Agreement.

COUNT I
(Breach of Contract)

25. ARE realleges Paragraphs 1 through 24.

26. This is an action for breach of contract based upon GMACM's failure to comply with the terms of the Servicing Agreement.

27. ARE has performed all of its obligations under the Servicing Agreement.

28. GMACM has breached the Servicing Agreement by:

(a) maintaining, inspecting and/or reporting on the wrong property securing the Mortgage Loans;

(b) failing to properly secure Mortgaged Properties and/or REO Properties from damage due to the elements and/or vandals;

(c) failing to properly maintain Mortgaged Properties and/or REO Properties, thereby subjecting them to violations of law and governmental fines;

(d) servicing Mortgaged Properties and/or REO Properties that were deemed a total loss as though they were in good condition;

(e) selling REO Properties in violation of the Servicing Agreement;

(f) over-insuring Mortgaged Properties and/or REO Properties;

(g) failing to timely file insurance claims;

(h) failing to exclude ARE's assets from the Homeowner's Affordability and Stability Plan despite ARE's written demand to exclude its assets from the program;

(i) failing to follow the approval matrix set forth in the Fourth Amendment to the Servicing Agreement;

(j) failing to timely provide ARE with required reports and properly requested information relating to the Mortgage Loans and REO Properties;

(k) failing to comply with ARE's demand for an audit pursuant to Section 4.06 of the Servicing Agreement;

(l) failing to furnish complete mortgage files to ALS pursuant to the Servicing Agreement and the transfer instructions by ARE in its April 1, 2010 letter, adversely affecting ALS's ability to service the Mortgage Loans and REO Properties; and

(m) failing to pay ARE the April, 2010 remittance pursuant to Section 3.01 of the Servicing Agreement.

29. As a direct and proximate result of GMACM's breaches of the Servicing Agreement, ARE has been damaged.

WHEREFORE, Plaintiff, ARE Residential Equities, LLC, requests the Court to enter judgment in its favor and against Defendant, GMAC Mortgage, LLC, successor by merger to GMAC Mortgage Corporation for: (i) compensatory damages; (ii) prejudgment and post-judgment interest; (iii) attorney's fees and costs; and (iv) for such other relief as it deems just and proper.

COUNT II
(Specific Performance)

30. ARE realleges Paragraphs 1 through 24.

31. This is an action for specific performance to compel GMACM to comply with Section 4.06 of the Servicing Agreement, which expressly provides ARE the right to audit GMACM's books and records relating to the Servicing Files and Mortgage Loans:

> The Owner shall have the right to examine and audit any and all of the books, records, or other information of the Servicer, whether held by the Servicer or by another on its behalf, with respect to or concerning this Agreement or the Mortgage Loans, during normal business hours or as otherwise acceptable to the Servicer, upon reasonable advance notice; provided that the Owner shall not so audit more than once per quarter.

32. GMACM has exclusive possession, custody, and control of the books and records relating to the Servicing Files and the Mortgage Loans.

33. GMACM has prohibited ARE from accessing GMACM's books and records and has refused ARE's demand for an audit under the terms of the Servicing Agreement.

34. GMACM's actions in refusing to allow ARE access to its books and records demonstrate that GMACM will not voluntarily participate in an audit absent Court intervention.

35. ARE has fully performed its obligations under the Servicing Agreement to be entitled to the audit, and remains ready, willing, and able to perform the audit pursuant to the Servicing Agreement.

WHEREFORE, Plaintiff, American Residential Equities, LLC, requests the Court to enter judgment in its favor and to compel Defendant, GMAC Mortgage, LLC, successor by merger to GMAC Mortgage Corporation, to allow American Residential Equities, LLC to audit the books and records relating to the Servicing Files and Mortgage Loans, and to award it attorneys' fees and costs and such further relief as the Court deems just and proper.

DATED: June 11, 2010.

/s/ Alan Rosenthal
Alan Rosenthal
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Exhibit B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 1:10-CV-21943-ASG

AMERICAN RESIDENTIAL EQUITIES, LLC,

Plaintiff,

vs.

GMAC MORTGAGE, LLC, successor by merger to GMAC Mortgage Corporation,

Defendant.
_____/

DEFENDANT GMAC MORTGAGE, LLC'S ANSWER AND COUNTERCLAIM

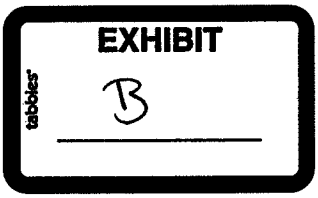
COMES NOW Defendant, GMAC Mortgage, LLC ("Defendant" or "GMACM"), by and through its undersigned counsel, and hereby submits its Answer to Plaintiff American Residential Equities, LLC's ("Plaintiff") Complaint as follows:

FIRST DEFENSE

For its response to the specifically enumerated paragraphs of Plaintiff's Complaint, Defendant states as follows:

Parties, Jurisdiction and Venue

1. Defendant denies it breached any contract and further denies that Plaintiff is entitled to any damages, specific performance, or other relief whatsoever and demands strict proof thereof.



2. Defendant lacks sufficient information or knowledge to admit or deny the allegations in Paragraph 2 of the Complaint and therefore denies them and demands strict proof thereof.

3. Defendant admits the allegations in Paragraph 3 of the Complaint.

4. Defendant lacks sufficient information or knowledge to admit or deny the allegations in Paragraph 4 of the Complaint and therefore denies them and demands strict proof thereof.

5. Defendant lacks sufficient information or knowledge to admit or deny the allegations in Paragraph 5 of the Complaint and therefore denies them and demands strict proof thereof.

General Allegations

6. Defendant states that the allegations in Paragraph 6 of the Complaint are not directed at Defendant and therefore no response is required. To the extent a response is required, Defendant lacks sufficient information or knowledge to admit or deny the allegations in Paragraph 6 of the Complaint and therefore denies them and demands strict proof thereof

7. Defendant states that the allegations in Paragraph 7 of the Complaint are not directed at Defendant and therefore no response is required. To the extent a response is required, Defendant lacks sufficient information or knowledge to admit or deny the allegations in Paragraph 7 of the Complaint and therefore denies them and demands strict proof thereof.

8. Defendant admits the allegations in Paragraph 8 of the Complaint.

9. Defendant states that the Servicing Agreement attached as Exhibit 1 to Plaintiff's Complaint is a written document that speaks for itself.

10. Defendant states that the documents attached as Exhibit 2 to Plaintiff's Complaint are written documents that speak for themselves.

11. Defendant denies the allegations in Paragraph 11 of the Complaint, including subparts (a) through (i), and demands strict proof thereof.

12. Defendant denies the allegations in Paragraph 12 of the Complaint and demands strict proof thereof.

13. Defendant states that the Letter attached as Exhibit 3 to Plaintiff's Complaint is a written document that speaks for itself.

14. Defendant states that the Letter attached as Exhibit 4 to Plaintiff's Complaint is a written document that speaks for itself.

15. Defendant admits that it was contacted by the borrower, Cornelius Heckstall, regarding the possibility of a loan modification. Defendant states that the May 2009 Letter attached as Exhibit 4 to Plaintiff's Complaint is a written document that speaks for itself. Defendant denies the remaining allegations in Paragraph 15 of the Complaint and demands strict proof thereof.

16. Defendant denies the allegations in Paragraph 16 of the Complaint and demands strict proof thereof.

17. Defendant admits that Plaintiff approved Mr. Heckstall's request for a loan modification. Defendant states that the May 2009 Letter attached as Exhibit 4 to Plaintiff's Complaint is a written document that speaks for itself. Defendant denies the remaining allegations in Paragraph 17 of the Complaint and demands strict proof thereof.

18. Defendant admits that Plaintiff improperly requested an audit of Defendant's books and records. Defendant lacks sufficient information or knowledge to admit or deny the

remaining allegations in Paragraph 18 of the Complaint and therefore denies them and demands strict proof thereof

19. Defendant admits that it lawfully refused Plaintiff's improper audit request.

20. Defendant admits that it lawfully refused Plaintiff's improper audit request. Defendant denies the remaining allegations in Paragraph 20 of the Complaint and demands strict proof thereof.

21. Defendant states that the Letter attached as Exhibit 5 to Plaintiff's Complaint is a written document that speaks for itself.

22. Defendant states that the Letter attached as Exhibit 5 to Plaintiff's Complaint is a written document that speaks for itself.

23. Defendant states that the Servicing Agreement attached as Exhibit 1 to Plaintiff's Complaint and the Letter attached as Exhibit 5 to Plaintiff's Complaint are written documents that speaks for themselves.

24. Defendant denies the allegations in Paragraph 24 of the Complaint and demands strict proof thereof.

COUNT I
(Breach of Contract)

25. Defendant adopts its responses to Paragraphs 1 through 24 of the Complaint as if fully set forth herein.

26. Defendant denies the allegations in Paragraph 26 of the Complaint and demands strict proof thereof.

27. Defendant denies the allegations in Paragraph 27 of the Complaint and demands strict proof thereof.

28. Defendant denies the allegations in Paragraph 28 of the Complaint, including subparts (a) through (m), and demands strict proof thereof.

29. Defendant denies the allegations in Paragraph 29 of the Complaint and demands strict proof thereof.

In response to the "WHEREFORE" paragraph following Paragraph 29 of the Complaint, Defendant denies Plaintiff is entitled to any compensatory damages, interest, fees, costs, or other relief whatsoever and demands strict proof thereof.

COUNT II
(Specific Performance)

30. Defendant adopts its responses to Paragraphs 1 through 29 of the Complaint as if fully set forth herein.

31. Defendant denies that Plaintiff is entitled to any specific performance or other relief whatsoever and demands strict proof thereof.

32. Defendant denies the allegations in Paragraph 32 of the Complaint and demands strict proof thereof.

33. Defendant admits that it lawfully refused Plaintiff's improper audit request.

34. Defendant denies the allegations in Paragraph 34 of the Complaint and demands strict proof thereof.

35. Defendant denies the allegations in Paragraph 35 of the Complaint and demands strict proof thereof.

In response to the "WHEREFORE" paragraph following Paragraph 35 of the Complaint, Defendant denies Plaintiff is entitled to any specific performance, judgment, fees, costs, or other relief whatsoever and demands strict proof thereof.

Defendant denies each and every allegation not specifically admitted herein.

SECOND DEFENSE

Defendant avers the affirmative defenses of statute of frauds, estoppel, waiver, release, justification, ratification, acquiescence, mistake, consent, notice and laches.

THIRD DEFENSE

Defendant denies that Plaintiff has been injured or damaged by Defendant and demands strict proof thereof.

FOURTH DEFENSE

Plaintiff's claims are, in whole or in part, preempted by applicable law.

FIFTH DEFENSE

Plaintiff's own negligence proximately caused any alleged injuries and damages.

SIXTH DEFENSE

Plaintiff's claims are barred, in whole or in part, pursuant to the applicable statutes of limitations.

SEVENTH DEFENSE

Plaintiff has not complied with conditions precedent or legal requirements necessary to maintain this action.

EIGHTH DEFENSE

Defendant denies the material allegations of the Complaint and demands strict proof thereof.

NINTH DEFENSE

Defendant pleads the general issue.

TENTH DEFENSE

No action by Defendant was the actual or proximate cause of injury to Plaintiff.

ELEVENTH DEFENSE

Plaintiff's claims are barred by the terms and conditions of the contracts that are the subject to this lawsuit.

TWELFTH DEFENSE

If an arbitration provision exists in any contract governing the claims made the basis of the Complaint, Defendant contends that the claims set forth against it should be referred to binding arbitration.

THIRTEENTH DEFENSE

Plaintiff has failed to mitigate its alleged damages.

FOURTEENTH DEFENSE

Defendant avers that its actions and conduct with respect to each contract or transaction was justified.

FIFTEENTH DEFENSE

Some or all of the claims asserted are barred by Plaintiff's lack of due diligence.

SIXTEENTH DEFENSE

Defendant asserts that there were legitimate, good faith business reasons for the acts alleged.

SEVENTEENTH DEFENSE

Defendant avers that it acted in accordance with industry standards at all material times.

EIGHTEENTH DEFENSE

Some or all of the Plaintiff's claims are barred by one or more of the doctrines of parole evidence, merger and integration.

NINETEENTH DEFENSE

Plaintiff's claims are barred in whole or in part by Plaintiff's own actions or inactions.

TWENTIETH DEFENSE

Some or all of the claims asserted are barred by the written terms of the contracts themselves.

TWENTY-FIRST DEFENSE

Defendant has complied with all relevant federal and state requirements regarding the transactions that are the subject of this lawsuit.

TWENTY-SECOND DEFENSE

Plaintiff's claims are barred pursuant to the doctrine of unclean hands.

TWENTY-THIRD DEFENSE

The Complaint fails to state a claim upon which relief may be granted.

TWENTY-FOURTH DEFENSE

Plaintiff's claims are barred because its claims are lacking in equity.

TWENTY-FIFTH DEFENSE

Plaintiff's claims are barred because Plaintiff has an adequate remedy at law.

TWENTY-SIXTH DEFENSE

Some or all of the claims asserted are barred by Plaintiff's contributory negligence, assumption of the risk, or both.

TWENTY-SEVENTH DEFENSE

Defendant denies any liability for the acts of other entities under a theory of *respondeat superior*, vicarious liability, agency, or otherwise.

TWENTY-EIGHTH DEFENSE

Plaintiff's claims are barred because it has not performed its parts of the agreements and contracts at issue in this case.

TWENTY-NINTH DEFENSE

Defendant has, at all times relevant hereto, complied with all applicable laws, regulations, and standards, and the claims asserted by Plaintiff are, therefore, preempted under state and/or federal laws.

THIRTIETH DEFENSE

Plaintiff is not entitled to a trial by jury pursuant to the express terms of the contracts at issue in this case.

THIRTY-FIRST DEFENSE

Plaintiff's claim for damages in whole or in part is barred pursuant to the express terms of the contracts at issue in this case.

THIRTY-SECOND DEFENSE

At the time this Answer is filed, Defendant has not obtained discovery from Plaintiff. Accordingly, Defendant reserves its rights to amend its Answer to assert such supplemental or additional defenses as are appropriate upon the completion of discovery.

COUNTERCLAIM FOR INJUNCTIVE AND OTHER RELIEF

COMES NOW Defendant/Counterclaim Plaintiff GMAC Mortgage, LLC ("GMACM"), by and through its undersigned counsel, and hereby submits its Counterclaim against Plaintiff/Counterclaim Defendant American Residential Equities, LLC ("ARE") as follows:

FACTUAL BACKGROUND

1. On or about July 29, 2004, GMACM and ARE entered into a Servicing Agreement whereby GMACM, in exchange for certain representations and warranties by ARE, agreed to service and administer various mortgage loans owned by ARE. (Exh. 1 to Doc. 4).

2. Said Servicing Agreement was subsequently amended on five different occasions. (Exh. 2 to Doc. 4).

3. The Servicing Agreement and the subsequent amendments are collectively referred to herein as "the Servicing Agreement" or "the Agreement."

4. In sum, the Agreement provides that GMACM shall service and administer all mortgage loans subject to the Agreement by, among other things, (a) collecting principal, interest, and escrow payments, (b) ensuring that taxes on the subject properties are current and paid for, (c) ensuring that insurance on the subject properties is provided and paid for, (d) initiating foreclosure proceedings when necessary, and (e) maintaining, preserving, marketing, and selling Real Estate Owned (REO) property. (*See generally* Exhs. 1 & 2 to Doc. 4).

5. In exchange, ARE agreed to pay GMACM a servicing fee and reimburse GMACM for advances made and expenses incurred in connection with the servicing of the subject mortgage loans. (*See generally* Exhs. 1 & 2 to Doc. 4).

6. Particularly, in regard to ARE's obligations to reimburse GMACM for advances made and expenses incurred in connection with the servicing of the mortgage loans, Section 3.03

of the Servicing Agreement provides, in relevant part, that "[GMACM] shall be entitled to first priority reimbursement . . . for Servicing Advances from recoveries from the related Mortgagor or from all Liquidation Proceeds and other payments or recoveries (including Insurance Proceeds and Condemnation Proceeds) with respect to the related Mortgage Loan." (Exh. 1 to Doc. 4, § 3.03).

7. The Agreement defines "Servicing Advances" as "[a]ll customary, reasonable and necessary 'out of pocket' costs and expenses (including reasonable attorneys' fees and disbursements) incurred in the performance by [GMACM] of its servicing obligations, including, but not limited to, the cost of (a) the preservation, restoration and protection of the Mortgaged Property, (b) any fees relating to any enforcement or judicial proceedings, excluding foreclosures, (c) foreclosure actions per FHLMC attorney fees and costs guidelines, (d) the management and liquidation of the Mortgaged Property if the Mortgaged Property is acquired in satisfaction of the Mortgage, (e) taxes, assessments, water rates, sewer rents and other charges which are or may become a lien upon the Mortgaged Property and (f) compliance with the obligations pursuant to the provisions of this Agreement." (Exh. 1 to Doc. 4, § 1.01).

8. In this same vein, the Agreement further provides that ARE shall reimburse GMACM for, among other things, "(i) any out-of-pocket expense [GMACM] incurs with the prior approval of [ARE] in connection with its servicing and administrative obligations set forth in this Agreement to the extent such expense is not ordinary to the servicing function . . . (ii) expenses that [ARE] has expressly agreed to pay or be liable for hereunder; and (iii) expenses incurred in connection with the performance by [GMACM] at the request of [ARE] of any activity that is not specifically required to be performed by [GMACM] under this Agreement and

is not reasonably ancillary to any specific requirements of [ARE] under this Agreement." (Exh. 1 to Doc. 4, § 4.08(b)).

9. And, in the event of a termination of the Agreement and a transfer of the loans to a successor servicer, the Agreement provides that "[GMACM] shall be entitled to be reimbursed for all unreimbursed Servicing Advances and any other advances made by the Servicer pursuant to this Agreement with respect to any Mortgage Loan on the related Transfer Date, but only if the servicer after the related Transfer Date is not the Servicer or an Affiliate. In addition, the Owner shall cause the Servicer to be reimbursed for any accrued and unpaid Servicing Fees and for any trailing expenses representing Servicing Advances for which invoices are received by the Servicer after the Transfer Date . . . ." (Exh. 1 to Doc. 4, § 6.02(b)).

10. The Agreement also includes a comprehensive confidentiality provision. Said provision provides that ARE shall not disclose or disseminate, among other things, any "information relating in any way to the customer and/or prospective client" and that any such breach of this provision shall "result in immediate and irreparable harm and that any remedies at law . . . [would] be inadequate." (Exh. 1 to Doc. 4, § 13.05).

11. Upon execution of the Servicing Agreement, GMACM began to diligently service and administer each of the mortgage loans subject to the Agreement.

12. In so doing, and pursuant to the express terms of the parties' Servicing Agreement, GMACM advanced funds and incurred expenses in its efforts to properly service the mortgage loans for ARE.

13. GMACM advanced funds and incurred expenses for, among other things, property inspections, property taxes, insurance, Broker Price Opinions, securing and un-securing

properties, snow services, foreclosure fees and services, lawn cuts and yard maintenance, utilities, and litigation expenses.

14. Throughout the course of the parties' relationship, ARE continually neglected its obligations under the Servicing Agreement.

15. Due in large part to the souring of the parties' relationship and ARE's failure to honor the terms of the Agreement, on April 20, 2009, GMACM notified ARE of its intent to terminate the parties' Servicing Agreement "effective the earlier of (i) July 31, 2009 or (ii) such other date as ARE notifies GMACM that a successor servicer has assumed GMACM's responsibilities and obligations." A copy of the April 20, 2009 Termination Notice is attached hereto as Exhibit "A".

16. ARE subsequently requested that GMACM extend the date in which the termination of the Servicing Agreement became effective.

17. Accordingly, on May 1, 2009, GMACM sent another termination notice to ARE, providing that "GMACM intends to terminate the Servicing Agreement effective the earlier of (i) November 30, 2009 or (ii) such other date as ARE notifies GMACM that a successor servicer has assumed GMACM's responsibilities and obligations." A copy of the May 1, 2009 Termination Notice is attached hereto as Exhibit "B".

18. Despite the fact that GMACM provided ARE with sufficient notice of the termination of the parties' Servicing Agreement and ARE's need to locate a successor servicer, ARE failed to timely locate a successor servicer.

19. Indeed, it was not until April 2010 until ARE provided GMACM with notice that the loans subject to the Agreement would be transferred to Acqura Loan Services.

20. Pursuant to ARE's instructions, the loans encompassed by the Agreement were subsequently transferred to Acqura Loan Services on May 3, 2010.

21. Both before and after the above-referenced transfer, GMACM demanded that ARE reimburse GMACM for all expenses and advancements made in connection with the servicing of the subject mortgage loans.

22. However, to date, ARE has completely and utterly failed to reimburse GMACM for the outstanding expenses and advancements made in connection with the servicing of the subject mortgage loans.

23. Furthermore, subsequent to GMACM's transfer of the mortgage loans encompassed by the parties' Servicing Agreement, ARE has made and published numerous false statements regarding GMACM.

24. Said false statements include, but are not limited to, statements that GMACM systematically mismanaged loans and properties in ARE's portfolio, failed to complete the simplest activities required of mortgage servicing companies, disregarded ARE's instructions, ignored ARE's requests for reports, and jeopardized ARE's assets.

25. Not only did ARE make and publish numerous false statements, but it also made and published confidential and proprietary customer information in violation of the parties' Servicing Agreement.

26. Specifically, in a recent press release sent out in conjunction with the filing of the Complaint in the above-styled action, ARE alleged that "GMAC pressured the company to offer a second modification to Cornelius Heckstall, despite the fact that he had failed to make payments according to an earlier loan modification with identical terms." A copy of the Press Release is attached hereto as Exhibit "C". In said press release, Jeffrey Kirsch, president and

CEO of ARE, went on to state that "[w]hile GMAC repeatedly neglected the assets in our portfolio, they appeared to bend over backwards for Rep. Heckstall's brother[;] [w]e bowed to the pressure because it gave us more time to find a competent replacement servicing company." (Exh. C).

COUNT I
(Breach of Contract)

27. GMACM adopts and incorporates by reference all allegations made in Paragraphs 1-23 of this Counterclaim as if fully stated herein.

28. The parties' Servicing Agreement is/was a valid and binding contract by and between GMACM and ARE.

29. At all times material herein, GMACM complied with its obligations under the terms of the Servicing Agreement.

30. ARE has materially breached the Agreement by failing and/or refusing to reimburse GMACM for expenses incurred and advances made in connection with the servicing of the mortgage loans subject to the Agreement.

31. Said advances and expenses include, but are not limited to, funds provided for property inspections, property taxes, insurance, Broker Price Opinions, securing and un-securing properties, snow services, foreclosure fees and services, lawn cuts and yard maintenance, utilities, and litigation expenses.

32. ARE has breached the parties' Servicing Agreement by failing to timely provide GMACM with a successor servicer after termination of the parties' relationship.

33. ARE has further breached the Agreement by continually neglecting its obligations under the Servicing Agreement.

34. ARE has also breached the Agreement by disclosing and disseminating confidential customer information regarding Cornelius Heckstall's mortgage loan – a customer and mortgage loan subject to the parties' Servicing Agreement. In a recent press release, ARE alleged that "GMAC pressured the company to offer a second modification to Cornelius Heckstall, despite the fact that he had failed to make payments according to an earlier loan modification with identical terms." (Exh. C). In said press release, Jeffrey Kirsch, president and CEO of ARE, went on to state that "[w]hile GMAC repeatedly neglected the assets in our portfolio, they appeared to bend over backwards for Rep. Heckstall's brother[;] [w]e bowed to the pressure because it gave us more time to find a competent replacement servicing company." (Exh. C).

35. Indeed, ARE's inclusion of allegations in its Complaint regarding the details of Cornelius Heckstall's loan modification is in direct violation of the parties' Servicing Agreement.

36. As a direct and proximate result of ARE's breaches of the Servicing Agreement, GMACM has been damaged.

COUNT II
(Unjust Enrichment)

37. GMACM adopts and incorporates by reference all allegations made in Paragraphs 1-23 of this Counterclaim as if fully stated herein.

38. GMACM has conferred a benefit upon ARE by, among other things, servicing numerous ARE-owned mortgage loans and advancing funds and incurring expenses, on ARE's behalf, in connection with the servicing of said mortgage loans.

39. ARE has knowledge of this benefit and has accepted and retained said benefit.

40. ARE has wrongfully failed to pay for this benefit, and inequity would result if ARE is not required to pay for the benefit received.

COUNT III
(Breach of the Implied Duty of Good Faith and Fair Dealing)

41. GMACM adopts and incorporates by reference all allegations made in Paragraphs 1-23 of this Counterclaim as if fully stated herein.

42. The parties' Servicing Agreement is/was a valid and binding contract by and between GMACM and ARE.

43. ARE has breached the implied duty of good faith and fair dealing in connection with the Agreement by, among other things, failing and/or refusing to reimburse GMACM for expenses incurred and advances made in connection with the servicing of the mortgage loans subject to the Agreement.

44. Said advances and expenses include, but are not limited to, funds provided for property inspections, property taxes, insurance, Broker Price Opinions, securing and un-securing properties, snow services, foreclosure fees and services, lawn cuts and yard maintenance, utilities, and litigation expenses.

45. ARE has breached the implied duty of good faith and fair dealing by failing to timely provide GMACM with a successor servicer after termination of the parties' relationship.

46. ARE has further breached the implied duty of good faith and fair dealing by continually neglecting its obligations under the Servicing Agreement.

47. ARE has also breached the implied duty of good faith and fair dealing by disclosing and disseminating confidential customer information regarding Cornelius Heckstall's mortgage loan – a customer and loan subject to the parties' Agreement. Specifically, in a recent press release, ARE alleged that "GMAC pressured the company to offer a second modification to

Cornelius Heckstall, despite the fact that he had failed to make payments according to an earlier loan modification with identical terms." (Exh. C). In said press release, Jeffrey Kirsch, president and CEO of ARE, went on to state that "[w]hile GMAC repeatedly neglected the assets in our portfolio, they appeared to bend over backwards for Rep. Heckstall's brother[;] [w]e bowed to the pressure because it gave us more time to find a competent replacement servicing company." (Exh. C).

48. Furthermore, ARE's inclusion of allegations in its Complaint regarding the details of Cornelius Heckstall's loan modification constitutes a breach of the implied duty of good faith and fair dealing.

49. As a result of said breaches, GMACM has been damaged.

COUNT IV
(Defamation)

50. GMACM adopts and incorporates by reference all allegations made in Paragraphs 1-23 of this Counterclaim as if fully stated herein.

51. Subsequent to GMACM's transfer of the mortgage loans encompassed by the parties' Servicing Agreement, ARE has made and published to third parties numerous false statements regarding GMACM.

52. Said false statements include, but are not limited to, statements that GMACM systematically mismanaged loans and properties in ARE's portfolio, failed to complete the simplest activities required of mortgage servicing companies, disregarded ARE's instructions, ignored ARE's requests for reports, and jeopardized ARE's assets.

53. As a result of ARE's conduct, GMACM has been damaged.

COUNT V
(Conversion)

54. GMACM adopts and incorporates by reference all allegations made in Paragraphs 1-23 of this Counterclaim as if fully stated herein.

55. ARE has unlawfully and wrongfully exercised dominion and control over GMACM's funds by, among other things, failing to reimburse GMACM for expenses incurred and advances made in connection with the servicing of the mortgage loans subject to the Agreement.

56. Said advances and expenses include, but are not limited to, funds provided for property inspections, property taxes, insurance, Broker Price Opinions, securing and un-securing properties, snow services, foreclosure fees and services, lawn cuts and yard maintenance, utilities, and litigation expenses.

57. GMACM has the exclusive right to the above-referenced funds, and ARE has deprived GMACM of the use and possession of said funds.

58. As a result of ARE's conduct, GMACM has been damaged.

COUNT VI
(Application for Injunctive Relief)

59. GMACM adopts and incorporates by reference all allegations made in Paragraphs 1-23 of this Counterclaim as if fully stated herein.

60. Subsequent to GMACM's transfer of the mortgage loans encompassed by the parties' Servicing Agreement, ARE has been disclosing and disseminating confidential customer information regarding Cornelius Heckstall's mortgage loan – a customer and loan subject to the parties' Agreement. Specifically, in a recent press release, ARE alleged that "GMAC pressured the company to offer a second modification to Cornelius Heckstall, despite the fact that he had

failed to make payments according to an earlier loan modification with identical terms." (Exh. C). In said press release, Jeffrey Kirsch, president and CEO of ARE, went on to state that "[w]hile GMAC repeatedly neglected the assets in our portfolio, they appeared to bend over backwards for Rep. Heckstall's brother[;] [w]e bowed to the pressure because it gave us more time to find a competent replacement servicing company." (Exh. C).

61. Should ARE not be enjoined from disseminating and disclosing such confidential customer information, GMACM will be immediately and irreparably harmed and will be exposed to liability from third parties.

62. Furthermore, there is a substantial likelihood GMACM will succeed on the merits, and GMACM has no adequate remedy at law.

63. Indeed, pursuant to the parties' Servicing Agreement, ARE specifically contracted that, in the event it disclosed any such information, said conduct would "result in immediate and irreparable harm and that any remedies at law . . . [would] be inadequate." (Exh. 1 to Doc. 4, § 13.05).

64. ARE further agreed that, in the event of such conduct, GMACM shall have "the right to obtain injunctive relief to restrain such disclosure or use." (Exh. 1 to Doc. 4, § 13.05).

65. In light of the foregoing, GMACM requests that this Court issue both a preliminary and permanent injunction, enjoining ARE, and its agents, officers, directors, employees, servants, attorneys, and/or anyone acting in concert or participation therewith, from disclosing or disseminating to any third party any information relating in any way to customers and/or loans covered under the parties' Servicing Agreement, including but not limited to, information pertaining to Cornelius Heckstall's loan modification.

66. GMACM further requests that this Court compel ARE to issue an appropriate retraction of all of its statements to third parties and media outlets pertaining to customers and/or loans covered under the parties' Servicing Agreement, including, but not limited to, its statements pertaining to Cornelius Heckstall's loan modification.

WHEREFORE, Defendant/Counterclaim Plaintiff GMACM demands

(a) judgment in its favor and against Plaintiff/Counterclaim Defendant ARE for compensatory damages, pre-judgment and post-judgment interest, attorneys' fees and costs;

(b) both a preliminary and permanent injunction, enjoining ARE, and its agents, officers, directors, employees, servants, attorneys, and/or anyone acting in concert or participation therewith, from disclosing or disseminating to any third party any information relating in any way to customers and/or loans covered under the parties' Servicing Agreement, including but not limited to, information pertaining to Cornelius Heckstall's loan modification;

(c) an order compelling ARE to issue an appropriate retraction of all of its statements to third parties and media outlets pertaining to customers and/or loans covered under the parties' Servicing Agreement, including, but not limited to, its statements pertaining to Cornelius Heckstall's loan modification; and

(d) any such other and further relief as this Court deems proper

Dated: July 8, 2010

/s/ D. Brian O'Dell
D. Brian O'Dell (Bar No. 0659665)
Ann T. Taylor (Bar No. 0037228)
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ataylor@babc.com

ATTORNEYS FOR DEFENDANT/COUNTERCLAIM PLAINTIFF
GMAC MORTGAGE, LLC

CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of July, 2010, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Alan Rosenthal
Natalie J. Carlos
Carlton Fields, P.A.
Suite 4200
Miami Tower
100 S.E. Second Street
Miami, FL 33131

/s/ D. Brian O'Dell
OF COUNSEL

Exhibit C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 1:10-CV-21943-GOLD/McALILEY

AMERICAN RESIDENTIAL
EQUITIES, LLC,

Plaintiff,

v.

GMAC MORTGAGE, LLC,

Defendant.

_____/

ORDER DENYING PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS ON COUNT II OF THE COMPLAINT [ECF No. 36]

THIS CAUSE comes before the Court on Plaintiff's Motion for Judgment on the Pleadings (the "Motion"). [ECF No. 36]. Plaintiff American Residential Equities, LLC ("ARE") requests that this Court enter judgment on Count II of the Complaint for specific performance compelling Defendant GMAC Mortgage, LLC ("GMACM") to submit to an audit of its books and records. GMACM has filed its Response in Opposition to ARE's Motion, and ARE filed a Reply in support of its Motion. [ECF Nos. 43, 46]. For the reasons stated below, I deny ARE's Motion for Judgment on the Pleadings on Count II of the Complaint.

I. BACKGROUND

The following facts are undisputed. Plaintiff ARE acquires, holds, and liquidates residential mortgage loans which are secured by real property. [ECF No. 1 ¶ 6]. Defendant GMACM is in the business of servicing mortgage loans. [*Id.* ¶ 7]. On July 29, 2004, ARE and GMACM entered into a Servicing

EXHIBIT
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Agreement, whereby GMACM, in exchange for certain representations and warranties made by ARE, agreed to service and administer various mortgage loans owned by ARE. [ECF No. 4-1; ECF No. 43, p.1].

Among other things, the Servicing Agreement provided for the following:

> **Section 4.06 Right to Examine Servicer Records**
>
> The Owner shall have the right to examine and audit any and all of the books, records, or other information of the Servicer, whether held by the Servicer or by another on its behalf, with respect to or concerning this Agreement or the Mortgage Loans, during normal business hours or as otherwise acceptable to the Servicer, upon reasonable advance notice; provided that the Owner shall not so audit more than once per quarter.
>
> **Section 6.01 Termination**
>
> . . . .
>
> (c) Servicer may terminate, at its sole option, the Agreement with respect to some or all of the Mortgage Loans or REO Property, without cause. Such termination shall not become effective until the earlier of: (i) 90 days after the date on which notice of termination is provided by the Servicer in writing and delivered to the Owner by registered mail, or (ii) successor shall have assumed the Servicer's responsibilities and obligations hereunder in the manner provided in Section 6.02.
>
> **Section 6.02 Transfer Procedures**
>
> In the event the Servicer is replaced pursuant to the terms of this Agreement, the Servicer agrees to cooperate reasonably with the Owner and with any party designated as the successor servicer or subservicer in transferring the servicing to such successor servicer. In addition, the Servicer shall be responsible for notifying the related mortgagors of any transfer of servicing in accordance with the requirements of RESPA and the Cranston Gonzalez National Affordable Housing Act of 1990. On or before the date upon which servicing is transferred from the Servicer to any successor servicer (the "Transfer Date"), the Servicer shall prepare, execute and deliver to the successor servicer any and all documents and other instruments, place in such successor's possession all Mortgage Loan Documents in the possession of the Servicer which are necessary or appropriate to effect the purposes of such notice of termination, including but not limited to the transfer and endorsement or assignment of the related Mortgage Loans and related documents. The Servicer shall reasonably cooperate with the Owner and such successor in effecting the termination of the Service's responsibilities and rights hereunder.

. . . .

> On the related Transfer Date, the Servicer shall comply with all of the provisions of this Agreement to effect a complete transfer of the servicing with respect to the related Mortgage Loans. Except as otherwise provided for in this Agreement, on the related Transfer Date for each related Mortgage Loan, this Agreement . . . shall terminate with respect to such Mortgage Loan.
>
> [ECF No. 4-1].

On April 20, 2009, GMACM transmitted a letter to ARE evidencing its intent to terminate the Parties' Servicing Agreement, without cause, effective no later than July 31, 2009. [ECF No. 1 ¶ 13]. On May 1, 2009, GMACM issued a second letter, which superseded previous correspondence, alerting ARE that it would extend the termination date an additional four months, through November 30, 2009. [*Id.* ¶ 14]. This letter expressly stated that the termination date would become "effective the earlier of (i) November 30, 2009 or (ii) such other date as ARE notifie[d] GMACM that a successor servicer ha[d] assumed GMACM's responsibilities and obligations." [ECF No. 7, p. 24]. GMACM also demanded reimbursement for expenses and advancements made in connection with the Servicing Agreement. [ECF No. 36, ¶ 9]

ARE did not appoint a successor servicer before November 30, 2009, and GMACM continued to service ARE's loans after that date.[1] ARE requested that GMACM permit ARE to perform an audit of its books and records in accordance with Section 4.06 of the Servicing Agreement. [ECF No. 1 ¶¶ 18–20].[2] GMACM

[1] ARE remains silent as to why it failed to appoint a successor servicer on or before November 30, 2009, and GMACM offers no explanation why it continued to service the mortgage loans after that date.

[2] As discussed in more detail below, it is unclear when and how many times ARE made such a request.

refused to allow ARE to perform any such audits. [*Id.*]. On April 1, 2010, ARE sent GMACM a letter demanding that it cease servicing ARE's mortgage loans and REO properties; enclosed with the letter were specific instructions for transferring the servicing files to Acqura Loan Services ("ALS"), the successor servicer. [*Id.* ¶ 22].

On June 11, 2010, ARE filed this action against GMACM. In its Complaint, ARE alleged that GMACM violated the terms of the Servicing Agreement by failing to properly service the relevant loans and properties; purporting to terminate the Servicing Agreement; refusing an audit of its books and records; and failing to follow certain instructions to transfer loan servicing to another company. [*Id.* ¶¶ 11–24]. As such, Plaintiff filed a two-count complaint alleging (1) breach of contract, and (2) specific performance. [*Id.* ¶¶ 25–35]. GMACM filed an Answer and Counterclaims for breach of contract, unjust enrichment, breach of implied duty of good faith and fair dealing, defamation, conversion, and injunctive relief. [ECF No. 49].[3] On October 15, 2010, ARE filed the instant Motion for Judgment on the Pleadings on Count II of its Complaint. [ECF No. 36].

II. LEGAL STANDARD AND GOVERNING LAW

Under the Federal Rules of Civil Procedure, "[a]fter the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings." FED. R. CIV. P. 12(c). Such relief is appropriate when there are no material facts in dispute and the moving party is entitled to judgment as a

[3] GMACM filed an Amended Answer after the Court granted ARE's Motion to Strike certain Affirmative Defenses listed in the original Answer. [ECF Nos. 7, 29, 44].

matter of law. *See Cannon v. City of West Palm Beach*, 250 F.3d 1299, 1301 (11th Cir. 2001); 5C CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1367, at 206, 208, 216 (3d ed. 2004) ("As numerous judicial opinions make clear, a Rule 12(c) motion is designed to provide a means of disposing cases when the material facts are not in dispute between the parties . . . . The motion for a judgment on the pleadings only has utility when all material allegations of fact are admitted or not controverted in the pleadings and only questions of law remain to be decided by the district court. . . . [I]f the pleadings do not resolve all of the factual issues in the case, a trial on the merits would be more appropriate than an attempt at resolution of the case on a Rule 12(c) motion."). As with a motion under Rule 12(b)(6), a court that rules on a motion under Rule 12(c) must accept the nonmovant's allegations as true and view all facts in the light most favorable to the nonmoving party. *See Mergens v. Dreyfoos*, 166 F.3d 1114, 1117 (11th Cir. 1999); *Latecoere Int'l, Inc. v. U.S. Dept. of the Navy*, 19 F.3d 1342, 1357 (11th Cir. 1994); 2 MOORE'S FEDERAL PRACTICE § 12.38, at 12-137 (3d ed. 2010); 5C WRIGHT & MILLER, *supra* § 1368, at 230 ("It is axiomatic . . . that for purposes of the court's consideration of the Rule 12(c) motion, all of the well pleaded factual allegations in the adversary's pleadings are assumed to be true and all contravening assertions in the movant's pleadings are taken to be false.").

Federal courts are generally reluctant to grant a motion for judgment on the pleadings where a case presents ambiguous factual circumstances that necessitate proper factual findings by a jury. *See Greenberg v. Gen. Mills Fun*

Grp., Inc., 478 F.2d 254, 256 (5th Cir. 1973); 5C WRIGHT & MILLER, *supra* § 1367, at 259 ("[Unlike a 12(b) motion, a motion for judgment on the pleadings] is directed towards a determination of the substantive merits of the controversy; thus, federal courts are unwilling to grant a judgment under Rule 12(c) unless it is clear that the merits of the controversy can be fairly and fully decided in this summary manner."); *id.* § 1367, at 223 ("A number of cases decided by various federal courts around the country indicat[e] that it is necessary for the movant to show a clear right to a judgment on the pleadings . . . .").

III. DISCUSSION

ARE argues that its Count II for specific performance is appropriate for summary disposition at this stage of the proceedings because its Motion presents purely legal questions of contract interpretation. [ECF No. 36, p. 2]. According to ARE, Sections 4.06 and 6.02 of the Servicing Agreement provide it with an unambiguous right to audit GMACM through the "Transfer Date," which occurred in April 2010. [ECF No. 36, pp. 1–2, 6; ECF No. 46, p. 1]. ARE maintains that this audit right was not extinguished when GMACM sent ARE termination notices because the Agreement and all of its provisions, including the audit provision, remained binding until the "Transfer Date." In particular, Section 6.02 of the Servicing Agreement provides that "[e]xcept as otherwise provided for in this Agreement, on the related Transfer Date for each related Mortgage Loan, this Agreement . . . shall terminate with respect to such Mortgage Loan." [ECF No. 4-1]. ARE argues that the only "reasonable" or "common sense"

provided *no dates whatsoever* as to when it requested an audit.[6] It is not the Court's responsibility to hypothesize or assume such critical facts and enter judgment on the pleadings based on such guesswork. To the contrary, judgment on the pleadings is only proper *where the movant demonstrates a "clear" right to such judgment. Greenberg*, 478 F.2d at 256–57 (reversing district court for granting motion for judgment on the pleadings in contractual dispute where right to relief as set forth in the pleadings was not clear); 5C WRIGHT & MILLER, *supra* § 1367, at 223 ("A number of cases decided by various federal courts around the country indicat[e] that it is necessary for the movant to show a *clear right to a judgment on the pleadings* . . . .") (emphasis added); *id.* § 1367, at 259 ("[Unlike a 12(b) motion, a motion for judgment on the pleadings] is directed towards a determination of the substantive merits of the controversy; thus, federal courts are unwilling to grant a judgment under Rule 12(c) *unless it is clear that the merits of the controversy can be fairly and fully decided in this summary manner.*") (emphasis added).

Unlike ARE, GMACM does cite a specific date when it asserts that ARE requested an audit of its books and records. According to GMACM, ARE transmitted a letter on Friday, March 5, 2010, demanding an audit pursuant to Sections 4.06 and 7.01 of the Servicing Agreement. [ECF No. 1 ¶ 18; ECF No.

[6] In its Reply, ARE seems to argue that the language of its Complaint permits the inference that it requested an audit before August 1, 2009. In particular, ARE cites paragraphs 18–20 of GMACM's Answer and argues that "GMACM admitted in its pleadings that it told ARE *before the effective Transfer Date* [that it would refuse an audit]." [ECF No. 46, p. 5]. Paragraphs 18–20 of GMACM's Answer refer to paragraphs 18–20 of the Complaint, but those paragraphs make no reference to the timing of an audit request.

36 ¶ 10].[7] The proposed audit was scheduled to take place the following Tuesday, March 9, 2010 and would "cover virtually all areas of GMACM's servicing processes: Collections, Loss Mitigation, Payment Posting, Foreclosure, Bankruptcy, REO, Property, Valuation, and Property Valuation." [ECF No. 43, ¶ 10]. According to GMACM, it declined ARE's audit request on March 8, 2010, arguing that it had already exercised its right to terminate the Servicing Agreement pursuant to Section 6.01(c) when it sent its termination letters on April 20 and May 1, 2009. [*Id.* ¶ 11].[8]

In support of this factual assertion, GMACM submitted a copy of the audit request letter ARE supposedly sent to it on March 5, 2010. [ECF No. 43-1]. GMACM argues that the letter provides issues of material fact precluding the Court from granting ARE's Motion because ARE failed to provide "reasonably advance notice" of the audit and because the scope of the proposed audit was beyond anything contemplated by Section 4.02 of the Servicing Agreement. [ECF No. 43, pp. 13–15]. I do not reach the issues presented by the substance of the letter because ARE disputes the existence and accuracy of the letter, calling it "unauthenticated," "hearsay," and "irrelevant." [ECF No. 46, p. 5].[9] I

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[7] In its Amended Answer, GMACM also provides that "GMACM refused Plaintiff's [audit] demand because GMACM had unilaterally terminated the Servicing Agreement, pursuant to the express terms of the Agreement, *months prior to Plaintiff's audit demand.*" [ECF No. 49, p. 7 (emphasis added)].

[8] GMACM's letter stated that, as provided for in Section 6.01(c) of the Servicing Agreement, the Servicing Agreement terminated on or about August 1, 2009, or 90 days after May 1, 2009, which was the date on which GMACM sent notice of termination.

[9] Plaintiff also argues that the letter should be "stricken." A court may order stricken from any pleading "any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." FED. R. CIV. P. 12(f). Courts recognize that motions to strike seek drastic relief and, therefore, disfavor them. *Augustus v. Bd. of Pub. Instruction*, 306 F.2d 862, 868 (5th Cir. 1962); *Holguin v. Celebrity Cruises, Inc.*, Case Nos. 10-20215, 10-20545, 10-20546, 2010 WL 1837808, at *1 (S.D. Fla. May 4, 2010) (refusing to strike alleged duties in plaintiffs' negligence count where

agree, however, with GMACM that this issue provides additional grounds for the denial of ARE's Motion because ARE's disagreement with GMACM about the content of the letter and the date and circumstances of the proposed audit provide a dispute of material fact. *Ortega v. Christian*, 85 F.3d 1521, 1524 (11th Cir. 1996) ("Judgment on the pleadings is proper when no issues of material fact exist, and the movant is entitled to judgment as a matter of law.").

Binding case law has long held that a district court in this circuit should not grant a motion for judgment on the pleadings where the movant requests specific performance unless the court is fully informed about the factual record, and no disputes of material fact exist.

> Specific performance is not grantable as a matter of right, but only as a matter of equity, and in the exercise of a sound and informed discretion *upon a knowledge of the whole facts.* Wherever, therefore, the truth of the matters bruited may lie, whether there is a real fire beneath, and accounting for, the smoke of the accusations is not a matter which ought to, or may be, determined on pleadings and without a trial of the facts.
>
> *Eristavi-Tchitcherine v. Lasser*, 164 F.2d 144, 145 (5th Cir. 1947) (reversing district court that had granted judgment on the pleadings for specific performance) (emphasis added).[10]

In short, disputes and factual uncertainty regarding how many times ARE requested an audit, when ARE requested an audit, and whether and to what extent the Parties were still operating under the terms of their agreement when

---

count alleged facts supporting duty of care). ARE does not provide citations to case law or any other authority explaining why I should invoke such "drastic" relief in this case. [ECF No. 31, p. 6]. Therefore, I decline to strike the letter.

[10] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions handed down by the former Fifth Circuit before October 1, 1981. District courts in other circuits have also reached similar conclusions. *See, e.g., Liu v. Mund*, — F. Supp. 2d —, Case No. 09-cv-500, 2010 WL 3743944, at *8 (W.D. Wisc. Sept. 21, 2010) (denying plaintiff's motion for judgment on the pleadings requesting specific performance where plaintiff "did very little to show she is entitled to an order of specific performance" because "the decision to order specific performance is a question of equity and there are reasons to wait before imposing such a burden").

ARE requested an audit require that I deny ARE's Motion for Judgment on the Pleadings.

ARE's memorandum of law in support of its Motion provides additional grounds for denying the Motion. In particular, ARE failed to provide any substantive state law support for the relief it requests. It is well-established that actions for specific performance are governed by state law, not federal law. *See Am. Dredging Co. v. Miller*, 510 U.S. 443, 452 (1994) (noting that state law governs the specific performance of arbitration agreements in admiralty actions); *JPMorgan Chase Bank, N.A. v. Winget*, 510 F.3d 577, 584 (6th Cir. 2007) (analyzing elements of specific performance under Michigan law where party in contractual dispute had moved for judgment on the pleadings requesting specific performance); *Mich. S. R.R. Co. v. Branch & St. Joseph Counties Rail Users Ass'n., Inc.*, 287 F.3d 568, 576 (6th Cir. 2002) ("[W]hat [Plaintiff] seeks in essence is the specific performance of the 1991 Agreement. This is purely a state law breach of contract action."); *Watson v. McCabe*, 527 F.2d 286, 288 (6th Cir. 1975) (holding that a case for the specific performance of an oral sales contract concerned "clearly non-federal matters").

ARE's Motion exclusively cites federal case law and provides no examination of relevant state law.[11] Nor does ARE provide any preliminary

[11] Furthermore, the cases cited by ARE in its Motion and Reply either do not properly support the Motion or are factually distinguishable. *See Orkin Exterminating Co., Inc. v. FTC*, 849 F.2d 1354, 1359, 1368 (11th Cir. 1988) (affirming Federal Trade Commission's cease and desist order where parties filed cross-motions for summary decisions pursuant to Rule 3.24 of the Commission's Rules of Practice for Adjudicative Proceedings); *JPMorgan Chase Bank, N.A. v. Winget*, 510 F.3d 577, 584–85 (6th Cir. 2007) (granting motion for judgment on the pleadings in contractual dispute regarding specific performance where the facts underlying the motion were "generally undisputed" and "not refuted" by any party); *Grife v. Allstate Floridian Ins. Co.*, 493 F. Supp. 2d 1249, 1250 (S.D. Fla. 2007) ("The parties concede that no factual dispute exists. Therefore, this

governing law analysis as to which state law would even apply to its request for specific performance. GMACM cited Florida law in its Response to ARE's Motion, but ARE failed to address these arguments in its Reply and instead relied entirely on one non-binding federal case from the Sixth Circuit. [ECF No. 43, pp. 11–12; ECF No. 46].[12]

For all of the reasons described above and viewing the facts in this case in the light most favorable to GMACM as I must under binding case law, I hold that ARE has not established a right to judgment on the pleadings with regard to Count II of its Complaint. Accordingly, it is hereby **ORDERED AND ADJUDGED** that

1. Plaintiff's Motion for Judgment on the Pleadings [ECF No. 36] is **DENIED**.
2. Defendant shall designate its expert witnesses within 30 days of this order in accordance with the Order issued January 26, 2011. [ECF No. 53].

DONE AND ORDERED, in chambers, in Miami, Florida, this 7 day of March, 2011.

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entire case turns on the legal issue of contract interpretation."); *Connell Leasing Co. v. JF Equities Acquisition, Inc.*, 731 F. Supp. 1539, 1542 (S.D. Fla. 1989) (granting motion for summary judgment where no material questions of fact exist regarding the parties obligations under the relevant contract).

[12] Neither Party references the governing law clause in the Servicing Agreement at issue in this case or explains why it should or should not govern their dispute concerning specific performance. That clause provides that all aspects of the Agreement shall be governed by the substantive laws of the state of Pennsylvania. [ECF NO. 4-2 § 13.07].

THE HONORABLE ALAN S. GOLD
UNITED STATES DISTRICT JUDGE

cc:
U.S. Magistrate Judge Chris M. McAliley
All counsel of record

Exhibit D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

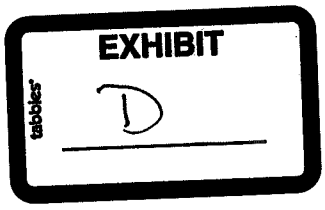
AMERICAN RESIDENTIAL EQUITIES, LLC,	)	
Plaintiff,	)	
v.	)	**Civil Action No.: 10-CV-21943/ GOLD/GOODMAN**
GMAC MORTGAGE, LLC, successor by merger to GMAC Mortgage Corporation,	)	
Defendant.	)	

NOTICE OF BANKRUPTCY
AND EFFECT OF AUTOMATIC STAY

Defendant and debtor, GMAC Mortgage, LLC (the "Debtor"), by and through its undersigned counsel, in accordance and consistent with section 362(a) of the United States Bankruptcy Code, 11 U.S.C. §§ 101 *et seq.* (the "Bankruptcy Code"), respectfully submits this Notice of Bankruptcy and Effect of Automatic Stay, and states as follows:

1. On May 14, 2012 (the "Petition Date"), the Debtor and certain of its affiliates filed voluntary petitions (the "Petitions") under Chapter 11 of Title 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York, One Bowling Green, New York, NY 10004-1408 (the "Bankruptcy Code"). The bankruptcy cases of the Debtor and its affiliates are jointly administered under the Chapter 11 Case for the affiliated debtor Residential Capital, LLC, which case is indexed as case number 12-12020.

2. The "automatic stay" is codified in section 362 of the Bankruptcy Code. Section 362(a), *inter alia*, operates as an automatic stay of: (i) the commencement or continuation of a



"judicial, administrative, or other action or proceeding" against the Debtor (11 U.S.C. § 362(a)(1)); (ii) acts to "obtain possession of property" of the Debtor's estate (11 U.S.C. § 362(a)(3)); and (iii) acts to "collect, assess, or recover a claim" against the Debtor arising prior to the Petition Date (11 U.S.C. § 362(a)(6)).

3. The above-captioned action constitutes a "judicial, administrative, or other action or proceeding" against the Debtor, an act to obtain possession of the Debtor's property, and/or an act to collect or recover on a claim against the Debtor.

4. Accordingly, the above-captioned lawsuit is stayed pursuant to 11 U.S.C. § 362(a).

Any action taken by the Plaintiff or any other party against the Debtor without obtaining relief from the automatic stay from the Bankruptcy Court may be void *ab initio* and may result in finding of contempt by the Bankruptcy Court against Plaintiff or such other party. The Debtor reserves and retains all of its rights to seek relief in Bankruptcy Court from any action, judgment, order, or ruling entered in violation of the automatic stay.

Dated this 17th day of May, 2012.

/s/ Hope T. Cannon

Hope T. Cannon *(pro hac vice)*
D. Brian O'Dell (Bar No. 0659665)
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ATTORNEYS FOR DEFENDANT/COUNTERCLAIM PLAINTIFF GMAC MORTGAGE, LLC

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 17th day of May, 2012, a true and correct copy of the foregoing document was served, via the Courts CM/ECF system, upon the following:

David A. Freedman
Coffey Burlington, PL
Office in the Grove, Penthouse
2699 South Bayshore Drive
Miami, Florida 33133
dfreedman@coffeyburlington.com

s/ Hope T. Cannon
OF COUNSEL

Exhibit E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

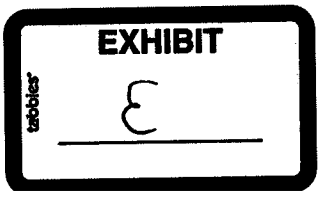
AMERICAN RESIDENTIAL EQUITIES, LLC,	)	
Plaintiff,	)	
v.	)	**Civil Action No.: 10-CV-21943/ GOLD/GOODMAN**
GMAC MORTGAGE, LLC, successor by merger to GMAC Mortgage Corporation,	)	
Defendant.	)	

AMENDED NOTICE OF BANKRUPTCY FILING AND SUPPLEMENTAL SERVICING ORDER

Defendant and debtor GMAC Mortgage, LLC, by and through its undersigned counsel, in accordance and consistent with section 362(a) of the United States Bankruptcy Code, 11 U.S.C. §§ 101 et seq. (the "Bankruptcy Code"), respectfully submits this Am*ended Notice of Bankruptcy Filing and Supplemental Servicing Order*, and states as follows:

1. On May 14, 2012 (the "Petition Date"), Residential Capital, LLC and certain of its direct and indirect subsidiaries (collectively, the "Debtors"), including GMAC Mortgage, LLC, filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code (the "Bankruptcy Filing") in the United States Bankruptcy Court for the Southern District of New York, One Bowling Green, New York, NY 10004-1408 (the "Bankruptcy Court"). The Debtors' Chapter 11 cases are being jointly administered, indexed at case number 12-12020 (MG).

2. As a result of the Bankruptcy Filing, on the Petition Date, the protections of the automatic stay codified in section 362(a) of the Bankruptcy Code arose with regard to the Debtors. Section 362(a), among other things, operates as an automatic stay of: (i) "the



commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding" against the Chapter 11 Debtors (11 U.S.C. § 362(a)(1)); (ii) acts to "obtain possession of property" of the Debtors' Chapter 11 estate (11 U.S.C. § 362(a)(3)); and (iii) acts to "collect, assess, or recover a claim" against the Debtor arising prior to the Petition Date (11 U.S.C. § 362(a)(6)).

3. On May 17, 2012, Debtor filed a *Notice of Bankruptcy and Effect of Automatic Stay* with this Court.

4. In a May 18, 2012 Order, this Court administratively closed the case pending resolution of the Debtor's bankruptcy proceedings.

5. On July 13, 2012, the Bankruptcy Court entered a final supplemental order granting, among other things, the Debtors' motion for limited relief from the automatic stay to permit non-Debtor parties in foreclosure and eviction proceedings, borrower bankruptcy cases and title disputes to continue to assert and prosecute certain defenses, claims and counter-claims (the "Final Supplemental Order"). Paragraphs 14, 15, 16 and 17 of the Final Supplemental Order identify the categories of defenses, claims and counter-claims for which the automatic stay has been modified (the "Permitted Claims"). A copy of the Final Supplemental Order is attached hereto as **Exhibit A**.

6. With regard to this matter, Plaintiff's claims remain stayed in their entirety as they do not fall within the relief from stay granted by the Final Supplemental Order. Plaintiff requests only monetary relief against Debtor, and as such, the claims remain subject to the automatic stay.

7. Pursuant to paragraph 23 of the Final Supplemental Order, any dispute regarding the extent, application and/or effect of the automatic stay under the Final Supplemental Order, must be heard and determined in the United States Bankruptcy Court for the Southern District of

New York, jointly administered under Case No. 12-12020, in accordance with the Case Management Order entered in the Debtors' case [Docket No. 141] and such other and further orders as may be entered by the United States Bankruptcy Court for the Southern District of New York.[1]

Dated this __ day of September, 2012.

Hope T. Cannon *(pro hac vice)*
D. Brian O'Dell (Bar No. 0659665)
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ATTORNEYS FOR DEFENDANT/COUNTERCLAIM PLAINTIFF GMAC MORTGAGE, LLC

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the ___ day of September, 2012, a true and correct copy of the foregoing document was served, via the Courts CM/ECF system, upon the following:

David A. Freedman
Coffey Burlington, PL
Office in the Grove, Penthouse
2699 South Bayshore Drive
Miami, Florida 33133
dfreedman@coffeyburlington.com

OF COUNSEL

[1] A copy of the Case Management Order may be obtained at no charge at http:/www.kccllc.net/rescap.

Exhibit F

CLOSED,JG,MEDIATION,REF_DISCOV,STAYED

U.S. District Court
Southern District of Florida (Miami)
CIVIL DOCKET FOR CASE #: 1:10-cv-21943-ASG

American Residential Equities, LLC v. GMAC Mortgage, LLC
Assigned to: Senior Judge Alan S. Gold
Referred to: Magistrate Judge Jonathan Goodman
Cause: 28:1332 Diversity-Breach of Contract

Date Filed: 06/11/2010
Date Terminated: 05/18/2012
Jury Demand: None
Nature of Suit: 190 Contract: Other
Jurisdiction: Diversity

Plaintiff

American Residential Equities, LLC represented by **Alice Evelyn Meyer**
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LEAD ATTORNEY
ATTORNEY TO BE NOTICED

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Email: arosenthal@carltonfields.com
TERMINATED: 06/20/2011
ATTORNEY TO BE NOTICED

Natalie Jessica Carlos
Carlton Fields P.A.

EXHIBIT
tabbies
F

Miami Tower
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Miami, FL 33131
305-530-0050
Fax: 305-530-0055
Email: ncarlos@carltonfields.com
TERMINATED: 06/20/2011
ATTORNEY TO BE NOTICED

V.

Defendant

GMAC Mortgage, LLC
successor by merger to GMAC Mortgage Corporation

represented by **Hope T. Cannon**
Bradley Arant Boult Cummings, LLP
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ATTORNEY TO BE NOTICED

Claimant

Carlton Fields, P.A.

Counter Claimant

GMAC Mortgage, LLC
successor by merger to GMAC Mortgage Corporation

represented by **Hope T. Cannon**
(See above for address)
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Ann T. Taylor
(See above for address)
ATTORNEY TO BE NOTICED

Christian Watson Hancock
(See above for address)
ATTORNEY TO BE NOTICED

David Brian O'Dell
(See above for address)
ATTORNEY TO BE NOTICED

V.

Counter Defendant

American Residential Equities, LLC

represented by **Natalie Jessica Carlos**
(See above for address)
TERMINATED: 06/20/2011
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Alan Rosenthal
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TERMINATED: 06/20/2011
ATTORNEY TO BE NOTICED

David Allan Freedman
(See above for address)
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
06/11/2010	1	COMPLAINT against GMAC Mortgage, LLC. Filing fee $ 350.00 receipt number 113C-2935914, filed by American Residential Equities, LLC. (Attachments: # 1 Civil Cover Sheet, # 2 Summon(s))(Carlos, Natalie) (Entered: 06/11/2010)
06/11/2010	2	Judge Assignment RE: Electronic Complaint to Judge Alan S. Gold (asl) (Entered: 06/11/2010)
06/11/2010	3	Summons Issued as to GMAC Mortgage, LLC. (asl) (Entered: 06/11/2010)
06/11/2010	4	NOTICE by American Residential Equities, LLC re 1 Complaint *of Filing Exhibits to Complaint* (Attachments: # 1 Exhibit 1 (part 1 of 3), # 2 Exhibit 1 (part 2 of3), # 3 Exhibit 1 (part 3 of 3), # 4 Exhibit 2, # 5 Exhibit 3, # 6 Exhibit 4, # 7 Exhibit 5)(Carlos, Natalie) (Entered: 06/11/2010)
06/30/2010	5	SUMMONS (Affidavit) Returned Executed by American Residential Equities, LLC. GMAC Mortgage, LLC served on 6/17/2010, answer due 7/8/2010. (Carlos, Natalie) (Entered: 06/30/2010)
06/30/2010	6	ORDER Requiring Compliance with Local Rule 16.1 and Notice of Court Practice. Signed by Judge Alan S. Gold on 6/30/2010. (lbc) (Entered: 06/30/2010)
07/08/2010	7	*Defendant GMAC Mortgage, LLC* ANSWER to Complaint, COUNTERCLAIM against American Residential Equities, LLC by GMAC Mortgage, LLC. (Attachments: # 1 Exhibit)(O'Dell, David) (Entered: 07/08/2010)
07/08/2010	8	Corporate Disclosure Statement by GMAC Mortgage, LLC identifying Corporate Parent Ally Financial Inc f/k/a GMAC Inc. for GMAC Mortgage, LLC, GMAC Mortgage, LLC (O'Dell, David) (Entered: 07/08/2010)
07/28/2010	9	Unopposed MOTION for Extension of Time to File Answer RE: Complaints re 7 Answer to Complaint, Counterclaim by American Residential Equities, LLC. (Carlos, Natalie) (Entered: 07/28/2010)
08/02/2010	10	(PAPERLESS) ORDER granting UNOPPOSED 9 Motion for Extension of Time to Respond to Answer and Counterclaim by American Residential Equities, LLC response due 8/27/2010. Plaintiff shall have up to and including August 27, 2010 to respond to Defendant's Answer and Counterclaim. Signed by Judge Alan S. Gold on 8/2/2010. (jvz) (Entered: 08/02/2010)
08/02/2010	11	SCHEDULING REPORT - **Rule 16.1** by American Residential Equities, LLC (Attachments: # 1 Joint Proposed Scheduling Order)(Carlos, Natalie) (Entered: 08/02/2010)
08/02/2010	12	CONSENT to Jurisdiction by US Magistrate Judge by American Residential Equities, LLC, GMAC Mortgage, LLC (Carlos, Natalie) (Entered: 08/02/2010)
08/05/2010	13	MOTION for Preliminary Injunction, MOTION for Hearing *and*

		Incorporated Memorandum of Law in Support by GMAC Mortgage, LLC. (Attachments: # 1 Exhibit A - Articles)(Hancock, Christian) (Entered: 08/05/2010)
08/06/2010	14	ORDER Setting Status Conference: Status Conference set for 8/9/2010 02:00 PM before Magistrate Judge Chris M. McAliley regarding Defendant's Motion for Preliminary Injunction [DE 13]. Signed by Magistrate Judge Chris M. McAliley on 8/6/2010. (tmi) (Entered: 08/06/2010)
08/06/2010	15	ORDER REFERRING MOTION: 13 MOTION for Preliminary Injunction MOTION for Hearing *and Incorporated Memorandum of Law in Support* filed by GMAC Mortgage, LLC Motions referred to Chris M. McAliley. Signed by Judge Alan S. Gold on 8/6/10. (tp) (Entered: 08/06/2010)
08/09/2010	16	Minute Entry for proceedings held before Magistrate Judge Chris M. McAliley: Status Conference held on 8/9/2010. (Digital 13:58:44.) (Tape #10H-68-322.) (nf) (Entered: 08/09/2010)
08/09/2010	17	ORDER following status conference. Joint confidentiality order due 8/19/2010. See Order for details. Signed by Magistrate Judge Chris M. McAliley on 8/9/2010. (tmi) (Entered: 08/09/2010)
08/19/2010	18	NOTICE by American Residential Equities, LLC re 17 Order, Set Motion and R&R Deadlines/Hearings *of Filing Proposed Confidentiality Agreement, Objections to Defendant's Proposed Confidentiality Agreement, and Request for Briefing Schedule and Hearing* (Attachments: # 1 Exhibit, # 2 Exhibit) (Carlos, Natalie) (Entered: 08/19/2010)
08/19/2010	19	MOTION for Entry of Confidentiality Agreement by GMAC Mortgage, LLC. (Attachments: # 1 Exhibit A)(O'Dell, David) Modified on 8/23/2010 (ls). [Second Portion Re-docketed at DE #21] (Entered: 08/19/2010)
08/19/2010	21	RESPONSE/OPPOSITION to 18 Notice (Other), Notice (Other)/Objections and Request for Hearing and Briefing Schedule by GMAC Mortgage, LLC. (ls)(See Image at DE # 19) (Entered: 08/23/2010)
08/23/2010	20	Clerks Notice to Filer re 19 MOTION For entry of Confidentiality Agreement and Opposition to Plaintiff's Objections and Request for Hearing and Briefing Schedule. **Two or More Document Events Filed as One**; ERROR - Only one event was selected by the Filer but more than one event was applicable to the document filed. The docket entry was corrected by the Clerk. It is not necessary to refile this document but in the future, the Filer must select all applicable events.**Document Not Linked**; ERROR - The filed document was not linked to the related docket entry. The correction was made by the Clerk. It is not necessary to refile this document. (ls) (Entered: 08/23/2010)
08/24/2010	22	ORDER Setting Status Conference: Status Conference set for 8/27/2010 11:00 AM before Magistrate Judge Chris M. McAliley. Signed by Magistrate Judge Chris M. McAliley on 8/24/2010. (tmi) (Entered: 08/24/2010)
08/26/2010	23	SCHEDULING ORDER: (Pretrial Conference set for 9/16/2011 10:00 AM in Miami Division before Judge Alan S. Gold., Jury Trial set for 10/24/2011 before Judge Alan S. Gold., Calendar Call set for 10/19/2011 01:30 PM

		before Judge Alan S. Gold., Discovery due by 5/2/2011., Expert Discovery due by 5/2/2011., In Limine Motions due by 8/16/2011., Dispositive Motions due by 6/1/2011., Pretrial Stipulation due by 8/16/2011.), ORDER REFERRING CASE to Magistrate Judge Chris M. McAliley for Discovery Proceedings, ORDER REFERRING CASE to Mediation. (Mediation Deadline 4/18/2011.), Notice of Court Practice. Signed by Judge Alan S. Gold on 8/26/2010. (lbc) (Entered: 08/26/2010)
08/27/2010	24	Minute Entry for proceedings held before Magistrate Judge Chris M. McAliley: Status Conference held on 8/27/2010. (Digital 11:01:17.) (Tape #10H-70-1480.) (nf) (Entered: 08/27/2010)
08/27/2010	25	MOTION for Extension of Time to File Answer RE: Complaints re 7 Answer to Complaint, Counterclaim *and Affirmative Defenses* by American Residential Equities, LLC. (Carlos, Natalie) (Entered: 08/27/2010)
08/29/2010	26	(PAPERLESS) ORDER granting 25 Motion for Extension of Time to Answer American Residential Equities, LLC response due 9/1/2010. Plaintiff shall have up to and including September 1, 2010 to file a response to Defendant's Answer and Counterclaim. Signed by Judge Alan S. Gold on 08/29/10. (jvz) (Entered: 08/29/2010)
08/31/2010	27	Joint MOTION for Extension of Time to Complete Discovery *by American Residential Equities, LLC and* by GMAC Mortgage, LLC. (O'Dell, David) (Entered: 08/31/2010)
09/01/2010	28	ORDER granting 27 Motion for Extension of Time to Complete Discovery. Signed by Magistrate Judge Chris M. McAliley on 8/31/2010. (tmi) (Entered: 09/01/2010)
09/01/2010	29	Plaintiff's MOTION to Strike 7 Answer to Complaint, Counterclaim *re: Affirmative Defenses* by American Residential Equities, LLC. Responses due by 9/20/2010 (Carlos, Natalie) (Entered: 09/01/2010)
09/01/2010	30	*Plaintiff's* ANSWER to Counterclaim *and Affirmative Defenses* by American Residential Equities, LLC.(Carlos, Natalie) (Entered: 09/01/2010)
09/07/2010	31	ORDER Granting Defendant's Motion for Entry of Confidentiality Agreement and Denying as Moot Defendant's Motion for Preliminary Injunction. Signed by Magistrate Judge Chris M. McAliley on 9/7/2010. (rms) (Entered: 09/07/2010)
09/07/2010	32	Confidentiality ORDER. Signed by Magistrate Judge Chris M. McAliley on 9/7/2010. (rms) (Entered: 09/07/2010)
09/08/2010	33	ORDER setting oral argument on 29 Plaintiff's MOTION to Strike 7 Answer to Complaint, Counterclaim *re: Affirmative Defenses*. Motion Hearing set for 11/1/2010 04:30 PM in Miami Division before Judge Alan S. Gold.. Signed by Judge Alan S. Gold on 9/7/2010. (lbc) (Entered: 09/08/2010)
09/13/2010	34	NOTICE of Mediator Selection: David Lichter selected.(Carlos, Natalie) (Entered: 09/13/2010)
09/17/2010	35	RESPONSE to Motion re 29 Plaintiff's MOTION to Strike 7 Answer to

		Complaint, Counterclaim *re: Affirmative Defenses* filed by GMAC Mortgage, LLC. Replies due by 9/27/2010. (Taylor, Ann) Modified on 9/21/2010 (ls). (Entered: 09/17/2010)
10/15/2010	36	MOTION for Judgment on the Pleadings on Count II of the Complaint by American Residential Equities, LLC. (Carlos, Natalie) Modified text on 10/18/2010 (asl). (Entered: 10/15/2010)
10/21/2010	37	ORDER Re-Setting Oral Argument and Adding Motion to Be Heard re 36 MOTION for Judgment on the Pleadings, 29 Plaintiff's MOTION to Strike 7 Answer to Complaint, Counterclaim *re: Affirmative Defenses* : Motion Hearing set for 12/28/2010 05:15 PM in Miami Division before Judge Alan S. Gold. Signed by Judge Alan S. Gold on 10/21/2010. (asl) (Entered: 10/21/2010)
10/21/2010	38	CORRECTED ORDER Regarding Oral Argument Dates; re 29 Plaintiff's MOTION to Strike 7 Answer to Complaint, Counterclaim *re: Affirmative Defenses*, 36 MOTION for Judgment on the Pleadings : Motion Hearing re 29 Motion set for 11/19/2010 02:30 PM before Judge Alan S. Gold. Motion Hearing re 36 Motion set for 12/28/2010 05:15 PM in Miami Division before Judge Alan S. Gold.. Signed by Judge Alan S. Gold on 10/21/2010. (asl) (Entered: 10/22/2010)
10/28/2010	39	MOTION for Extension of Time to File Response/Reply as to 36 MOTION for Judgment on the Pleadings by GMAC Mortgage, LLC. (Attachments: # 1 Exhibit A - Proposed Order)(O'Dell, David) (Entered: 10/28/2010)
10/29/2010	40	ORDER Granting 39 Motion for Extension of Time to File Response/Reply re 39 MOTION for Extension of Time to File Response/Reply as to 36 MOTION for Judgment on the Pleadings Responses due by 11/12/2010. Signed by Judge Alan S. Gold on 10/29/2010. (rgs) (Entered: 11/01/2010)
11/04/2010	41	ORDER TO SHOW CAUSE why the Court should not dismiss the case for lack of subject matter jurisdiction. Show Cause Response due by 11/12/2010 at 12:00pm.. Signed by Judge Alan S. Gold on 11/4/2010. (ag) (Entered: 11/04/2010)
11/12/2010	42	Joint RESPONSE TO ORDER TO SHOW CAUSE by American Residential Equities, LLC, GMAC Mortgage, LLC. (Carlos, Natalie) Modified text on 11/15/2010 (asl). (Entered: 11/12/2010)
11/12/2010	43	RESPONSE in Opposition re 36 MOTION for Judgment on the Pleadings *on Count II of the Complaint* filed by GMAC Mortgage, LLC. (Attachments: # 1 Exhibit A & B)(O'Dell, David) (Entered: 11/12/2010)
11/17/2010	44	ORDER granting in part and denying in part 29 Motion to Strike Defendant's Affirmative Defenses. Signed by Judge Alan S. Gold on 11/17/2010. (jh) (Entered: 11/17/2010)
11/22/2010	45	Unopposed MOTION for Extension of Time to File Response/Reply *in Support of Motion for Judgment on the Pleadings* by American Residential Equities, LLC. (Carlos, Natalie) (Entered: 11/22/2010)
11/23/2010	47	ORDER Granting 45 Motion for Extension of Time to File Response/Reply

		Replies due by 11/24/2010.. Signed by Judge Alan S. Gold on 11/23/2010. (rgs) (Entered: 11/29/2010)
11/24/2010	46	REPLY in Support of 36 MOTION for Judgment on the Pleadings *on Count II of the Complaint* filed by American Residential Equities, LLC. (Carlos, Natalie) Modified text on 11/29/2010 (asl). (Entered: 11/24/2010)
12/02/2010	48	PAPERLESS ORDER Cancelling Oral argument previously scheduled for December 28, 2010. Signed by Judge Alan S. Gold on 12/2/2010. (lms) (Entered: 12/02/2010)
12/03/2010	49	*Defendant GMAC Mortgage, LLC's Amended* ANSWER to Complaint *and Counterclaim* by GMAC Mortgage, LLC. (Attachments: # 1 Exhibit A, B and C)(O'Dell, David) (Entered: 12/03/2010)
01/13/2011	50	Unopposed MOTION for Extension of Time to File *Expert Witness Designations, Expert Witness Reports and to Designate a Mediator* by American Residential Equities, LLC. (Carlos, Natalie) (Entered: 01/13/2011)
01/18/2011	51	ORDER Granting 50 Motion for Extension of Time to File. Signed by Judge Alan S. Gold on 1/18/2011. (rgs) (Entered: 01/18/2011)
01/25/2011	52	Unopposed MOTION for Extension of Time to File *Expert Witnesses Designation and Submit Rebuttal Expert Reports* by GMAC Mortgage, LLC. (Attachments: # 1 Exhibit A-Proposed Order Granting Motion for Extension of Time)(O'Dell, David) (Entered: 01/25/2011)
01/26/2011	53	ORDER Granting 52 MOTION for Extension of Time to File Expert Witnesses Designation and Submit Rebuttal Expert Reports . Signed by Judge Alan S. Gold on 01/26/2011. (rgs) Modified on 1/26/2011 (rgs). (Entered: 01/26/2011)
03/04/2011	54	Notification of Ninety Days Expiring by American Residential Equities, LLC re 46 Reply to Response to Motion filed by American Residential Equities, LLC, 36 MOTION for Judgment on the Pleadings filed by American Residential Equities, LLC, 43 Response in Opposition to Motion filed by GMAC Mortgage, LLC (Carlos, Natalie) (Entered: 03/04/2011)
03/07/2011	55	ORDER Denying 36 Plaintiff's Motion for Judgment on the Pleadings on Count II of the Complaint. Signed by Judge Alan S. Gold on 3/7/2011. (ral) (Entered: 03/08/2011)
04/01/2011	56	Joint MOTION for Extension of Time to extend all existing deadlines and trial dates re 53 Order on Motion for Extension of Time, 23 Scheduling Order, Order Referring Case to Magistrate Judge, Order Referring Case to Mediation, Notice of Court Practice,,,,,,,, 51 Order on Motion for Extension of Time by GMAC Mortgage, LLC. Responses due by 4/18/2011 (Attachments: # 1 Text of Proposed Order)(O'Dell, David) (Entered: 04/01/2011)
04/01/2011	58	Case Reassignment of Paired Magistrate Judge pursuant to Administrative Orders 2010-145 and 2011-18 to Magistrate Judge Jonathan Goodman. Magistrate Judge Chris M. McAliley no longer assigned to case. (dm) (Entered: 04/06/2011)

04/04/2011	57	ORDER Granting 56 Parties' Joint Motion to Extend All Existing Deadlines and Trial Dates; See Order for complete details. Signed by Judge Alan S. Gold on 4/4/2011. (ral) (Entered: 04/05/2011)
04/04/2011		Reset Deadlines/Hearings per 57 Order: Joint Scheduling Report due by 4/22/2011. Calendar Call reset for 1/11/2012 01:30 PM before Judge Alan S. Gold. Trial reset for 1/16/2012 before Judge Alan S. Gold. Pretrial Conference reset for 12/2/2011 02:00 PM before Judge Alan S. Gold. (ral) (Entered: 04/05/2011)
04/12/2011	59	Notice of Court Practice re Magistrate Judge Goodman's Discovery Procedures. Entered by Magistrate Judge Jonathan Goodman on 4/12/2011. (dkc) (Entered: 04/12/2011)
04/22/2011	60	Joint SCHEDULING REPORT - **Rule 26(f)** by American Residential Equities, LLC, GMAC Mortgage, LLC (O'Dell, David) Modified text on 4/25/2011 (asl). (Entered: 04/22/2011)
05/04/2011	61	Unopposed MOTION for Extension of Time to Respond to Discovery by American Residential Equities, LLC. Responses due by 5/23/2011 (Carlos, Natalie) (Entered: 05/04/2011)
05/04/2011	62	AMENDED ORDER Setting Pretrial and Trial Dates, Referring Discovery Motions, Directing Parties to Mediation, and Establishing Pretrial Dates and Procedures: (Pretrial Conference set for 2/10/2012 10:00 AM in Miami Division before Judge Alan S. Gold, Trial set for 3/12/2012 before Judge Alan S. Gold, Calendar Call set for 3/7/2012 01:30 PM in Miami Division before Judge Alan S. Gold, Amended Pleadings due by 9/1/2011, Expert and Non-Expert Discovery due by 10/1/2011, In Limine Motions due by 1/10/2012, All Dispositive Pretrial Motions due by 11/1/2011, All Non-Dispositive Pretrial Motions due by 9/1/2011, Joint Pretrial Stipulation due by 1/10/2012, Mediation Deadline 9/15/2011); Referring Case to Magistrate Judge Jonathan Goodman for Pretrial Discovery Proceedings. Signed by Judge Alan S. Gold on 5/4/2011. (ral) (Entered: 05/05/2011)
05/05/2011	63	ENDORSED ORDER granting 61 Plaintiff's Unopposed Motion for Extension of Time. Plaintiff shall have an additional thirty-days until June 5, 2011, the date requested in its motion, to respond to Discovery propounded by Defendant. Signed by Magistrate Judge Jonathan Goodman on 5/5/2011. (dkc) (Entered: 05/05/2011)
06/02/2011	64	MOTION for Extension of Time to Complete Discovery *Unopposed Motion for Extension of Time to Respond to Discovery Requests* by GMAC Mortgage, LLC. (O'Dell, David) (Entered: 06/02/2011)
06/02/2011	65	ENDORSED ORDER granting 64 Motion for Extension of Time to Respond to Discovery Requests. The unopposed motion is granted to the extent requested therein. GMACM shall have an additional thirty days, until July 3, 2011, to respond to ARE's requests, and ARE shall have an additional thirty days, until July 5, 2011, to respond to GMACM's requests. It is further ORDERED that ARE must file a status report on its counsel's status within ten days of this order. If ARE's counsel intends to file a motion to withdraw, it should do so as soon as practicable. Signed by Magistrate Judge Jonathan

		Goodman on 6/2/2011. (dkc) (Entered: 06/02/2011)
06/03/2011	66	MOTION to Withdraw as Attorney *for Defendant* by Alan Rosenthal and Natalie J. Carlos of Carlton Fields, P.A.. by American Residential Equities, LLC. Responses due by 6/20/2011 (Carlos, Natalie) (Entered: 06/03/2011)
06/03/2011	67	Corrected MOTION to Withdraw as Attorney by Alan Rosenthal and Natalie J. Carlos of Carlton Fields, P.A.. by American Residential Equities, LLC. Responses due by 6/20/2011 (Carlos, Natalie) (Entered: 06/03/2011)
06/15/2011	68	ORDER Setting Telephonic Hearing on Motion 67 Corrected MOTION to Withdraw as Attorney by Alan Rosenthal and Natalie J. Carlos of Carlton Fields, P.A. : Motion Hearing set for 6/21/2011 02:45 PM in Miami Division before Judge Alan S. Gold. See order for telephone number, access and security code. Signed by Judge Alan S. Gold on 6/15/2011. (jh) (Entered: 06/15/2011)
06/17/2011	69	NOTICE of Attorney Appearance by David Allan Freedman on behalf of American Residential Equities, LLC (Freedman, David) (Entered: 06/17/2011)
06/20/2011	70	ORDER granting 67 Motion to Withdraw as Attorney. Attorney Natalie Jessica Carlos and Alan Rosenthal terminated.. Signed by Judge Alan S. Gold on 6/20/2011. (ra) (Entered: 06/20/2011)
06/20/2011	71	NOTICE by Carlton Fields, P.A. *of Attorneys' Charging Lien* (Carlos, Natalie) (Entered: 06/20/2011)
06/28/2011	72	Unopposed MOTION for Extension of Time To Respond to Discovery Requests by GMAC Mortgage, LLC. Responses due by 7/15/2011 (Attachments: # 1 Exhibit A-Proposed Order)(O'Dell, David) (Entered: 06/28/2011)
06/28/2011	73	ENDORSED, PAPERLESS ORDER granting 72 Defendant GMACM's Unopposed Motion for Extension of Time to Respond to Discovery Requests. GMACM has an additonal 30 days, through and including August 2, 2011, to respond to Plaintiff's discovery requests. Signed by Magistrate Judge Jonathan Goodman on 6/28/2011.(JG) (Entered: 06/28/2011)
07/05/2011	74	ORDER STRIKING 71 Notice (Other) filed by Carlton Fields, P.A. Counsel is directed to file Motion Regarding Charging Lien. Signed by Judge Alan S. Gold on 7/5/2011. (tp) (Entered: 07/05/2011)
07/12/2011	75	Unopposed MOTION for Extension of Time to Designate Expert Witnesses and Submit Expert Reports re 60 SCHEDULING REPORT - Rule 26(f)/16.1 by GMAC Mortgage, LLC. Responses due by 7/29/2011 (Attachments: # 1 Exhibit A-Proposed Order)(Taylor, Ann) (Entered: 07/12/2011)
07/13/2011	76	ORDER granting 75 Motion for Extension of Time to Designate Expert Witnesses and Submit Expert Reports. Signed by Judge Alan S. Gold on 7/13/2011. (tp) (Entered: 07/14/2011)
07/25/2011	77	Unopposed MOTION for Extension of Time to Respond to Discovery Requests by GMAC Mortgage, LLC. Responses due by 8/11/2011

		(Attachments: # 1 Exhibit A)(O'Dell, David) (Entered: 07/25/2011)
07/26/2011	78	ENDORSED ORDER granting 77 GMACM's Unopposed Motion for Extension of Time to Respond to American Residential Equities's discovery requests. GMACM shall have an additional thirty-days, until September 1, 2011, the date requested in GMACM's unopposed motion, to serve its discovery responses. The Court notes that the requested unopposed extension of time will mean the responses will be provided shortly before the expiration of the discovery cut-off. Any consequences flowing from the juxtaposition of the extended response time and the discovery cut-off will be the parties' responsibility. The Undersigned does not have jurisdiction to extend the discovery cut-off deadline established by the District Court and the parties should not presume that this Order in any way suggests or implies that the discovery cut-off will be extended upon request. To the contrary, the parties should assume that the discovery deadline and other trial-type deadlines established by the District Court will remain in place and will not be modified upon request. Signed by Magistrate Judge Jonathan Goodman on 7/26/2011. (dkc) (Entered: 07/26/2011)
08/29/2011	79	MOTION for Extension of Time of all pending deadlines and trial dates by American Residential Equities, LLC. Responses due by 9/15/2011 (Attachments: # 1 Exhibit A)(Freedman, David) (Entered: 08/29/2011)
08/29/2011	80	NOTICE by GMAC Mortgage, LLC *Designation of Expert Witnesses* (O'Dell, David) (Entered: 08/29/2011)
08/30/2011	81	ORDER SETTING TELEPHONIC HEARING on Motion 79 MOTION for Extension of Time of all pending deadlines and trial date: Motion Hearing set for 9/8/2011 11:00 AM in Miami Division before Judge Alan S. Gold. Please see order for toll-free number and access codes. Signed by Judge Alan S. Gold on 8/30/2011. (jh) (Entered: 08/30/2011)
09/08/2011	82	PAPERLESS Minute Entry for proceedings held before Judge Alan S. Gold: Motion Hearing held on 9/8/2011 re 79 MOTION for Extension of Time of all pending deadlines and trial dates filed by American Residential Equities, LLC and the motion is granted, court order to follow. The parties shall appear for a discovery conference before Magistrate Judge Goodman regarding new dates and deadlines. PARTICIPANTS: Alice Evelyn Meyer, Esquire; David Brian O'Dell, Esquire. Court Reporter: Joseph Millikan, 305-523-5588 / Joseph_Millikan@flsd.uscourts.gov (jh) (Entered: 09/08/2011)
09/16/2011	83	ORDER Following Status Conference; granting 79 Motion for Extension of Time on all Pending Dates; Setting Discovery Conference before U.S. Magistrate Judge Jonathan Goodman. Signed by Judge Alan S. Gold on 9/15/2011. (ls) (Entered: 09/19/2011)
09/16/2011		Set/Reset Deadlines/Hearings Mediation Deadline 1/16/2012. Dispositive Motions due by 3/2/2012. Pretrial Stipulation due by 5/11/2012. Calendar Call set for 7/11/2012 01:30 PM in Miami Division before Judge Alan S. Gold. Discovery Conference set for 9/23/2011 10:00 AM in Miami Division before Magistrate Judge Jonathan Goodman. Jury Trial set for 7/16/2012 before Judge Alan S. Gold. Pretrial Conference set for 6/8/2012 10:00 AM in

		Miami Division before Judge Alan S. Gold. (ls) (Entered: 09/19/2011)
09/20/2011	84	ENDORSED RE-NOTICE of DISCOVERY CONFERENCE: the Discovery Conference originally set in docket entry number 83 is re-set for 9/26/2011 at 03:00 PM in the Miami Division before Magistrate Judge Jonathan Goodman. As per Judge Gold's original order, the Defendant may appear by telephone. Defendant must phone Chambers ten minutes beforehand at 305-523-5720. If multiple persons will be attending by phone for Defendant, however, all of these people must form one conference call before calling Chambers. Please use a landline if available. (dkc) (Entered: 09/20/2011)
09/20/2011	85	NOTICE of Attorney Appearance by Alice Evelyn Meyer on behalf of American Residential Equities, LLC (Meyer, Alice) (Entered: 09/20/2011)
09/26/2011	86	PAPERLESS MINUTE ENTRY for proceedings held before Magistrate Judge Jonathan Goodman: Discovery Hearing held on 9/26/2011. Paries present: Alice E. Meyer, Esq., and David A. Freedman, Esq., for Plaintiff/Counter Defendant. Via telephone - David Brian O'Dell, Esq., for Defendant/Counter Claimant. Matters taken under advisement. Order to follow.(Digital 14:54:28.) (mso) (Entered: 09/26/2011)
09/26/2011	87	ORDER FOLLOWING DISCOVERY CONFERENCE. Signed by Magistrate Judge Jonathan Goodman on 9/26/2011. (dkc) (Entered: 09/26/2011)
10/07/2011	88	NOTICE by American Residential Equities, LLC *of Filing Joint Discovery Plan* (Attachments: # 1 Exhibit Joint Discovery Plan)(Meyer, Alice) (Entered: 10/07/2011)
10/14/2011	89	Witness List *Designation of Expert Witnesses* by American Residential Equities, LLC.. (Meyer, Alice) (Entered: 10/14/2011)
10/21/2011	90	NOTICE by American Residential Equities, LLC, GMAC Mortgage, LLC *Notice of Non-Consent* (O'Dell, David) (Entered: 10/21/2011)
11/23/2011	91	MOTION for Waiver of Rule 4(B)(3) Designation by GMAC Mortgage, LLC. (Attachments: # 1 Text of Proposed Order)(O'Dell, David) (Entered: 11/23/2011)
11/28/2011	92	MOTION to Appear Pro Hac Vice and to Electronically Receive Notices of Filing for Hope T. Cannon. Filing Fee $ 75.00. Receipt # 29035. (ksa) (Entered: 11/29/2011)
12/02/2011	93	ORDER granting 91 Motion for waiver of Rule 4(b)(3); granting 92 Motion to Appear Pro Hac Vice, Consent to Designation, and Request to Electronically Receive Notices of Electronic Filing. Signed by Judge Alan S. Gold on 12/2/11. (tp) (Entered: 12/05/2011)
12/14/2011	94	Joint MOTION for Extension of Time extend certain deadlines by American Residential Equities, LLC. Responses due by 1/3/2012 (Attachments: # 1 Text of Proposed Order Order Extending Certain Deadlines)(Meyer, Alice) (Entered: 12/14/2011)
01/04/2012	95	ORDER granting 94 Joint MOTION for Extension of Time extend certain

		deadlines filed by American Residential Equities, LLC. Discovery due by 4/13/2012, Mediation Deadline 2/29/2012, Dispositive Motions due by 5/11/2012, Calendar Call reset for 9/5/2012 01:30 PM in Miami Division before Judge Alan S. Gold, Jury Trial reset for 9/10/2012 before Judge Alan S. Gold, Pretrial Conference reset for 8/3/2012 11:00 AM before Judge Alan S. Gold. Signed by Judge Alan S. Gold on 1/4/12. (tp) (Entered: 01/05/2012)
02/23/2012	96	MOTION for Partial Summary Judgment on Breach of Contract Claim and Supporting Memorandum of Law and Authority by GMAC Mortgage, LLC. Responses due by 3/12/2012 (Attachments: # 1 Exhibit A - Part 1)(O'Dell, David) Modified text on 2/24/2012 (asl). (Entered: 02/23/2012)
02/23/2012	97	APPENDIX to 96 MOTION for Partial Summary Judgment by GMAC Mortgage, LLC (O'Dell, David) (Entered: 02/23/2012)
02/23/2012	98	APPENDIX to 97 Appendix, 96 MOTION for Partial Summary Judgment by GMAC Mortgage, LLC (O'Dell, David) (Entered: 02/23/2012)
02/23/2012	99	APPENDIX to 97 Appendix, 98 Appendix, 96 MOTION for Partial Summary Judgment by GMAC Mortgage, LLC (Attachments: # 1 Exhibit B)(O'Dell, David) (Entered: 02/23/2012)
02/23/2012	100	Statement of: Of Undisputed Facts Supporting Motion for Partial Summary Judgment on Breach of Contract by GMAC Mortgage, LLC re 96 MOTION for Partial Summary Judgment (Attachments: # 1 Exhibit A)(O'Dell, David) (Entered: 02/23/2012)
02/23/2012	101	MOTION To Exclude Testimony of Plaintiff's Expert Lawrence D. Morriss, Jr. and Supporting Memorandum of Law and Authority by GMAC Mortgage, LLC. (Attachments: # 1 Exhibit A - Part 1, # 2 Exhibit A - Part 2, # 3 Exhibit A - Part 3, # 4 Exhibit A - Part 4, # 5 Exhibit B)(O'Dell, David) Modified text on 2/24/2012 (asl). (Entered: 02/23/2012)
02/23/2012	102	MOTION Request for Oral Argument re 101 MOTION To Exclude Testimony of Plaintiff's Expert Lawrence D. Morriss, Jr. , 96 MOTION for Partial Summary Judgment by GMAC Mortgage, LLC. (O'Dell, David) Modified relief on 2/24/2012 (asl). (Entered: 02/23/2012)
02/24/2012	103	Clerks Notice to Filer re 97 Appendix, 99 Appendix, 98 Appendix. **Document not filed in Text Searchable Format**; ERROR - The document was not filed in Text Searchable Format. All future filings must be submitted in Text Searchable format as instructed in the CM/ECF Administrative Procedure 3G(5) -Page 10-. It is not necessary to refile this document. (asl) (Entered: 02/24/2012)
02/24/2012	104	Clerks Notice to Filer re 97 Appendix, 99 Appendix, 98 Appendix. **Document Not Captioned**; CORRECTIVE ACTION REQUIRED - The Filer must File a Notice of Striking, then refile the document with the proper caption pursuant to Local Rules. (asl) (Entered: 02/24/2012)
02/24/2012	105	MOTION Notice to Correct Filing re 97 Appendix, 99 Appendix, 98 Appendix, 96 MOTION for Partial Summary Judgment by GMAC Mortgage, LLC. (O'Dell, David) Modified to re-docket, see 107 Withdrawal of Motion

		on 2/24/2012 (asl). (Entered: 02/24/2012)
02/24/2012	106	MOTION for Partial Summary Judgment on Breach of Contract Claim and Supporting Memorandum of Law and Authority by GMAC Mortgage, LLC. Responses due by 3/12/2012 (Attachments: # 1 Exhibit A - Part 1, # 2 Exhibit A - Part 2, # 3 Exhibit A - Part 3, # 4 Exhibit A - Part 4, # 5 Exhibit A - Part 5, # 6 Exhibit B)(O'Dell, David) Modified text on 2/24/2012 (asl). (Entered: 02/24/2012)
02/24/2012	107	NOTICE to Correct Filing/WITHDRAWAL of Motion re 96 MOTION for Partial Summary Judgment filed by GMAC Mortgage, LLC. See 105 for image (asl) (Entered: 02/24/2012)
02/29/2012	108	ORDER Granting 102 Request for Oral Argument; Setting Oral Argument on Motion for Partial Summary Judgment 106 and Motion to Exclude Expert 101 . Oral argument on Defendant's Motion for Partial Summary Judgment 106 and Motion to Exclude Expert 101 is hereby set before the Honorable Alan S. Gold on Friday, May 18, 2012 at 2:00 pm. Signed by Judge Alan S. Gold on 2/29/2012. (mno) (Entered: 02/29/2012)
02/29/2012		Set/Reset Hearings Defendant's Motion for Partial Summary Judgment 106 and Motion to Exclude Expert 101 set for 5/18/2012 02:00 PM in Miami Division before Judge Alan S. Gold. (mno) (Entered: 02/29/2012)
03/06/2012	109	Plaintiff's MOTION to Compel *Discovery and*, Plaintiff's MOTION to Continue *to Adjust Trial and Pretrial Schedules; Incorporated Memorandum of Law* by American Residential Equities, LLC. Responses due by 3/23/2012 (Attachments: # 1 Exhibit 1 - Freedman letter, # 2 Exhibit 2 - Nov 8 2011 email, # 3 Exhibit 3 - Dec 14 2011 email, # 4 Exhibit 4 - Plaintiff's 1st RFP, # 5 Exhibit 5 - Morriss affidavit, # 6 Exhibit 6 - Feb 6 2012 email, # 7 Exhibit 7 - financial transactions, # 8 Exhibit 8 - email re extension, # 9 Exhibit 9A - documents not produced by GMACM, # 10 Exhibit 9B - documents not produced by GMACM, # 11 Exhibit 10 - documents produced by GMACM, # 12 Exhibit 11 - Cannon letter, # 13 Exhibit 12 - email re missing items, # 14 Exhibit 13 - Sept 7 2011 email)(Freedman, David) (Entered: 03/06/2012)
03/07/2012	110	ORDER REFERRING MOTION: 109 Plaintiff's MOTION to Compel *Discovery and*Plaintiff's MOTION to Continue *to Adjust Trial and Pretrial Schedules; Incorporated Memorandum of Law* filed by American Residential Equities, LLC, as to 109 Plaintiff's MOTION to Compel *Discovery and*Plaintiff's MOTION to Continue *to Adjust Trial and Pretrial Schedules; Incorporated Memorandum of Law*. (Responses due by 3/15/2012, Replies due by 3/21/2012.) Motions referred to Jonathan Goodman. Signed by Judge Alan S. Gold on 3/7/2012. (mno) (Entered: 03/07/2012)
03/07/2012	111	RESPONSE to Motion re 101 MOTION To Exclude Testimony of Plaintiff's Expert Lawrence D. Morriss, Jr. filed by American Residential Equities, LLC. Replies due by 3/19/2012. (Attachments: # 1 Exhibit Affidavit of Lawrence Morriss, # 2 Exhibit December 9 2011 letter, # 3 Exhibit email dtd 12-14-11)(Meyer, Alice) (Entered: 03/07/2012)
03/08/2012	112	*ENDORSED ORDER SETTING HEARING ON 109 Plaintiff's Motion to Compel Discovery and to Adjust Trial and Pretrial Schedules. Motion

		Hearing set for 3/30/2012 at 03:00 PM in Miami Division before Magistrate Judge Jonathan Goodman. Signed by Magistrate Judge Jonathan Goodman on 3/8/2012. (dkc) (Entered: 03/08/2012)
03/08/2012	113	RESPONSE to Motion re 106 MOTION for Partial Summary Judgment filed by American Residential Equities, LLC. Replies due by 3/19/2012. (Attachments: # 1 Exhibit 1-2 Affidavit of Morriss and Riley,)(Meyer, Alice) (Entered: 03/08/2012)
03/08/2012	114	Statement of: of Undisputed Facts Supporting its Response to GMAC Motion for Partial Summary Judgment by American Residential Equities, LLC re 113 Response to Motion (Meyer, Alice) (Entered: 03/08/2012)
03/15/2012	115	RESPONSE in Opposition re 109 Plaintiff's MOTION to Compel *Discovery and*Plaintiff's MOTION to Continue *to Adjust Trial and Pretrial Schedules; Incorporated Memorandum of Law* filed by GMAC Mortgage, LLC. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F, # 7 Exhibit G, # 8 Exhibit H, # 9 Exhibit I, # 10 Exhibit J, # 11 Exhibit K, # 12 Exhibit L, # 13 Exhibit M, # 14 Exhibit N, # 15 Exhibit O, # 16 Exhibit P, # 17 Exhibit Q, # 18 Exhibit R, # 19 Exhibit S, # 20 Exhibit T, # 21 Exhibit U, # 22 Exhibit V)(O'Dell, David) (Entered: 03/15/2012)
03/19/2012	116	REPLY to Response to Motion re 101 MOTION To Exclude Testimony of Plaintiff's Expert Lawrence D. Morriss, Jr. filed by GMAC Mortgage, LLC. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2)(O'Dell, David) (Entered: 03/19/2012)
03/19/2012	117	REPLY to Response to Motion re 106 MOTION for Partial Summary Judgment filed by GMAC Mortgage, LLC. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3, # 4 Exhibit 4, # 5 Exhibit 5 Part 1, # 6 Exhibit 5 Part 2, # 7 Exhibit 5 Part 3, # 8 Exhibit 5 Part 4)(O'Dell, David) (Entered: 03/19/2012)
03/22/2012	118	Plaintiff's MOTION to Strike 116 Reply to Response to Motion, 117 Reply to Response to Motion, *and Incorporated Memorandum of Law* by American Residential Equities, LLC. Responses due by 4/9/2012 (Meyer, Alice) (Entered: 03/22/2012)
03/22/2012	119	REPLY to Response to Motion re 109 Plaintiff's MOTION to Compel *Discovery and*Plaintiff's MOTION to Continue *to Adjust Trial and Pretrial Schedules; Incorporated Memorandum of Law Memorandum in Support of Motion to COmpel Discovery* filed by American Residential Equities, LLC. (Attachments: # 1 Exhibit 1 - 2-17-2012 letter, # 2 Exhibit 2 - report, # 3 Exhibit 3 - report)(Meyer, Alice) (Entered: 03/22/2012)
03/23/2012	120	RESPONSE to Motion re 118 Plaintiff's MOTION to Strike 116 Reply to Response to Motion, 117 Reply to Response to Motion, *and Incorporated Memorandum of Law and Request for Permission to Exceed Page Limitation* filed by GMAC Mortgage, LLC. Replies due by 4/2/2012. (Attachments: # 1 Exhibit 1)(O'Dell, David) (Entered: 03/23/2012)
03/23/2012	121	MOTION/REQUEST for Permission to Exceed Page Limitation by GMAC

		Mortgage, LLC. See 120 for image. (ral) (Entered: 03/26/2012)
03/26/2012	122	Clerks Notice to Filer re 120 Response to Motion, 121 MOTION for Leave to File Excess Pages. **Two or More Document Events Filed as One**; ERROR - Only one event was selected by the Filer but more than one event was applicable to the document filed. The docket entry was corrected by the Clerk. It is not necessary to refile this document but in the future, the Filer must select all applicable events. (ral) (Entered: 03/26/2012)
03/26/2012	123	ENDORSED ORDER RE-SETTING HEARING ON 109 Plaintiff's Motion to Compel Discovery and to Adjust Trial and Pretrial Schedules. Motion Hearing RE-SET for 3/30/2012 at 2:00 PM in the Miami Division before Magistrate Judge Jonathan Goodman (See also ECF No. 112 for previous order scheduling same hearing for 3:00 PM). Signed by Magistrate Judge Jonathan Goodman on 3/26/2012. (dkc) (Entered: 03/26/2012)
03/28/2012	124	ORDER Granting Request for 121 Motion for Leave to File Excess Pages. Signed by Judge Alan S. Gold on 3/28/2012. (mno) (Entered: 03/28/2012)
03/30/2012	125	PAPERLESS MINUTE ENTRY for proceedings held before Magistrate Judge Jonathan Goodman: Discovery Hearing held on 3/30/2012. Matters taken under advisement. Order to follow. Parties present: David Freedman, Esq., and Alice Meyer, Esq., for Plaintiff. Patricia Wood representative with CBIZ Accounting Firm. Hope Cannon, Esq., for Defendant.(Digital 13:59:33.) (mso) (Entered: 03/30/2012)
04/10/2012	126	ORDER GRANTING 109 Plaintiff's Motion to Compel and REPORT AND RECOMMENDATIONS on 109 Plaintiff's Request to Extend Pre-Trial and Trial Deadlines. Signed by Magistrate Judge Jonathan Goodman on 4/10/2012. (dkc) (Entered: 04/10/2012)
04/20/2012	127	REPORT REGARDING Fees by GMAC Mortgage, LLC (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D)(Hancock, Christian) (Entered: 04/20/2012)
04/20/2012	128	OBJECTION of Magistrate Judge 126 REPORT AND RECOMMENDATIONS re 109 Plaintiff's MOTION to Compel *Discovery and*Plaintiff's MOTION to Continue *to Adjust Trial and Pretrial Schedules; Incorporated Memorandum of Law* filed by American Residential Equit to District Court (Hancock, Christian) (Entered: 04/20/2012)
04/20/2012	129	ORDER CANCELLING ORAL ARGUMENT: Oral argument on Defendant's Motion for Partial Summary Judgment 106 and Motion to Exclude Expert 101 set for Friday, May 18, 2012 p.m. is hereby CANCELLED. Signed by Judge Alan S. Gold on 4/20/2012. (mno) (Entered: 04/20/2012)
04/22/2012	130	Plaintiff's MOTION to Strike 127 Report Regarding *Fees and For Sanctions* by American Residential Equities, LLC. Responses due by 5/10/2012 (Meyer, Alice). Added MOTION for Sanctions on 4/23/2012 (ral). (Entered: 04/22/2012)
04/23/2012	131	Clerks Notice to Filer re 130 Plaintiff's MOTION to Strike 127 Report

		Regarding *Fees and For Sanctions* MOTION for Sanctions. **Motion with Multiple Reliefs Filed as One Relief**; ERROR - The Filer selected only one relief event and failed to select the additional corresponding events for each relief requested in the motion. The docket entry was corrected by the Clerk. It is not necessary to refile this document but future filings must comply with the instructions in the CM/ECF Attorney User's Manual. (ral) (Entered: 04/23/2012)
04/23/2012	132	OBJECTIONS to 126 Report and Recommendations by American Residential Equities, LLC. (Attachments: # 1 Exhibit Records With "Notes", # 2 Exhibit Records Without "Notes", # 3 Exhibit Email dated 6/6/12, # 4 Exhibit Email dated 11/22/11, # 5 Exhibit Correspondence dated 1/27/12, # 6 Exhibit Email dated 2/10/12, # 7 Exhibit Chart dated 2/22/12, # 8 Exhibit Email dated 2/13/12)(Meyer, Alice) (Entered: 04/23/2012)
05/04/2012	133	RESPONSE TO OBJECTION to 126 Report and Recommendations by American Residential Equities, LLC. (Meyer, Alice) (Entered: 05/04/2012)
05/07/2012	134	ORDER Setting Briefing Schedule and Oral Argument on 128 132 Objections to Report and Recommendations and 130 Motion to Strike and for Sanctions; (Responses to Objections due by 5/9/2012, Replies to Objections due by 5/16/2012); ORDER Setting Hearing on 130 Motion to Strike and for Sanctions; Motion Hearing set for 6/8/2012 10:30 AM in Miami Division before Senior Judge Alan S. Gold; Response to 130 Motion due 5/11/2012; Reply to 130 Motion due 5/18/2012. Signed by Senior Judge Alan S. Gold on 5/7/2012. (ral) (Entered: 05/07/2012)
05/07/2012		Set Deadlines as to 130 Motion to Strike and for Sanctions per 134 Order. Responses due by 5/11/2012 Replies due by 5/18/2012. (ral) (Entered: 05/07/2012)
05/09/2012	135	RESPONSE in Opposition re 128 OBJECTION of Magistrate Judge 126 REPORT AND RECOMMENDATIONS re 109 Plaintiff's MOTION to Compel *Discovery and*Plaintiff's MOTION to Continue *to Adjust Trial and Pretrial Schedules; Incorporated Memorandum of Law< filed by GMAC Mortgage, LLC. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C) (O'Dell, David) (Entered: 05/09/2012)*
05/11/2012	136	RESPONSE in Opposition re 130 Plaintiff's MOTION to Strike 127 Report Regarding *Fees and For Sanctions* MOTION for Sanctions filed by GMAC Mortgage, LLC. (O'Dell, David) (Entered: 05/11/2012)
05/16/2012	137	NOTICE by American Residential Equities, LLC re 134 Order, Set/Reset Deadlines, Set Motion and R&R Deadlines/Hearings, Order Setting Hearing on Motion,,,,,,,,, *Regarding Scheduling* (Attachments: # 1 Exhibit email btwn counsels)(Freedman, David) (Entered: 05/16/2012)
05/17/2012	138	ORDER TO SHOW CAUSE Show Cause Response due by 5/24/2012. Signed by Senior Judge Alan S. Gold on 5/17/2012. (mno) (Entered: 05/17/2012)
05/17/2012	139	NOTICE by GMAC Mortgage, LLC *of Bankruptcy and Effect of Automatic Stay* (O'Dell, David) (Entered: 05/17/2012)

05/18/2012	140	ORDER DISCHARGING ORDER TO SHOW CAUSE; STAYING CASE. Order to Show Cause 138 is Discharged. This case is STAYED pursuant to pending resolution of Southern District of New York Bankruptcy case. The Clerk of Court is instructed to ADMINISTRATIVELY CLOSE this case. All hearing are CANCELLED. All deadlines are HELD IN ABEYANCE pending further Court order. Signed by Senior Judge Alan S. Gold on 5/18/2012. (mno) (Entered: 05/18/2012)
09/11/2012	141	NOTICE by GMAC Mortgage, LLC *AMENDED NOTICE OF BANKRUPTCY FILING AND SUPPLEMENTAL SERVICING ORDER* (Attachments: # 1 Exhibit A)(O'Dell, David) (Entered: 09/11/2012)

PACER Service Center

Transaction Receipt

01/25/2013 09:26:13

PACER Login:	ba0105	**Client Code:**	0R0808-301038-00900
Description:	Docket Report	**Search Criteria:**	1:10-cv-21943-ASG
Billable Pages:	14	**Cost:**	1.40

Exhibit G

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

AMERICAN RESIDENTIAL EQUITIES, LLC,	)	
Plaintiff,	)	
v.	)	**CIVIL ACTION NUMBER: 10-21943-Civ-Gold/Goodman**
GMAC MORTGAGE, LLC, successor by merger to GMAC Mortgage Company,	)	
Defendant.	)	

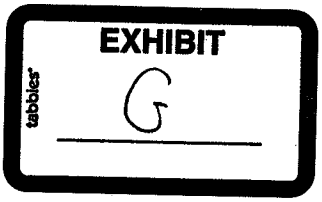
GMAC MORTGAGE, LLC'S MOTION TO EXCLUDE TESTIMONY OF PLAINTIFF'S EXPERT LAWRENCE D. MORRISS, JR. AND SUPPORTING MEMORANDUM OF LAW AND AUTHORITY

Comes now Defendant GMAC Mortgage, LLC ("GMACM"or "Defendant"), pursuant to Fed. R. Evid. 702 and *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993), respectfully moves to exclude the opinions, report and any testimony from Plaintiff's expert Lawrence D. Morriss, Jr. ("Morriss"). In support thereof, GMACM submits this Motion and Supporting Memorandum.

I. INTRODUCTION

This is a breach of contract action arising out of a Servicing Agreement (and Amendments) entered into between GMACM and Plaintiff American Residential Equities, LLC ("ARE" or "Plaintiff") on July 29, 2004.[1] Under the Servicing Agreement, GMACM serviced and administered certain loans secured by mortgages owned or serviced by ARE (the "ARE Loans"). These loans had high rates of default and, in fact, many of them had been uncollectible

[1] The Servicing Agreement was subsequently amended six times by amendments dated January 1, 2006, February 1, 2007, May 31, 2007, April 10, 2008 and February 6, 2009, each with a corresponding effective date.



for more than a year prior to being serviced by GMACM.[2] In fact ARE describes the loans as "non-performing". *See* Doc. 1, Complaint, ¶ 6. There were over 2,600 ARE Loans serviced by GMACM for ARE under the Service Agreement, prior to the termination of the parties' relationship. Over one year ago, on or about June 11, 2010, Plaintiff filed this action against GMACM alleging two claims: (1) a breach of contract claim and (2) a specific performance claim.[3]

Plaintiff has designated Morriss as its only expert in this case. Morriss is a forensic accountant. *See* Doc. 89. Morriss purports to provide opinions about how ARE has allegedly been damaged by actions taken by GMACM in the servicing and administration of the ARE Loans. On February 13, 2012, the expiration of the fifth extension for providing expert reports, ARE provided a report from Morriss. The report is titled a **"preliminary"** report and contains his opinions about **"possible damages"** that **"may"** have been caused by GMACM. *See* Morriss Report, attached hereto as Exh. "A". Morriss's opinions regarding ARE's alleged damages are premised on assumptions relating to **"possible"** diminutions in value of the mortgaged properties.

Morriss's report, which spans a mere 11 pages of actual text (to support what he contends is a possible over $69,000,000.00 claim), is incomplete, lacks any definitive opinion, contains speculation and conjecture and, thus, is not reliable and relevant under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) or Federal Rule of Evidence 702. As such, Morriss's report does nothing to assist a trier of fact in determining any issues in this case. The expert

[2] The industry parlance for these types of loans is "scratch-and-dent."

[3] ARE moved for judgment on the pleadings on its specific performance claim, which motion was denied. In denying the motion, the Court specifically stated that there is no right to an accounting after the termination of the parties' relationship. However, the Court determined that, at that time, there were questions of fact remaining regarding whether an accounting had been sought by ARE prior to the termination of the Servicing Agreement. *See* Doc. 55.

report deadline having passed and Morriss' opinions, as set forth in his "preliminary" report, having to meet *Daubert* or Rule 702 standards, Morriss must be excluded as an expert. *See Jackson v. Carnival Cruise Lines, Inc.*, 203 F.Supp.2d 1367, 1378 (S.D. Fla. 2002) (this Court excluded presentation of expert report on summary judgment motion for several reasons, including, because deadline for providing expert reports had expired).

As an additional ground for excluding Morriss as an expert, Morriss was not designated as, and is not, a servicing expert. *See* Doc. 89. Nonetheless, as part of Morriss's speculative report, Morriss attempts to provide conjectural opinions regarding the propriety of GMACM's servicing and administration of the ARE Loans. Morriss, however, is not qualified to provide such opinions. He has had no experience servicing mortgage loans. He is an accountant and an auditor. Failing to qualify as a servicing industry expert, Morriss must be excluded as a servicing expert.

II.
LEGAL ARGUMENT

A. The Standard

In *Daubert*, the United States Supreme Court established the standard by which expert testimony is permitted in federal courts. The Supreme Court emphasized that Federal Rules of Evidence 702 requires trial courts to serve as evidentiary "gatekeepers" who must conscientiously screen expert testimony for relevance and reliability. *Daubert*, 509 U.S. at 593. As part of a court's "gatekeeping" function, the court must ensure that proffered expert testimony is "supported by appropriate validation." *Id.* Moreover, nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert. *See General Electric Co. v.*

Joiner, 522 U.S. 136, 140, 146 (1997) (holding that expert testimony constituted "subjective belief or unsupported speculation").

In *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 119 S.Ct. 1167 (1999), the Court made clear that the principals enunciated in *Daubert* applied to both scientific testimony as well as testimony based on "technical" or "other specialized knowledge," such as testimony regarding lost profits, damages, and diminution of value. *See Kumho Tire Co.*, 526 U.S. at 147; *Maiz v. Virani*, 253 F.3d 641, 666 (11th Cir. 2001). In fact, Fed.R.Evid.702, provides that:

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise.

See also, MDS (Canada), Inc. v. RAD Source Tech., Inc., -- F.Supp.2d --, 2011 WL 4591186 at *48 (S.D. Fla. Sept. 30, 2011).

There are, thus, three (3) prongs that must be met for an expert opinion testimony to be admissible: (1) it is given by a person who qualifies as an expert; (2) it meets certain scientific data requirements and (3) it would assist the trier of fact. *See United States v. Shay*, 57 F.3d 126, 133 (1st Cir. 1995). Under the first prong, the proffered expert must have sufficient knowledge of the topic on which he proposes to testify. *See Daubert*, 509 U.S. at 590. The second prong charges the district court with determining whether the proffered evidence possesses a sufficient evidentiary reliability to be admissible as scientific, technical, or other specialized knowledge. The third prong requires the court to determine whether the proffered evidence is relevant in the sense that it will assist the trier of fact to understand the evidence or determine a fact at issue. *Daubert,* 509 U.S. at 591-92. As the proponent of Morriss's report, Plaintiff has a "*substantial burden* under Rule 702." *See MDS (Canada), Inc.*, 2011 WL 4591186 at *49 (emphasis supplied). As discussed herein, given the speculative nature of Morriss's report; the expiration

of the expert report deadline and the failure of Morriss to qualify as a servicing expert, ARE cannot meet its burden under Rule 702.

B. Morriss's Report Is Speculative And Must Be Excluded.

As this Court stated in *MDS (Canada), Inc. v. RAD Source Tech., Inc.*, "Daubert requires the trial court to act as a gatekeeper to insure that speculative and unreliable opinions do not reach [the factfinder]". *See id.* at *49. In *McClain v. Metabolife Int'l, Inc.* 401 F.3d 1233, 1237 (11th Cir. 2005), which this Court quoted in *MDS (Canada), Inc.*, the Eleventh Circuit held that a pharmacology expert should have been excluded because the "expert drew speculative conclusions about supplement's toxicity from questionable principles" and (similar to Morriss's report) left a "trail of equivocation" by making statements containing "if" and "may". *See id.* at 1240. The decisions in *MDS (Canada)* and *McClain* support the exclusion of Morriss's opinion, report and testimony as speculative, unreliable and irrelevant under *Daubert* and Rule 702.

Morriss has provided a "preliminary" expert report which contains essentially no definitive opinions. Morriss spends several pages of his 11-page report attempting to explain why he was unable to provide a complete report or provide any opinions, despite the fact that the expert report deadline was February 13, 2012. In the remaining pages, Morriss opines that ARE's damages **"may"** have been caused by GMACM. In fact, in Morriss's attempt at analyzing three (out of over 2,600) of the ARE Loans, he states that "GMACM's servicing of [those] loans **may have** resulted in a permanent diminution of the value of ARE's [] investment [in the mortgaged property]." *See* Morriss's Report, p. 7-9. Moreover, Morriss does not even provide a definitive non-speculative opinion about the amount of ARE's alleged damages. Instead, Morris opines that ARE's damages could fall anywhere between a **"possible"** range of $26,540,629 to $69,499,825 (a possible range of $43,000,000.00). There can be no other

conclusion but that Morriss's report is speculative, and the deadline for expert reports having passed, Morriss must be excluded.

Courts have consistently excluded expert testimony, similar to that provided by Morriss, for being speculative and conjectural. In *U.S. v. Henderson,* 693 F.2d 1028 (11th Cir. 1983), a case arising out of the Middle District, the Eleventh Circuit determined that the evidence was too speculative for a jury to find defendant guilty where the handwriting expert in a forgery case opined that the defendant *"probably"* endorsed the check. *See id.* at 1031-32 (emphasis added). In *In re Mentor Corp. Obtape Transobturator Sling Products Liability Litigation,* 711 F.Supp.2d 1348 (M.D. Ga. 2010), the court granted a motion for summary judgment after excluding expert testimony on the grounds that expert's opinion that the product "*may have* caused degradation" was speculative and conjectural. *See id.* at 1375 (emphasis added); *see also, Kallas v. Carnival Corp.*, 2009 WL 901507, *8 (S.D. Fla. March 30, 2009) (excluding expert opinion regarding economic loss to a child by loss of her father because "expert testimony must be properly grounded, well reasoned and *not speculative* before it can be admitted"); *Sun Ins. Marketing Network, Inc. v. AIG Life Ins. Co.,* 254 F.Supp.2d 1239, 1248 (M.D. Fla. 2003) (excluding accountant's lost profits opinion as being too speculative); *KW Plastics v. United States Can Co.*, 131 F.Supp.2d 1289, 1292 (M.D. Ala. 2001) (excluding accountant's testimony regarding calculation of seller's lost profits as too speculative to be admitted and unreliable and irrelevant); *McCorvey v. Baxter Healthcare Corp.*, 298 F.3d 1253, 56-57 (11th Cir. 2002) (rejecting argument that credibility of expert is role for the jury and finding expert's opinion not scientifically reliable and based on speculation).

Like the excluded expert opinions in the cases above, Morriss's opinions, as expressed in his report, are speculative and conjectural. Just like the expert's opinion in *McClain*, Morriss's

report contains no definitive conclusions and is replete with equivocations. For example, in Morriss's discussion of the "examples of servicing errors," (referring to what appears to be the only three loans Morriss reviewed out of 2,600 provided to ARE by GMACM) Morriss speculates that GMACM's servicing **may** have resulted in a permanent diminution in value and that ARE **may** have lost a **portion or all** of its investment. *See* Exh. "A", Morriss Report, 7-11.

Similarly, in opining about the amount of ARE's damages, Morriss states that he has "determined a **preliminary possible** damage" for ARE of $26,540,692 to $69,499,825. Morriss explained how he reached that speculative opinion as follows:

> The $26,540,629 reflects ARE'S **possible** damages **assuming** that the $42,959,196 of loans transferred from GMACM has not retained any value, as reflected in the schedule below. The $69,494,4825 reflects ARE'S **possible** damages **assuming** that the $42,959,196 of the transferred loans has retained 100% of its value. The reasonable assumption, based on the discussion included in the Examples of Servicing Errors Section above is that the value of the $42,959,196 of mortgage loans ARE retained will have **some value between 100% and zero**.

See Exh. "A", Morriss Report, p. 10.

Given that explanation, Morriss's damages opinion is not only speculative, but it is also premised on unreasonable assumptions. First, Morriss unreasonably assumes that from 2004 to 2010 (which includes one of the largest housing market downturns in history) all of the mortgaged properties securing all 2,687 of ARE's scratch-and-dent loans **"retained 100% of its value."** Second, Morriss unreasonably assumes that ARE would have received a return on these scratch-and-dent loans of 15%, adjusted a mere 5% to reflect a single year's ("2007/2008") downturn in the housing market. *See* Report, pp. 10-11. According to Morriss, his 5% adjustment is his **"best estimate"** and, thus, is not based on any data study or authority. *See id.* at 11. In fact, according to Morriss, the only "reasonable assumption" is that the mortgage properties would have retained **"some value between 100% and zero."** Third, Morriss's

damages opinions unreasonably assume that ARE will be able to establish that any diminution in value was caused by GMACM rather other factors. Fourth, Morriss's opinion unreasonably assumes that there were breaches engaged in by GMACM as to **all** 2,687 ARE Loans. Clearly, these unreasonable assumptions cannot stand because they are based solely on Morriss's own speculative and baseless assertions. As the court stated in *Hall v. Thomas*, 753 F.Sup. 1113 (N.D. Ala. 2010),

> An expert opinion is inadmissible when the only connection between the conclusion and the existing data is the expert's own assertions. If an expert's facially relevant conclusion relates to the data purports to rely upon by his own *ipse dixit*, it ultimately is simply an argument, offering nothing more than what lawyers for the parties can argue in closing arguments and consequently fails to meet Rule 702's helpfulness requirement.

See id. at 1140. Morriss's proffered opinions and report falls well short of meeting the *Daubert* or Rule 702 standard and should be excluded.

C. MORRISS'S REPORT MUST "STAND ON ITS OWN TWO LEGS."

Recognizing the deficiencies in his report and opinions, ARE identifies Morriss's expert report as a "preliminary" report, presumably to lay the ground for providing an additional report at some later unknown date. However, on February 13, 2012, the parties were to exchange complete and "meaningful" expert reports compliant with Rule 26, and not preliminary incomplete reports. *See* Doc. 94. Thus, Morriss's preliminary report must "stand on its own two legs." *Hall,* 753 F.Supp.2d at 1137.

Like ARE, the plaintiff in *Hall v. Thomas,* without advising the court or the other side, submitted a "preliminary" and incomplete expert report on the date that reports were to be exchanged. Also, like Morriss, the plaintiffs' expert in *Hall*, an economist, Dr. Charles Borjas claimed he needed to perform additional work (a regression analysis) and further alleged, like Morriss, that he was unable to perform his analysis because the defendant has failed to provide him with either accurate or complete information. *See id.* at 1141. The deadline for expert

reports having passed (and having been extended on numerous prior occasions), the court in *Hall* refused to allow the plaintiffs to submit an additional report to "cure the deficiencies" in Borjas's report. *See id.* at 1131. Instead, the court stated that Borjas's report "must stand on its own two feet" and determined that it could not. *See id.* at 1139.

In the court's opinion, the court made the following additional findings (all of which apply in this case):

- Plaintiffs provided no explanation as to why they did not bring the asserted discrepancies to the court's attention when discovered, rather than providing an incomplete report months later . . . . *See id.* at 1137.
- "Not once did plaintiffs alert this court to any of the problems they now could should entitle them to further discovery, nor did they ever seek aid in securing the information [the expert] says was necessary for the completion of his report." *See id.* at 1137.
- "Shorn of its purely speculative conclusion, [the expert]'s report contains no relevant opinions at all. Rather, it is merely a recitation of a methodology and facts to which that methodology purportedly could be applied. *See id.* at 1142
- The "report provides no viable opinions regarding facts in issue" and thus is due to be excluded and report stricken. *See id.* at 1144.

Having submitted such a deficient report, Morriss must be excluded as an expert.

D. MORRISS HAD SUFFICIENT INFORMATION TO COMPLETE HIS REPORT.

Also, like the expert in *Hall v. Thomas*, Morriss attempts to shift the blame with the problems in his report to alleged discovery failures by GMACM. Those allegations, however, are only a ruse and have no merit either factually or legally.

1. GMACM Produced Over 500,000 Pages of Documents.

There were over 2,600 ARE Loans serviced by GMACM during the course of the parties' relationship. 285 of the ARE Loans were sold by ARE to a third party investor, such as UBS or Goldman Sachs, prior to the termination of the parties' relationship (hereinafter referred to as the

"Non-ARE" Loans)[4]. As a servicer, GMACM maintains certain documents on each loan. Those documents primarily include payment histories, servicing notes, and, in some cases, images of miscellaneous loan documents, such as communications with the borrowers, inspection reports and broker price opinions.

The documents that provide the best timeline and overview of the servicing and administration activities which took place on a particular loan are the payment histories and servicing notes. The payment histories detail each payment received by GMACM and each expense incurred or advanced by GMACM on the loan to service and administer the loan, such as advances for taxes, insurance, inspection fees, broker price opinion fees and property preservation fees. The servicing notes provide a chronological history of the activities on the loan, including communications with ARE, foreclosure counsel, third parties, and the borrower.

Over the course of this litigation, GMACM has made **16** productions of documents to ARE, including three (3) productions that consisted of repeat productions of files that ARE advised it either could not open, or for some reason, could not locate. GMACM made its first production of documents, consisting of over 41,000 pages of payment histories and servicing notes on or about October 5, 2011. By December 14, 2011, when ARE and GMACM moved jointly to extend the expert report deadline to February 13, 2011 (the fifth extension granted by the Court) GMACM had produced **439,024** pages of documents consisting of, among other documents, payment histories and servicing notes and loan documents for almost the entire

[4] The Non-ARE Loans were the last large group of loans that were produced to ARE and they were delivered on January 11, 2012, over one month before the expert report deadline. The delay was incurred because GMACM provided notice to the current owners of the Non-ARE Loans notifying them of ARE's request because information generated on the loans after ARE sold the loans is subject to confidentiality under the law and under contractual obligations GMACM owes to such third parties. ARE, inexplicably, did not notify GMACM that it had not received this production set until just days prior to the discovery deadline. When that information was made known to GMACM, GMACM re-produced the documents via overnight delivery.

population of ARE Loans. In fact, contrary to the statements made in Morriss' report, GMACM has produced payment histories and servicing notes for **2,685** loans.

Now, after GMACM has undertaken this massive production in the hopes of finally getting some "meaningful" information from ARE about its claims, none has been provided. *See* Doc. 94 (ARE represented that it believed by February 13, 2011, it will have sufficient discovery exchanged to make the reports "meaningful"). ARE's conduct cannot be rewarded.

2. If ARE Needed More Time Or More Documents To Comply With The Expert Report Deadline, It Should Have Requested An Extension.

Assuming, *arguendo*, that Morriss needed more documents or more time to produce a complete report, ARE should have sought an extension of time rather than flout the Court's deadline and submit a preliminary report. ARE is no stranger to seeking extensions from this Court or asking GMACM to agree to an extension anytime it has needed one. In fact, since this litigation was filed, ARE has unilaterally or jointly sought an extension of discovery and expert deadlines at least **nine (9) times**. Yet, despite knowing that "meaningful" expert reports were due on February 13, 2012, and despite Morriss's protestations that he needs more documents, ARE did not ask for an extension of the February 13 deadline. *See* Doc. 94.

Similarly, the plaintiffs in *Hall* also failed to ask for an extension, a fact that the court did not take lightly. In granting the defendant's motion to exclude the plaintiffs' expert for submitting an incomplete and preliminary report, the court noted that "Plaintiffs provided no explanation as to why they did not bring the asserted discrepancies to the court's attention when discovered, rather than providing an incomplete report months later and then pointing to the different numbers as an excuse." *See Hall,* 753 F.Supp.2d. at 1137. Thus, the court concluded that there could be only one reason for the plaintiffs' failure to seek an extension, "that the

expert's theory did not hold up." *See id.* at 1137. That is also the only reasonable conclusion in this case.

What other explanation can there be to explain why, at no time prior to the February 13, 2012, deadline, ARE ever indicated that its expert would be providing a preliminary, incomplete and anything but "meaningful" report. Furthermore, at no time prior to the February 13, 2012, expert disclosure deadline did ARE file any motions to compel or seek assistance from the Court to get the documents it claims has not been produced. **Moreover, despite the fact that over a week has now passed since Morris's report was provided, ARE has not asked GMACM for any additional documents.** Not once between December 2011, when the parties moved to extend the deadline to February 13, 2012, to that date, did ARE indicate that it needed more time to complete its expert report.

Most telling is the fact that, instead of advising the Court or GMACM that it needed an extension of the report deadline, ARE chose to have its expert provide an incomplete, speculative and unreliable "preliminary" report while letting GMACM produce two expert reports (one from an accountant and one from a servicing expert) supporting its counterclaims, which detail each loan that is subject to the GMACM's counterclaim and details each expense or advance that GMACM seeks to recover against ARE in this case. ARE should not be allowed to benefit from such conduct. *See Hall*, 753 F.Supp.2d at 1137 (finding it significant that, "[n]ot once did plaintiffs alert this court to any of the problems they now could should entitle them to further discovery, nor did they ever seek aid in securing the information [the expert] says was necessary for the completion of his report").

3. Morriss's Claim That He Needs Complete Loan Files For Each Of The Over 2,600 Loans To Perform A Statistical Sampling Makes No Sense.

Finally, Morriss claims that he intends to conduct a statistical sampling of the loan files and needs more documents and more time to do so. That argument makes no sense because if Morriss is only going to sample some subset of the over 2,600 ARE Loans, he does not need complete loan documents for each of those loans. In fact, in the New York state court case attached as an exhibit to Morriss's report, one of the basis raised by the plaintiffs to support statistical sampling of over 368,000 loans was to reduce the number of documents that the defendants would have produce, thereby reducing litigation cost and time. *See MBIA Ins. Corp. v. Countrywide Home Loans Svc., LLP*, 2010 WL 7151801 (N.Y. Supp. April 30, 2010), *Memorandum of Law in Support of Plaintiff's Motion in Limine Regarding Sampling.*

Moreover, since this case was filed ARE has never indicated that it planned to engage in a statistical sampling of the loans.[5] To the contrary, despite repeated requests by GMACM for ARE to identify those loans for which it believed GMACM had breached the Servicing Agreement, ARE insisted on the production of the entire ARE Loan portfolio. Not once during the four months of GMACM's document production did ARE indicate that it would be sampling only a portion of the ARE Loan portfolio. Clearly, if it had, and had GMACM agreed, GMACM could have saved considerable expense and time that was spent collating, bates labeling, reviewing and preparing the over 500,000 pages of documents it has produced.

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[5] Should this Court not grant GMACM's Motion to Exclude, GMACM is not waiving its right, and is not agreeing, that statistical sampling is a valid or appropriate method for proving ARE's damages of breach of contract claim. For example, the facts of this case are different from the facts in *Countrywide*, which involved over 368,000 loans. Moreover, the court in *Countrywide* stated that,

"The use of sampling does not obviate Plaintiff's need to prove each element of its claims for breach of contract or fraud, and the Plaintiff must prove entitlement to any damages. Should sampling be used, Plaintiff retains its obligation to demonstrate to the trier of fact that each element of each cause of action has been met. The possible use of sampling does not change Plaintiff's ultimate burden of proof, only how Plaintiff may present that proof." *See* Opinion, p. 5.

In fact, ARE represented to the Court in its August 29, 2011, Motion for Extension that it needed an extension of deadlines because the parties had been considering arbitration to avoid the time and cost of a "loan-by-loan" review. *See* Doc. 79. Morriss's claim that he intended to sample some undefined number of the over 2,600 loans is simply not consistent with his claim that he needs complete loan files for each of the 2,600 loans. Moreover, it is prejudicial to GMACM for Morriss, who admits that he has received complete loan files for over 1,300 of the ARE Loans, to not even attempt to review any more than three (3) of those loans as part of his report. Such conduct must not be rewarded.

D. Morriss Is Not Qualified To Provide Any Opinions About GMACM's Servicing Or Administration Of The ARE Loans.

Morriss is ARE's only expert. Morriss, however, is not a servicing expert. He is an accountant and an auditor. In ARE's Expert Disclosure, ARE described Morriss as an expert who "specializes in national complex commercial litigation, forensic investigation, valuation and bankruptcy matters. He is a former PricewaterhouseCoopers, LLP partner, a CPA, a certified fraud examiner, a certified financial forensics and a certified valuation analysis with over 30 years of experience." *See* Doc. 89. Morris states in his report that he has experience in "accounting, tax, financial, forensic investigations, expert testimony, valuation, insolvency and damage analysis experience." *See* Exh. "A", Morriss Report.

Morriss has never worked for a mortgage servicer (other than as an auditor, accountant expert or accountant consultant). *See* Exh. "B", Morriss's CV. Morriss has never serviced or administered mortgage loans. *See id.* Thus, in addition to providing a speculative report, Morriss is also unqualified to provide any opinion about GMACM's servicing and administration of the ARE Loans. Morriss should be excluded to the extent he purports to be a servicing expert. *See Vaughn v. Nacco Materials Handling Group*, 440 Fed.Appx. 821 (11th Cir. 2011) (excluding

expert because he lacked "sufficient knowledge, skill, experience, training or education to render a [design] opinion").

CONCLUSION

Morriss's report consists of nothing more than speculative opinions premised on unsupported assumptions. Morriss admits that his report is incomplete and preliminary. Morriss speculates that GMACM's conduct "may" have damaged ARE and caused "possible" damages to ARE. Choosing to submit a preliminary and incomplete report, rather than seeking an extension of the expert report deadline, and the deadline for expert reports having expired, Morris's report does not meet Rule 702 or *Daubert* muster and Morriss must be excluded.

WHEREFORE, above premises considered, GMACM respectfully moves the Court to exclude the opinions, testimony and report of Lawrence D. Morriss, Jr.

Dated: February 23, 2012

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ATTORNEYS FOR DEFENDANT/COUNTERCLAIM PLAINTIFF GMAC MORTGAGE, LLC

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was served upon the following via the CM/ECF system and by placing a copy of same in the United States mail, first-class postage prepaid and addressed to his regular mailing address on the 23rd day of February, 2012:

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s/ Hope T. Cannon
OF COUNSEL

Exhibit H

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 10-21943-CIV-GOLD/GOODMAN

AMERICAN RESIDENTIAL
EQUITIES, LLC,

Plaintiff,

v.

GMAC MORTGAGE, LLC,

Defendant.
_____/

ORDER GRANTING MOTION TO COMPEL AND

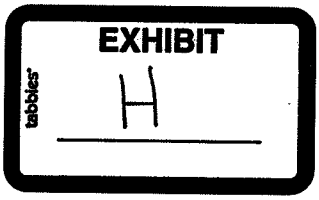
REPORT AND RECOMMENDATIONS RE: PLAINTIFF'S

REQUEST TO EXTEND PRE-TRIAL AND TRIAL DEADLINES

This matter is before the Undersigned on an order of reference [ECF 110] from United States District Judge Alan S. Gold concerning [ECF 109] Plaintiff's Motion to Compel Discovery and to Adjust Trial and Pretrial Schedules.

For the reasons outlined below, the Undersigned **GRANTS** the motion to compel and **RESPECTFULLY RECOMMENDS** that the pre-trial and trial deadlines be extended – but with additional conditions designed to make sure this case remains on track and to eliminate the possibility that another continuance will be required. The Court is also awarding fees to GMAC Mortgage, LLC ("GMAC") because of American Residential Equities, LLC's ("ARE") failure to comply with the pre-filing conference requirements (and for incorrectly certifying that it had complied).

In addition, the Undersigned also recommends that Judge Gold require the parties to mediate after the exchange of additional expert reports.



Moreover, because an extension of the trial and pre-trial deadlines will almost certainly impact Defendant's already-filed motions for partial summary judgment [ECF 106] and to exclude expert testimony [ECF 101], the Undersigned **recommends** that the District Court deny those motions without prejudice, so that Defendant may re-file those motions, if it chooses, after Plaintiff obtains the additional discovery. Plaintiff advised the Court of its intent to arrange for its expert witness to supplement his conclusions and analysis based on the forthcoming discovery as well as the documents already produced. Given that ARE's expert (or experts) will undoubtedly reach revised conclusions, it makes little sense for the Court to spend valuable time assessing motions based on circumstances which will likely change, perhaps significantly.

I. Factual Background

This case involves the claims of Plaintiff, a holder of real estate loans, against Defendant, its former loan-servicing agent, for breach of a loan servicing agreement. Currently before the Court is Plaintiff's motion to compel production of documents that Plaintiff claims are necessary for it to supplement its expert report and to calculate its damages, as well a companion request to extend trial deadlines in order to allow analysis of the requested additional production.

On March 30, 2012, the Court held a hearing on the motion. Based on the hearing, which lasted more than two hours, the Court is convinced that the "Captain" character (played by actor Strother Martin) in the 1967 movie "Cool Hand Luke" provides an apt description of the circumstances:

"What we've got here is . . . failure to communicate"[1]

In its motion, Plaintiff describes three document categories which Defendant has not produced: GMAC's "notes," data concerning financial transactions and the loan servicing documents.

Although Plaintiff filed this lawsuit on June 11, 2010 [ECF 1], nearly two years ago, the parties did not reach a common understanding of the terminology in the discovery requests and in communications about the discovery requests until the hearing. Likewise, they did not fully appreciate the positions they were taking on certain discovery issues until the hearing.

For example, the Court (and the parties) learned for the first time at the hearing that the term "notes," as used by Plaintiff, refers to documents which GMAC calls "servicing history," or, at times, "call notes." In addition, a member of Plaintiff's document review support team (i.e., a third party vendor which Plaintiff says has received more than $800,000 in this case to help compile, organize and analyze Defendant's discovery responses) advised the Court that field notes are different than GMACAC notes.[2]

The confusion over the definition of "notes," as called for by Plaintiff's discovery, is significant. Plaintiff contends that GMAC's failure to timely provide all "notes" has undermined its ability to prepare for trial and has prevented its

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[1] The movie quote is not "**a**" failure to communicate. Instead, the Captain engages in a long pause before uttering the second part of the sentence. The quote is ranked #11 in the American Film Institute's list of the top 100 movie quotations in American cinema. http://www.afi.com/100years/quotes.aspx (last visited March 30, 2012), http://www.imdb.com/title/tt0061512 (last visited March 30, 2012).

[2] The parties used "GMACAC," in addition to "GMAC," to describe these notes in the papers filed with the Court.

expert from performing an adequate review and from providing detailed conclusions and opinions.

Once the parties discussed their different understandings of the "notes" which Plaintiff said have not been produced, GMAC conceded that it failed to produce notes from 727 loan files. GMAC's counsel explained that the omission was due to an oversight and that she did not realize the omission until shortly before the hearing. The loan portfolio at issue in this case consists of approximately 2,680 loans – which means that GMAC neglected to produce notes for 27% of the loan files at issue.

GMAC represented that it could produce the missing notes from the 727 loan files within one week. The Court ordered GMAC to make this production by April 6, 2012, thus granting in part the motion to compel.

The parties similarly miscommunicated about insurance coverage documents concerning the properties that serve as security for the 2,680 loans at issue in this case.

Plaintiff claims it possess information demonstrating that GMAC failed to timely insure properties, under-insured certain properties, over-insured certain properties and sometimes even insured incorrect properties. In its motion, Plaintiff therefore demands copies of all the insurance policies for the individual properties and copies of the master insurance agreement between GMAC and the insurance carrier it selected to provide forced-placed insurance (Plaintiff believes that the forced-placed insurer is a company known as "Balboa").[3]

[3] Plaintiff argued in its motion to compel (p. 16) that it was entitled to "see copies of the insurance policies for each property; all correspondence with

Notwithstanding the fact that Plaintiff filed its lawsuit almost two years ago, it was not until after it filed its motion to compel that Plaintiff first learned that GMAC does not have individual insurance policies for each property. In other words, Plaintiff demanded, at least in part, documents which do not exist – a scenario generated by the parties' failure to discuss the policies before Plaintiff filed its motion. Instead of individual policies, GMAC has a *master agreement*. Defense counsel confirmed at the hearing that Balboa is, in fact, the insurer involved, though she noted that GMAC might also have used one additional insurer during a time period relevant to the case.

The first communication misstep regarding insurance coverage occurred when Plaintiff did not even request the forced-placed coverage master insurance policy until February 2012. After GMAC received this request, it challenged the relevancy of the master insurance agreements and asked for an explanation of Plaintiff's relevance theory. But Plaintiff never responded to GMAC's objection and so the parties never discussed the issue again until after Plaintiff filed the motion to compel.

At the hearing, GMAC agreed to produce the master agreement (or agreements, if insurers other than Balboa were involved) by April 6, 2012. The Court therefore ordered GMAC to produce the documents by this deadline, thus granting, at least in part, another portion of the motion to compel.

Although GMAC does not have copies of individual insurance policies for the properties at issue in this case, it previously advised Plaintiff that property-

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insurers for each property; as well as GMAC's master policy 'policies' [sic] with Balboa and/or any similar insurers who provided coverage at the request of GMAC."

specific information about the insurance coverage is available in individual insurance declaration pages and letters. Those documents, GMAC advised, would reflect the property address, the coverage limit, the coverage type and the premium amount.

However, the non-existence or inadequacy of insurance coverage would not, by itself, create damages for Plaintiff. Damages would only exist if a property securing a loan actually sustained insurable damage, and the insurance was inadequate to cover the damage. Otherwise, it is irrelevant whether the property was under-insured or not insured at all. GMAC advised that it would be cumbersome and time-consuming to locate the declaration pages and coverage letters for all properties. Moreover, as explained above, many of the documents would be irrelevant because only those properties which actually sustained insurable property damage, and for which GMAC received insufficient insurance proceeds from the insurance carrier, would be part of Plaintiff's claim.

Framed by this practical dynamic, Plaintiff agreed to review its files and try to pinpoint for GMAC those properties which sustained damage so that GMAC could locate and produce only relevant declaration pages and coverage letters.

Concerning the missing loan servicing documents, Plaintiff described them as third-party backup documents, such as vendor invoices. But GMAC does not have these loan servicing documents for approximately 170 loans which are now being handled by another loan servicer. Plaintiff acknowledged that the Court cannot compel GMAC to produce what it does not have. Plaintiff also conceded that it has not served a subpoena for these third party documents (for the 170

properties). These facts suggest that Plaintiff may not actually believe these documents are critical.[4]

II. Failure to Comply with Pre-Filing Conferral Requirement

Local Rule 7.1(a)(3) requires parties to confer in good faith about a discovery dispute and to try to resolve the dispute before filing a motion. It also requires the movant to include a certification about the efforts to confer. Failure to comply with this rule has consequences. Violating the rule "may be cause for the Court to grant or deny the motion and impose on counsel an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney's fee."

Federal Rule of Civil Procedure 37(a) requires a party moving to compel discovery to "include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action."

Similar to the Local Rule and Rule 37, the Court's orders governing discovery disputes in this case contain independent, but analogous, pre-filing conferral requirements. Soon after this lawsuit was filed on June 30, 2010, Judge Gold entered an order [ECF 6] which, in a section entitled "Meet and Confer," requires that "Counsel **must** actually confer (in person or via telephone)

[4] There are 37 other sets of similar third-party loan servicing documents that Plaintiff does have because GMAC transferred these documents, unlike the other 170, to ARE's new loan servicer at the termination of the ARE-GMAC relationship. These 37 sets of documents are therefore not at issue here.

and engage in reasonable compromise in a genuine effort to resolve their discovery disputes **before** filing discovery motions."

Judge Gold repeated these discovery procedures in an April 12, 2011 Order [ECF 59], when the magistrate reference for this case was transferred to the Undersigned. Judge Gold also specified that there "must be an **actual conversation** before a discovery motion is filed" and that "the Court may impose sanctions, monetary or otherwise, if it determines . . . a party fails to confer in good faith."

The communication problems plaguing this case also affected the motion to compel. Simply stated, there was no communication. ARE simply filed the motion to compel without conferring with GMAC beforehand.

Nevertheless, ARE certified that it *did* confer in good faith – and represented that the good faith conferences were delineated in the motion. As purported evidence of its attempt to confer, ARE outlined myriad communications since the inception of the case. But the last communication it mentioned occurred on February 3, 2012 – **more than a month before the motion to compel was filed.**

Given the significant gap between the last conference about discovery and the filing of the motion to compel, Defendant GMAC's response [ECF 115] contended (unsurprisingly) that ARE did not, in fact, satisfy the meet and confer requirements. GMAC pointed out that it offered to discuss discovery issues in a

February 10, 2012 email to which ARE never responded.[5] Instead, ARE ignored the offer, waited almost a month and then filed a 20-page motion to compel without any warning.

At the hearing, ARE conceded that it had not engaged in any substantive communications with GMAC about the discovery issues raised in its motion after February 3, 2012 and had not responded to the February 10, 2012 suggestion to have a telephone conference before filing its March 6, 2012 motion to compel. Nevertheless, ARE argued that it complied with the various conference requirements because it had communicated with GMAC during the prior year and a half (since September 7, 2011) and because GMAC advised it at some unspecified point that it would not be producing additional information. According to ARE, it was excused from any further pre-filing attempts to resolve discovery issues because of communications ending almost a month before filing and because it believed GMAC had adopted a "we're-not-producing-any-more-discovery" position.

There are several problems with ARE's theory.

First, it is fundamentally illogical for ARE to conclude that the pre-filing conference requirements were met in good faith through a communication that occurred almost a month before the motion was filed. While it is true that the Federal Rules of Civil Procedure, the Local Rules and the Court's Discovery Procedures do not pinpoint the *specific* timing of when the pre-filing efforts to resolve the dispute must occur, the notion that an email sent almost a month

[5] Defense counsel's email suggested that "[i]t might make sense for us to get on the phone because what you guys say you're missing does not line up with what we've produced."

earlier is sufficient defies common sense. If that practice were permitted, then parties could always circumvent the pre-filing conference requirement by exchanging a brief email a month before filing the motion.[6]

Typically, parties engage in pre-filing discussions anywhere from one day to a few days before filing a motion. Sending an email a *month* before filing a motion to compel is not a good faith effort to resolve a discovery dispute – the purpose of the requirement. The rules governing the conference all suggest that it should occur *shortly* before a party files a motion and do not justify a theory that a communication sent almost a month before filing a motion to compel complies with the pre-filing requirement. ARE did not cite any authority to support a contrary view and the Court is unaware of any.

Second, ARE does not identify the GMAC communication which it believes adopted the "no-more-discovery" position it now says was sufficient to eliminate the need for any additional conferencing.

Third, even if GMAC did announce in early February 2012 that it had no more discovery to provide, then ARE would *still* need to make a good faith effort to discuss this position before filing a motion to compel on March 6, 2012.

Fourth, ARE's argument is inconsistent with GMAC's February 10, 2012 offer to discuss the alleged discovery shortfall in a phone conference. Likewise,

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[6] It would be difficult for the drafters of the applicable rules to specify precisely when a pre-filing conference must occur. This calculation must necessarily consider the nature of the case, the type and degree of the dispute, the relationship between the parties, the schedules of the parties and their counsel and myriad other case-specific variables. Therefore, the requirement is phrased broadly (i.e., before filing) – and it will only succeed if counsel exercise common sense and operate in good faith.

it contradicts GMAC's February 10, 2012 email, which states, "We continue to try to narrow the range of problems."

Fifth, ARE's argument ignores the fact that its motion to compel raises, for the first time, discovery issues which were never part of *any* pre-filing conference. For example, the motion mentions blank pages and the Bates ranges of the supposedly blank pages, but ARE did not mention these ranges to GMAC before the motion was filed. In other words, ARE generated another "failure to communicate scenario."

The Court is therefore convinced that ARE failed to comply with the myriad meet and confer requirements concerning its motion to compel.

As a result, it appears as though at least some of the problem areas outlined in ARE's 20-page motion to compel could easily have been resolved through a good faith conference – but were not. For example, GMAC explained that there were no difficulties with four disks produced to ARE – and that a paralegal employed by ARE's counsel mistakenly thought there was a gap in the Bates ranges because ARE's counsel did not advise the paralegal that the "missing" documents were actually produced in a separate email. Even assuming that the failure to mention the email to the paralegal was a mere oversight, if ARE's counsel had discussed the issue with GMAC's counsel, then presumably GMAC's counsel could have reminded ARE's counsel where the documents were located. This is precisely the type of discovery roadblock which could and should be avoided through a pre-filing conference.

III. The Motion to Compel

Having determined that ARE did not comply with the pre-filing conference requirements, the Court must now decide what role this fact should play in the resolution of ARE's motion.

Not surprisingly, GMAC asks the Court to deny the motion to compel based upon the failure to confer. The Court is certainly *authorized* to deny the motion because of ARE's failure to comply with the pre-filing meet and confer requirements. However, the Court is not required to deny the motion.

Given that the parties did, in fact, engage in many discovery conversations over the past year and a half, that Plaintiff has advised that it already paid more than $800,000 to its third party analyst, and the reality that GMAC did not produce its notes for more than 25% of the loan files at issue, the Court will not deny the motion based on the pre-filing failure to confer. Indeed, GMAC already advised the Court at the hearing that it found the missing notes and would be producing them to ARE within a week. It also agreed to produce other documents. Consistent with its rulings during the hearing, the Court therefore grants the motion to compel to the extent that GMAC must produce the documents at issue in the motion.

However, the Court also concludes that some consequence is in order for ARE's failure to follow the myriad pre-filing conference requirements and for its questionable certification (which claimed that it had fulfilled the requirement). Federal Rule of Civil Procedure 37 mandates an award of attorney's fees, unless one of the narrow exceptions applies. Therefore, as the party prevailing on a

motion to compel, ARE would ordinarily be entitled to a fees award. In fact, the Undersigned's practice is to strictly follow Rule 37 and to award fees to the prevailing party in a discovery dispute.

But Rule 37(a)(5)(A)(i) provides that fees are *not* to be ordered if "the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action." The circumstances here fall squarely within this exception and therefore the Court will not award ARE any fees.

But the consequences analysis cannot end there because Judge Gold's second discovery order [ECF 59] provides for a monetary consequence if a party fails to confer in good faith. ARE failed to confer and submitted a certification attesting to the contrary in direct contravention of that order. The Court therefore **orders** ARE's counsel to pay the fees which GMAC incurred in responding to the motion, preparing for the hearing and attending the hearing.[7]

IV. Summary of Rulings on the Motion to Compel

GMAC shall provide (1) the missing "notes" and the master insurance policy (or policies) by **April 11, 2012** (assuming they have not yet been provided) and (2) the declaration pages and other documents relating to property-specific insurance coverage concerning the 2,680 properties at issue in this case **within 14 days** after receiving from ARE a more-complete list of the specific properties for which ARE is seeking insurance coverage information.

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[7] To be clear, there are two distinct violations here. The first violation is the failure to confer before filing the motion. The second violation is the inaccurate statement in the certificate, incorrectly representing that the conference actually occurred. The Court views the second violation as the more-serious one, though the first violation is hardly insignificant given the magnitude of the case.

ARE's counsel must pay GMAC the attorney's fees it incurred in connection with ARE's motion to compel. Counsel for ARE and GMAC shall first attempt by themselves to resolve the issue of the amount of fees. If those efforts are successful, then ARE's counsel shall pay the fees to GMAC **within 10 days** of this order. If counsel cannot agree, then GMAC shall advise the Court **within 10 days** of this order and the Court will schedule an evidentiary hearing. The law firms will be required to produce to each other their respective time entries and billing rates for the time at issue.

The fees, whether based on an agreed amount or one set by the Court, must be paid by ARE's counsel, who shall not pass on the amount to the client, **within 10 days** of the agreement on fees or an order awarding fees. ARE shall submit an affidavit attesting to the payment of fees to GMAC to the Court's efile inbox (which is separate from the public CM/ECF docket) at goodman@flsd.uscourts.gov **within 5 days** of the payment. The affidavit shall also list the amount of the fees if the amount is the subject of an agreement. To maintain the privacy of this information, no party shall file the affidavit with the Clerk's Office through the CM/ECF system.[8]

V. Plaintiff's Request to Adjust Trial & Pretrial Schedules

The thrust of ARE's motion to adjust the trial deadlines is that it requires additional time for expert analysis and damages calculations because of incomplete document production. ARE contends that once production is

[8] The Court is ordering these payments as a cost/fee-shifting mechanism, not as a disciplinary sanction. Therefore, the attorneys involved would **not** be required to answer "yes" if asked (e.g., in a Bar application, insurance coverage application, submission to a judicial nominating commission, etc.) whether this Order imposed "sanctions" against them.

complete its experts will be able to provide better opinions regarding damages. Judge Gold also referred this motion to me. In the referral, Judge Gold asked me to make a recommendation on whether the trial and pretrial deadlines should be extended, and, if so, for how long. To do so, it is first necessary to outline the case's present procedural posture.

Based on Judge Gold's January 4, 2012 Order Resetting Deadlines [ECF 95], trial is scheduled to begin September 10, 2012, the calendar call is scheduled for September 5, 2012, the pretrial conference is scheduled for August 3, 2012, the cutoff for dispositive motions is May 11, 2012, and the discovery completion deadline is April 13, 2012.

Before Plaintiff filed its motion to compel, Defendant filed motions to exclude the testimony of Plaintiff's expert witness [ECF 101] and for partial summary judgment [ECF 106]. Judge Gold scheduled those two motions for a hearing on May 18, 2012 [ECF 108].

Defendant bases its motion to exclude, in part, on the preliminary, incomplete and speculative nature of the expert's opinions. In its opposition to the motion to exclude its expert [ECF 111], ARE argues that GMAC itself is responsible for the preliminary and incomplete nature of the opinions because it did not timely comply with its discovery obligations and still has not fulfilled its discovery duties.

As of the hearing, ARE still had not received the GMAC notes for approximately 27% of the loan files at issue. It is therefore not surprising that ARE's expert did not provide concrete, firm opinions.

ARE explained that its preferred damages calculations method is known as sampling. To engage in sampling, however, ARE said it needs to have a certain level of documentation completeness in order to reach the confidence level sufficient for the necessary extrapolation. With notes from 27% of the 2,680 loan files missing, ARE argued, its expert cannot generate a damages analysis using sampling and extrapolation.

ARE stated that, if further document production resulted in enough complete files to justify sampling, then it would take that preferred approach. The fact is, however, that ARE might never be able to use extrapolation. This is because, as noted, GMAC cannot produce third party materials for 170 loans. ARE therefore concluded that it may have difficulty achieving the requisite confidence level about the completeness of the documentation even if GMAC makes some additional production.

ARE explained that it is now, in the absence of enough complete files to reach a sufficient sampling confidence level, using another damages calculation strategy. This method involves the manual, file-by-file analysis for 145 of the 200 largest loans in its portfolio.[9] ARE characterized this method as its "least-preferred" method. ARE advised the Court that it (or its vendor) has hired additional analysts and that it would take 6 additional months to review the 145 loan files because of the sheer size of the data involved. In addition, ARE stated that if it is unable to use sampling after further production, but this production

[9] ARE is analyzing only 145 – or approximately 72.5% – of these files because only 145 of the 200 files are complete.

nonetheless results in some additional complete files among any of the 55 now-incomplete largest loan files, then ARE will also analyze these files manually.

Concerning the motion for partial summary judgment, GMAC argued that ARE must have expert testimony to prove its damages and that ARE's expert has not, among other alleged faults and deficiencies, identified the specific amount of any damages caused by an alleged breach.

In response [ECF 113], ARE conceded that its expert's report is preliminary and does not provide absolute conclusions. It blamed this shortcoming on GMAC's tardy and incomplete discovery responses.

ARE advised that its expert will supplement his report (presumably to make it more-certain) once GMAC produces the data it has failed to provide in discovery. It argued that the Court should deny GMAC's motion for partial summary judgment because GMAC should not be "rewarded" for violating its discovery obligations. Therefore, ARE argued, it "would be a perversion of the fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts."

ARE seeks a nine-month continuance. It says it requires this amount of time to review the additional discovery which GMAC has advised it will produce, to provide the file review analysis to its expert and to provide its expert with sufficient time to supplement his earlier conclusions. GMAC does not oppose an extension of the scheduling order deadlines. But, acknowledging that it failed to provide notes for 27% of the loan files at issue, GMAC takes the position that a modest one-month extension is adequate to address Plaintiff's concerns.

After reviewing the motions and memoranda and hearing argument of counsel, the Court is inclined to accept the explanation of ARE's counsel – that the parties badly misperceived the time necessary to complete both production and loan file review. GMAC's failure to produce the notes for 27% of the loan files is now undisputed. Under this scenario, GMAC's suggestion of a mere one-month extension is woefully inadequate.

Under the circumstances, the Undersigned **recommends** that Judge Gold grant ARE's request to extend the trial and pre-trial deadlines. However, in order to prevent continued miscommunication and to keep the parties focused on the new deadlines, the Undersigned also recommends that Judge Gold adopt the following schedule:

- ARE shall advise GMAC by May 31, 2012 *whether* it intends to use another or different expert to provide testimony at trial. If ARE is going to use one or more new experts, then it shall provide the expert's resumes and litigation experience lists to GMAC by May 31, 2012. (The parties should keep in mind that this requirement is designed to timely advise GMAC of the type of experts which ARE plans to use at trial, so that it may timely determine whether it needs to secure additional expert witnesses for itself.)
- If GMAC intends to use expert witnesses, then it shall provide the information described in the preceding paragraph to ARE by July 20, 2012.

- ARE shall produce its expert reports (including amended/supplemental reports from its existing expert) to GMAC by October 15, 2012.
- GMAC shall produce its expert reports (including amended/supplemental reports) by October 30, 2012.
- The parties shall exchange rebuttal expert reports by November 9, 2012.
- The parties shall complete all expert witness discovery, including depositions, by December 7, 2012.
- The parties must complete Mediation by December 21, 2012.
- The parties must file all dispositive pretrial motions and memoranda by January 4, 2013.

Finally, the Undersigned **recommends** that Judge Gold reschedule the trial for a date after March 1, 2013, with appropriate additional dates for the pretrial conference and calendar call.[10]

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[10] If Judge Gold permits the parties, as recommended, to engage in additional discovery, additional loan file analysis, and supplemental expert witness evaluation, then the factual underpinnings regarding ARE's damages will likely be different and the motion for partial summary judgment and to exclude ARE's expert will based on outdated and incomplete information. Therefore, the Undersigned **recommends** that Judge Gold **deny** these two motions **without prejudice** and provide the parties with leave to re-file them (or similar motions) after GMAC produces additional document discovery and after supplemental expert witness discovery is completed. Consequently, the Undersigned also **recommends** that Judge Gold **cancel** the May 18, 2012 hearing on these motions.

VI. Objections to the Scheduling Adjustment Recommendations

Pursuant to 28 U.S.C. § 636(b)(1) and Local Magistrate Rule 4(b), the parties have fourteen (14) days after being served with a copy of this Report and Recommendations to serve and file written objections, if any, with the District Court. Each party may file a response to the other party's objection within 14 days of the objections. Failure to timely file objections shall bar the parties from a *de novo* determination by the District Court of an issue covered in this report and bar the parties from attacking on appeal the factual findings contained herein. *Resolution Trust Corp. v. Hallmark Builders, Inc.*, 996 F.2d 1144, 1149 (11th Cir. 1993) (citing *LoConte v. Dugger*, 847 F.2d 745, 749-50 (11th Cir. 1988)).[11]

DONE and ORDERED and RESPECTFULLY RECOMMENDED, in Chambers, in Miami, Florida, this 10th day of April, 2012.

Jonathan Goodman
UNITED STATES MAGISTRATE JUDGE

Copies furnished to:
The Honorable Alan S. Gold
All counsel of record

[11] Objections to the "order" portion of this document are governed by Local Magistrate Rule 4(a) and are subject to the "clearly erroneous or contrary to law standard."

Exhibit I

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

AMERICAN RESIDENTIAL EQUITIES, LLC,	)	
Plaintiff,	)	
v.	)	**CIVIL ACTION NUMBER: 10-21943-Civ-Gold/Goodman**
GMAC MORTGAGE, LLC, successor by merger to GMAC Mortgage Company,	)	
Defendant.	)	

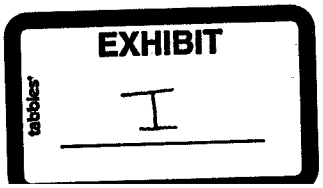
GMAC MORTGAGE, LLC'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON BREACH OF CONTRACT CLAIM AND SUPPORTING MEMORANDUM OF LAW AND AUTHORITY

Comes Now, Defendant GMAC Mortgage, LLC ("Defendant" or "GMACM") and respectfully moves this Court, pursuant to Federal Rule of Civil Procedure 56, for an order granting summary judgment in favor of GMACM on Plaintiff's breach of contract claim. In support thereof, GMACM submits the Undisputed Statement of Facts, filed contemporaneously herewith, and further states as follows:

INTRODUCTION

On June 11, 2010, Plaintiff American Residential Equities, LLC ("Plaintiff" or "ARE") filed this action against GMACM alleging that GMACM "fail[ed] to comply with the terms of the Servicing Agreement."[1] *See* Doc. 1, Complaint, ¶ 26. The Servicing Agreement referenced

[1] Specifically, ARE alleges that GMACM "breached the Servicing Agreement by: (a) maintaining, inspecting and/or reporting on the wrong property securing the Mortgage Loans; (b) failing to properly secure Mortgaged Properties and/or REO Properties from damage due to the elements and/or vandals; (c) failing to properly maintain Mortgaged Properties and/or REO Properties, thereby subjecting them to violations of law and governmental fines; (d) servicing Mortgaged Properties and/or REO Properties that were deemed a total loss as though they were in good condition; (e) selling REO Properties in violation of the Servicing Agreement; (f) over-insuring Mortgaged Properties and/or REO Properties; (g) failing to timely file insurance claims; (h) failing to exclude ARE's assets from the Homeowner's Affordability and Stability Plan despite ARE's written demand to exclude its assets from the



by ARE is a contract entered into between GMACM and ARE on or about July 29, 2004, pursuant to which GMACM would service and administer certain substandard loans held by, or serviced by, ARE (hereinafter, the "ARE Loans").[2] *See* SoF ¶ s 3-4. Under the terms of the Servicing Agreement, GMACM's conduct in servicing and administering the ARE Loans was guided by the terms of the Servicing Agreement, Accepted Servicing Practices, certain Servicing Performance Standards and, effective April 10, 2008, an Approval Matrix. *See* SoF ¶ s 5-6. The Servicing Agreement with Amendments is attached as Exh. A to the Statement of Facts.

"Accepted Servicing Practices" is defined in the Servicing Agreement as "those *mortgage servicing practices of mortgage lending institutions which service mortgage loans of the same type as such [ARE] Loan in the jurisdiction where the related Mortgaged Property is located, exercising the same care in performing those practices that [GMACM] customarily employs and exercises in servicing and administering mortgage loans for its own account (including, compliance with applicable federal, state and local laws).*" *See* SoF ¶ 7. Thus, one of the elements ARE must establish to support its breach of contract claim is that GMACM's servicing and administration of the ARE Loans was not consistent with Accepted Servicing Practices (i.e., applicable industry practice) and that GMACM did not exercise the same standard of care on the ARE Loans as on GMACM's loans. The only way for ARE to establish such a breach of industry standard practices and requisite standard of care is through expert testimony. *Goolsby v. Gain Tech., Inc.*, 362 Fed.Appx. 123, 135 (11th Cir. 2010).

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program; (i) failing to follow the approval matrix set forth in the Fourth Amendment to the Servicing Agreement; (j) failing to timely provide ARE with required reports and properly requested information relating to the Mortgage Loans and REO Properties; (k) failing to comply with ARE's demand for an audit pursuant to Section 4.06 of the Servicing Agreement; (l) failing to furnish complete mortgage files to ALS pursuant to the Servicing Agreement and the transfer instructions by ARE in its April 1, 2010 letter, adversely affecting ALS's ability to service the Mortgage Loans and REO Properties; and (m) failing to pay ARE the April, 2010 remittance pursuant to Section 3.01 of the Servicing Agreement." *See* Doc. 1 Complaint, ¶ 28.

[2] The Servicing Agreement was amended six times, with each amendment having a separate effective date. *See* SoF ¶ 4.

ARE has designated Lawrence D. Morriss, Jr. ("Morriss") as its only expert, and provided a "preliminary" report for Morriss (which as discussed in GMACM's Motion to Exclude, filed contemporaneously herewith, is subject to exclusion under Federal Rule of Evidence 702). Morriss is an accountant and is not a servicing expert. *See* Doc. 89. Morriss's report fails to (1) identify the industry practices and requisite standard of care to be employed by GMACM under the Servicing Agreement; (2) identify any alleged failure by GMACM to conform to said conduct in servicing or administering of any loan or (3) identify the specific amount of any damages caused by any alleged breach. Furthermore, as discussed in the Motion to Exclude, as well as herein, Morriss does not provide any definitive, non-speculative opinions in his report. ARE's lack of expert testimony and opinion is fatal to ARE's breach of contract claim.

STANDARD OF REVIEW

A court should grant a motion for summary judgment "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party, bears the initial responsibility of informing the court of the basis of its motion and identifying the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Where the moving party meets the initial burden—and GMACM submits that it has—the burden "then moves to the opposing party who must present significant probative evidence tending to support its claim or defense." *Intel Corp. v. Hartford Acc. & Indem. Co.*, 952 F.2d 1551, 1558 (9th Cir. 1991) (quoting *Richards v. Neilsen Freight Lines*, 810 F.2d 898, 902 (9th Cir. 1987)). The non-moving party must go beyond the pleadings and designate facts showing an issue for trial. *Celotex*, 447 U.S. at 322-23.

ARGUMENT

I. ARE'S BREACH OF CONTRACT CLAIM MUST BE SUPPORTED BY EXPERT TESTIMONY.

ARE has alleged that GMACM breached the terms of the Servicing Agreement. Under Florida law, a plaintiff must establish the following three (3) elements to support a breach of contract claim: (1) a valid contract; (2) a material breach and (3) damages. *See e.g., Abruzzo v. Haller*, 603 So.2d 1338, 1340 (Fla. 1st DCA 1992). The parties do not dispute that a valid contract existed between the parties, that is, the Servicing Agreement (with its amendments). *See* SoF ¶s 3-4. Thus, the first element of ARE's breach of contract claim is met. However, ARE cannot create a genuine issue of material fact as to the second and third elements of its claim without expert testimony.

Pursuant to the terms of the Servicing Agreement, GMACM had wide discretion in carrying out the servicing and administration of the ARE Loans, limited only by the terms of the Servicing Agreement, Accepted Servicing Practices, certain Servicing Performance Standards and (effective April 10, 2008), an Approval Matrix. *See* SoF ¶ s 5-6. The Servicing Performance Standards consists of specific standards set forth in Exhibit 16, and subsequently amended by Exhibit 16A, of the Servicing Agreement. *See* SoF. ¶ 4. The Approval Matrix, which became effective on April 10, 2008, sets forth certain criteria to be employed by GMACM in determining when approval by ARE with regard to specific servicing and administration actions may be necessary. *See* SoF ¶ s 2, 6. Thus, the Servicing Performance Standards and Approval Matrix are specifically set forth and identified in the Servicing Agreement. On the other hand, the Accepted Servicing Practices are not specific criteria set forth in the Servicing Agreement. Rather, Accepted Servicing Practices refer to those standard practices employed by

similar mortgage lenders servicing similar mortgage loans in similar jurisdictions carried out with the requisite standard of care. *See* SoF ¶ s 7.

Thus, although expert testimony is generally not required to establish a breach of contract claim, expert testimony is required in this case because whether GMACM breached the terms of the Servicing Agreement is dependent on whether its conduct was consistent with Acceptable Servicing Practices, which, as stated above, is defined to include the practices employed by mortgage lenders servicing similar loans in similar jurisdictions (i.e., the standard employed in the industry). *See Botes v. Weintraub*, 2010 WL 966864, *12 (N.D. Ga. 2010) (holding that breach of contract claim based on allegation that attorney's conduct fell below standard of performance required expert testimony as to standard of care). Without expert testimony as to the standard practices employed in the industry, a trier of fact "must impermissibly speculate" as to the standard against which GMACM's conduct is to be measured. *See Goolsby*, 362 Fed.Appx. at 135. It is well settled that a plaintiff who alleges a breach or violation of an industry standard or failure to act with reasonable care must establish such a violation though expert testimony. *See* Atwater, 2009 WL 3254925 at *11 (holding that without expert testimony, plaintiff has failed to produce any evidence that the defendant's conduct fell below any applicable standard of care and "that deficiency is in itself fatal to plaintiff's claim"); *Barbazza v. Int'l Motor Sports Ass'n, Inc.*, 538 S.E.2d 859 (Ga. App. 2000) (granting summary judgment where plaintiff presented no expert evidence that defendant's actions violated industry standards).

Additionally, as part of ARE's breach of contract claim, ARE has alleged that GMACM sold Real Estate Owned ("REO") Properties[3] in violation of the Servicing Agreement. The Servicing Agreement provides that, GMACM will use *"commercially reasonable"* efforts to dispose of the property as soon as possible. *See* SoF ¶ 11. To establish what is *commercially reasonable,* ARE must present expert testimony or opinion from an industry expert. *See e.g., See Sunjet, Inc. v. Ford Motor Credit Co.,* 703 S.W.2d 285, 289 (Tex. App. 1985) ("the testimony of an expert may be necessary to establish that procedures used complied with practices normally followed in the industry, or that the sale was otherwise commercially reasonable"); *ITT Commercial Finance Corp. v. Riehn,* 796 S.W.2d 248, 251 (Tex. App. 1990) ("[i]n general, expert testimony is required to establish the commercial reasonableness of a sale."). Expert testimony is necessary for ARE to show that GMACM's disposition of REO properties was not "commercially reasonable" (as alleged) because the normal standards exercised by mortgage lenders servicing similar loans in similar jurisdictions are not "within the knowledge of the average person . . [and] . . [w]ithout expert testimony, neither [the court or the jury] would have sufficient knowledge to be able to determine the reasonableness of the methods used in such a sale." *Sunjet, Inc.,* 703 S.W.2d at 289. ARE, however, has not presented such expert testimony and the deadline for expert designations and reports has passed.

II. ARE'S ONLY DESIGNATED EXPERT IS ACCOUNTANT LAWRENCE D. MORRISS, JR.

ARE has designated Lawrence D. Morriss, Jr. ("Morriss") as an expert in this case. *See* Doc. 89. On February 13, 2012, the deadline for the exchange of expert reports, ARE produced

[3] REO Property is defined as "A Mortgaged Property acquired by the Servicer on behalf of the Owner through foreclosure or by deed in lieu of foreclosure, as described in Section 2.15 [of the Servicing Agreement]. *See* SoF ¶ 2, *See* Attachment A to the SoF, p. 10.

a "preliminary" and incomplete report from Morriss. *See* Morriss Report, attached hereto, as Exh. "A." Morriss is an accounting expert. *See* Doc. 89.

Morriss's report contains no opinions regarding Acceptable Servicing Practices or GMACM's attendant standard of care under the Servicing Agreement. It is devoid of such opinions because Morriss is not a servicing expert and, therefore, would not be qualified to offer any such opinions. Additionally, Morriss's report must be excluded under *Daubert* and Fed. R. Evid. 702 because, even as to damages, Morriss's report consists of only speculative opinions based on conjecture and unfounded assumptions. Thus, Morriss's report is not relevant or reliable. Moreover, ARE should not be allowed to supplement or provide an additional report by Morriss to rebut this summary judgment motion. Not only have the expert disclosure and report deadlines passed, but the Court has extended these deadlines at least five times previously.

A. Morriss's Report Fails To Create A Genuine Issue of Material Fact As To Plaintiff's Breach of Contract Claim.

ARE needs expert testimony to establish a question of fact as to whether GMACM's servicing and administration of the ARE Loans was inconsistent with, or a breach of, the Accepted Servicing Practices and GMACM's attendant standard of care; whether GMACM failed to dispose of REO Properties in a "commercially reasonable" manner and whether ARE has suffered damages as a result of any such breaches. *See Anza v. Ideal Steel Supply Corp.*, 547 US 451 (2006) (stating that it is "plaintiff's responsibility to prove that the amount of damages he seeks if fairly attributable to the defendant"). Morriss's report, however, fails to provide any such opinions.

Morriss's report provides no opinions regarding (1) the servicing practices employed by mortgage lenders servicing similar loans in similar jurisdictions; (2) the standard for determining when a disposition of property is "commercially reasonable"; (3) how GMACM's conduct fell

below any requisite standard of care or (4) what provision(s) GMACM is alleged to have breached in the Servicing Agreement. ARE, thus, has failed to provide any expert opinion regarding the applicable practices or standards of care governing GMACM's conduct in the Servicing Agreement from which a fact finder could gauge GMACM's conduct in servicing and administering the ARE Loans. In fact, in the 7 pages of the "analysis" portion of Morriss's 11-page report, Morriss provides only three "examples" of possible errors which he contends "**may**" have caused ARE damage. *See* Exh. "A", Morriss Report, p. 7 ("GMACM's servicing of this loan **may** have resulted in permanent diminution of value.").

Morriss's report also fails to provide any definitive opinions about how ARE has been damaged or to what extent. Rather, Morriss's report contains a 2-page "**Possible Damages**" section and a conjecture that ARE has been damaged by somewhere in a **"possible"** $43,000,000.00 range of damages. *See* Exh. "A", Morriss Report, p. 5 ("The *possible* amount of ARE's damages ranges from $26,540,629 to $69,499,825"). Thus, as the court so aptly stated in *Hall v. Thomas*, 753 F.Supp.2d 1113 (N.D. Ala. 2010) (discussed further below), "shorn of its purely speculative conclusions, [the expert] report contains no relevant opinions at all." *See id.* at 1142.

The deadline for expert designations and reports having passed, ARE cannot create a genuine issue of material fact as to all the elements of its breach of contract claim against GMACM. Summary judgment, therefore, must be entered in favor of GMACM where the report of ARE's only designated expert "provides no viable opinions regarding facts in issue." *See id.* at 1144; *see also, Jackson v. Carnival Cruise Lines, Inc.*, 203 F.Supp.2d 1367, 1378 (S.D. Fla. 2002) (holding expert report inadmissible on motion for summary judgment where, among other reasons, the report was provided after the expert report deadline).

B. Morriss's Opinions, Testimony and Report Should be Excluded.

Moreover, Morriss's report is so lacking that he should be excluded as an expert in this matter. As shown in GMACM's Motion to Exclude Expert Opinions, Report or Testimony from Morriss, Morriss should be precluded from testifying as an expert in this matter because the report he provided contains no opinions which could pass *Daubert* or Rule 702 muster. Despite being faced with an expert report deadline that had previously been extended five times (*see, infra, fn. 3*) Morriss submitted a "preliminary" and incomplete report, which contains nothing but speculation and conjecture as to ARE's alleged damages in this case and **possible** servicing errors. *See* Exh. "A", Morriss Report. Thus, as established in GMACM's Motion to Exclude, Morriss should be excluded from providing any expert testimony or opinion in this matter. (For the sake of brevity, GMACM's Motion to Exclude is adopted and incorporated by reference as though fully set out herein).

III. SUMMARY JUDGMENT IN FAVOR OF GMACM.

Without expert testimony to support ARE's breach of contract claim, ARE cannot survive this motion for summary judgment. For example, in *Owaki v. City of Miami*, 491F.Supp.2d 1140, 1161 (S.D. Fla. 2007), the court granted a motion for summary judgment after excluding an expert's testimony as being "imprecise and unspecific." *See also, Jackson v. Carnival Cruise Lines, Inc.*, 203 F.Supp.2d 1367, 1378 (S.D. Fla. 2002) (this Court granted summary judgment after excluding expert testimony); *In re Mentor Corp. ObTape Transobturator Sling Products Liab. Lit.*, 711 F.Supp.2d 1348, 1375 (M.D. Ga. 2010) (granting summary judgment after excluding expert's testimony as "speculative").

A. The Summary Judgment Is Ripe For Adjudication.

The facts of this case are nearly identical to the facts which were before the Northern District of Alabama in *Hall v. Thomas*, 753 F.Supp.2d 1113 (N.D. Ala. 2010). In *Hall v. Thomas*, the plaintiffs filed a RICO class action suit against defendant poultry company alleging that the company had engaged in conduct of intentionally hiring illegal workers to depress the wages of the company's employees. *See id.* The plaintiffs designated an economics expert, Dr. Charles Borjas, to testify regarding depressed wages. *See id.* at 1123.

Like Morriss's report, Dr. Borjas's report was preliminary and incomplete. *See id.* at 1131, 1137, 1141. Dr. Borjas stated that he needed additional information to perform a regression analysis (similarly, Morriss states that he needs more information to perform a statistical sampling). *See id.* Dr. Borjas's report contained no conclusions or opinions beyond conjecture (just like Morriss's report). *See id.* at 1140, 1142. Similarly to Morris's contention, Dr. Borjas blamed his inability to complete his report on the lack of information or lack of accurate information from defendant (an argument which was rejected by the court). *See id.* at 1135.

The defendant moved to exclude Dr. Borjas's report and opinion and, at the same time, moved for summary judgment. The court granted both motions and specifically rejected the plaintiffs' argument that the summary judgment motion was premature because they needed additional information from the defendants for Dr. Borjas to complete his report and cure any deficiencies. *See id.* at 1139. Specifically, the court noted that plaintiffs failed to provide any explanation as to why they did not bring the asserted discrepancies to the court's attention when they were discovered rather than providing an incomplete report and then pointing to the discrepancies as an excuse. *See id.* at 1137. Rather, the court concluded that the most likely

reason the plaintiffs did not call the discovery issue to the court's attention is the plaintiffs realized their expert's theory was not going to hold up. *See id.* ("neither the failure of discovery to prove what a party hoped it would . . . [is] even marginally convincing justifications under Rule 56(f))." Thus, the court held that plaintiffs **"are not entitled to yet another opportunity to tender a Rule 26(a)(2)(b) expert report on damages and causation sufficient to preclude summary judgment."** *See id.* at 1137. As stated by the court, **"[t]he federal rules do not reward the dilatory and plaintiffs' lack of diligence militates in favor of denial. The expert report must stand on its own two legs."** *See id.*

B. ARE Ignored The Expert Report Deadline By Providing A "Preliminary" and Incomplete Report And Should Not Benefit From Such Conduct.

The facts described above fit squarely with the facts before this Court. The Plaintiff issued broad discovery requests to GMACM seeking the production of all documents relating to every loan that was serviced by GMACM for ARE under the Servicing Agreement. Despite GMACM's contention that ARE's requests were unduly burdensome and overly broad and despite GMACM's repeated requests to ARE to limit its requests to the specific loans it believes are at issue (which ARE refused to do), GMACM produced documents for 2,685 loan files, which included payment and servicing histories and loan documents.

On or about October 7, 2011, after a discovery conference with the Court, the parties submitted a joint discovery plan, which required the parties to disclose experts by October 14, 2011 and to produce reports "under Rule 26(a)(2) of the Federal Rules of Civil Procedure" by November 23, 2011. (That November 23, 2011, date was the fourth extension of expert reports that was given by the Court.) [4] *See* Doc. 88. On December 14, 2011, the parties jointly moved

[4] Pursuant to the Court's initial Scheduling Order, the original expert report deadline was February 15, 2011. *See* Doc. 23. On January 13, 2011, ARE moved to extend that deadline until a decision was made on its motion for judgment on the pleadings as to its specific performance claim. *See* Doc. 50. A similar motion was filed by

for a fifth extension of the expert disclosure deadline to February 13, 2012 (and other remaining deadlines). *See* Doc. 94. This Court granted that Motion in January 2012. *See* Doc. 95. In that joint motion, ARE represented to the Court that "extensive discovery has taken place in this matter, but is not yet finished" and that "the Parties have agreed to disclose expert reports on February 13, 2012 as the **Parties believe that by that time they will have sufficient discovery exchanged to make the reports meaningful.**" *See* Doc. 94.

Like the plaintiffs in *Hall*, at no time prior to the February 13, 2012, deadline did ARE seek this Court's assistance with requiring GMACM to produce any loan files or documents Morriss contends he needs to complete his report (which GMACM contends were produced). At no time prior to the February 13, 2012 deadline did ARE indicate that it needed more time to complete its report or that it intended to flout the Court's discovery deadlines and provide only an incomplete or preliminary report. At no time between December 14, 2011, when the joint motion for extension was filed and February 13, 2012, did ARE reach out (as it had done before) to ask GMACM for additional time for the exchange of reports. In fact, although no stranger to requests for extensions (having moved either jointly or solely at least 7 times for various extensions), ARE never moved this Court for an extension of the February 13, 2012, expert report deadline.

GMACM on January 25, 2011. *See* Doc. 52. Both motions were granted. *See* Docs. 51, 53. On April 4, 2011, the parties jointly moved for a 120-day extension of remaining deadlines, including expert disclosures and reports. *See* Doc. 56. That motion was granted. *See* Doc. 57. On May 4, 2011 the Court entered an Amended Scheduling Order which included an expert report deadline of August 1, 2011. *See* Doc. 62. On July 12, 2011, GMACM filed an unopposed motion to extend deadlines, which included an extension of expert disclosures to August 29, 2011, with expert reports due on September 15, 2011. *See* Doc. 75. That motion was granted. *See* Doc. 76. On August 29, 2011, ARE filed a motion for extension of all deadlines for 120 days. *See* Doc. 79. That motion resulted in a conference with the Court, which resulted in the submission of a joint discovery plan setting expert disclosures for October 14, 2011, and reports by November 23, 2011. *See* Doc. 88. The parties then jointly moved again for an extension of the report deadline to February 13, 2012, which motion was also granted by the Court. *See* Docs. 94 and 95.

Moreover, despite admitting that he has complete loan files for over 1,300 ARE Loans (50% of the total ARE Loans), Morriss reviewed only three (3) of those loans and provided only a cursory and speculative analysis of potential, "possible" and hypothetical alleged errors and damages. Furthermore, if, in fact, Morriss intended all along to conduct a statistical sampling of loans, then it was unnecessary for GMACM to produce a complete set of loan documents for each of the over 2,600 ARE Loans serviced by GMACM throughout the parties 6-year relationship. Yet, that is exactly the production ARE demanded of GMACM, and that is exactly the production GMACM in fact made. Further, contrary to Morriss's representations regarding his intent to perform statistical sampling, ARE represented to this Court in its August 29, 2011 Motion for Extension that the parties were considering arbitration to avoid the time and costs associated with a "loan-by-loan review." *See* Doc. 79 ("Given the complexities of the case and the sheer volume of materials involved in a loan-by-loan review, the parties have been exploring the potential of utilizing the American Arbitration Association to resolve this voluminous commercial dispute."). In fact, not once prior to this so-called "expert" report, did ARE raise even the spector of using a statistical sampling methodology to review this document set.[5]

Additionally, similar to the facts in *Hall*, any alleged inability by Morriss to complete his report is purely a product of ARE's lack of diligence and a ruse to the real issue at hand; namely, the fact that over one year after filing this action and less than two months before the discovery cutoff, ARE still has produced no evidence of any actual breaches of the Servicing Agreement or damages and has failed to identify any specific breaches, errors or damages as required in its

[5] In Morriss's report he relies on a New York state opinion on a motion *in limine* to support his belief that statistical sampling is appropriate in a case such as this one. Aside from the fact that that case is inapplicable to the facts of this case (as discussed in more detail in GMACM's Motion to Exclude), the opinion arose out of a motion *in limine* filed by the plaintiffs before production occurred to allow the plaintiffs to engage in statistical sampling and to reduce the number of documents that the defendant would need to produce. Moreover, the loans at issue in that case were over 368,000. Having demanded that GMACM produce a complete set of loan documents for each of the over 2,600 ARE Loans it is disingenuous for Morriss (and ARE) to turn to the statistical sampling route.

expert report and as posed to it in numerous discovery requests. Moreover, in response to GMACM's Second Set of Interrogatories, in which GMACM sought an identification of alleged breaches for specific loans and specific damages, ARE responded as follows: "At this time, ARE cannot respond to this Interrogatory with the degree of specificity sought by GMACM. Once GMACM has produced all of the loan files at issue and ARE has performed an in-depth review and accounting of those files, ARE will supplement this response." *See ARE Responses to GMACM's Second Set of Interrogatories*, attached hereto as Exh. "B". However, despite the fact that (1) GMACM's discovery requests were issued almost 2 years ago; (2) documents for over 2,600 loans have been produced; and (3) expert report deadlines have passed, ARE has not supplemented its responses. It has not done so because despite having the payment histories, servicing notes and loan documents, ARE cannot point to any breaches or damages.

ARE should not be allowed to ignore the expert report deadline, sit back and benefit from GMACM's expert reports (including a report from a servicing expert which does include a loan by loan analysis of the loans subject to GMACM's counterclaims and a report from a forensic accountant containing a specific analysis of the damages sought) and assume that it can provide a complete report whenever it deems fit.[6] GMACM's motion for summary judgment is ripe and should be granted because, failing to support its claims with the requisite expert testimony, ARE cannot create a genuine issue of material fact to support its breach of contract claim.

WHEREFORE, GMACM respectfully requests the Court grant its motion for summary judgment as to ARE's breach of contract claim and for such other and just relief it deems appropriate.

[6] In fact, since producing Morriss' report, ARE has not requested one additional document from GMACM.

Dated: February 23, 2012

/s/ Hope T. Cannon
Hope T. Cannon *(pro hac vice)*
D. Brian O'Dell (Bar No. 0659665)
BRADLEY ARANT BOULT CUMMINGS LLP
One Federal Place
1819 Fifth Avenue North
Birmingham, Alabama 35203
Telephone: (205) 521-8000
Facsimile: (205) 488-6318
bodell@babc.com
ataylor@babc.com

ATTORNEYS FOR DEFENDANT/COUNTERCLAIM PLAINTIFF GMAC MORTGAGE, LLC

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was served upon the following via the CM/ECF system and by placing a copy of same in the United States mail, first-class postage prepaid and addressed to his regular mailing address on the 23rd day of February, 2012:

David A. Freedman
Coffey Burlington, PL
Office in the Grove, Penthouse
2699 South Bayshore Drive
Miami, Florida 33133
dfreedman@coffeyburlington.com

s/ Hope T. Cannon
OF COUNSEL

EXHIBIT "A"

Exhibit J

Claim #5718 Date Filed: 11/16/2012

B 10 Modified (Official Form 10) (12/11)

UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF NEW YORK | **PROOF OF CLAIM**

Name of Debtor and Case Number: GMAC Mortgage, LLC, Case No. 12-12032

NOTE: *This form should not be used to make a claim for an administrative expense* ***(other than a claim asserted under 11 U.S.C. § 503(b)(9))*** *arising after the commencement of the case. A "request" for payment of an administrative expense* ***(other than a claim asserted under 11 U.S.C. § 503(b)(9))*** *may be filed pursuant to 11 U.S.C § 503.*

Name of Creditor (the person or other entity to whom the debtor owes money or property):
American Residential Equities, LLC, in its own individual capacity and in its capacity as Trustee

Name and address where notices should be sent:

ARE, LLC, Trustee
3422 Old Capitol Trail, PMB #1839
Wilmington, DE 19808

☑ Date Stamped Copy Returned
☐ No self addressed stamped envelope
☐ No copy to return

Telephone number: 305-577-1011 email:

Name and address where payment should be sent (if different from above):

Telephone number: email:

☐ Check this box if this claim amends a previously filed claim.

Court Claim Number: _____ (*If known*)

Filed on: _____

☐ Check this box if you are aware that anyone else has filed a proof of claim relating to this claim. Attach copy of statement giving particulars.

1. Amount of Claim as of Date Case Filed: $ Unliquidated

If all or part of the claim is secured, complete item 4.

If all or part of the claim is entitled to priority, complete item 5.

■ Check this box if the claim includes interest or other charges in addition to the principal amount of the claim. Attach a statement that itemizes interest or charges.

2. Basis for Claim: See attached adversary complaint (Adv. No. 12-01934-mg) (Bankr. S.D.N.Y.)
(See instruction #2)

3. Last four digits of any number by which creditor identifies debtor:	**3a. Debtor may have scheduled account as:**	**3b. Uniform Claim Identifier (optional):**
___ ___ ___ ___	(See instruction #3a)	(See instruction #3b)

4. Secured Claim (See instruction #4)
Check the appropriate box if the claim is secured by a lien on property or a right of setoff, attach required redacted documents, and provide the requested information.

Nature of property or right of setoff: ☐ Real Estate ☐ Motor Vehicle ■ Other
Describe:
Value of Property: $_____ **Annual Interest Rate** _____% ☐ Fixed ☐ Variable
(when case was filed)
Amount of arrearage and other charges, as of the time case was filed, included in secured claim, if any: $_____ **Basis for perfection:** See attached complaint
Amount of Secured Claim: $ Unliquidated **Amount Unsecured:** $ Unliquidated

6. Claim Pursuant to 11 U.S.C. § 503(b)(9):
Indicate the amount of your claim arising from the value of any goods received by the Debtor within 20 days before May 14, 2012, the date of commencement of the above case, in which the goods have been sold to the Debtor in the ordinary course of such Debtor's business. Attach documentation supporting such claim.
$_____ (See instruction #6)

7. Credits. The amount of all payments on this claim has been credited for the purpose of making this proof of claim. (See instruction #7)

8. Documents: Attached are **redacted** copies of any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages, and security agreements. If the claim is secured, box 4 has been completed, and **redacted** copies of documents providing evidence of perfection of a security interest are attached. *(See instruction #8, and the definition of "redacted".)*

DO NOT SEND ORIGINAL DOCUMENTS. ATTACHED DOCUMENTS MAY BE DESTROYED AFTER SCANNING.

If the documents are not available, please explain:

5. Amount of Claim Entitled to Priority under 11 U.S.C. §507(a). If any part of the claim falls into one of the following categories, check the box specifying the priority and state the amount.

☐ Domestic support obligations under 11 U.S.C. §507(a)(1)(A) or (a)(1)(B).
☐ Wages, salaries, or commissions (up to $11,725*) earned within 180 days before the case was filed or the debtor's business ceased, whichever is earlier – 11 U.S.C. §507 (a)(4).
☐ Contributions to an employee benefit plan – 11 U.S.C. §507 (a)(5).
☐ Up to $2,600* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use – 11 U.S.C. §507 (a)(7).
☐ Taxes or penalties owed to governmental units – 11U.S.C. §507 (a)(8).
☐ Other – Specify applicable paragraph of 11 U.S.C. §507 (a)(__).

Amount entitled to priority:

$_____

* *Amounts are subject to adjustment on 4/1/13 and every 3 years thereafter with respect to cases commenced on or after the date of adjustment.*

9. Signature: (See instruction #9) Check the appropriate box.

☐ I am the creditor. ■ I am the creditor's authorized agent. (Attach copy of power of attorney, if any.) ☐ I am the trustee, or the debtor, or their authorized agent. (See Bankruptcy Rule 3004.) ☐ I am a guarantor, surety, indorser, or other codebtor. (See Bankruptcy Rule 3005.)

I declare under penalty of perjury that the information provided in this claim is true and correct to the best of my knowledge, information, and reasonable belief.

Print Name: Jeffrey Kirsch
Title: Authorized Signatory
Company: ARE, LLC, Trustee

_____ 11/15/12
(Signature) (Date)

Address and telephone number (if different from notice address above):

Telephone number: Email:

RECEIVED
NOV 16 2012
KURTZMAN CARSON CONSULTANTS

COURT USE ONLY

Penalty for presenting fraudulent claim: Fine of up to $500,000 or imprisonment for up to 5 years, or both. 18



LISA PHILLIPS
ATTORNEY AT LAW
3121 WASHINGTON BLVD.
MARINA DEL REY, CA 90292
PHONE (310) 526-3113 FAX (310) 526-8392

November 15, 2012

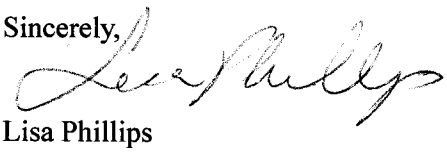
ResCap Claims Processing Center
c/o KCC
2335 Alaska Ave.
El Segundo, CA 90243

VIA OVERNIGHT MAIL

To Whom It May Concern:

Enclosed please find Proof of Claim for American Residential Equities, LLC, individually, and as Trustee. Please return a time-stamped copy in the enclosed envelope provided herein.

Sincerely,



Lisa Phillips

Bradford Sandler, Esq.
PACHULSKI STANG ZIEHL & JONES LLP
780 Third Avenue, 36th Floor
New York, New York 10017
Telephone: (212) 561-7000
Facsimile: (212) 561-7777

Counsel to the Plaintiff

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	
RESIDENTIAL CAPITAL, LLC et al.,	Case No. 12-12020 (MG)
Debtors.	Chapter 11
	(Joint Administration)
AMERICAN RESIDENTIAL EQUITIES, LLC, in its own individual capacity and in its capacity as Trustee under that certain American Residential Equities, LLC Master Trust Agreement dated August 8, 2005,	Adv. Pro. No. 12-_____
Plaintiff,	
v.	
GMAC MORTGAGE, LLC, as successor by merger to GMAC Mortgage Company, and BALBOA INSURANCE COMPANY,	
Defendants.	

ADVERSARY COMPLAINT

American Residential Equities, LLC ("ARE"), in its own individual capacity and in its capacity as Trustee under that certain American Residential Equities LLC Master Trust Agreement dated August 8, 2005, as amended (the "Trust Agreement"), a true and correct copy of which Trust Agreement is attached hereto as Exhibit "A," by and through its undersigned

counsel of record, as and for its Complaint against GMAC Mortgage, LLC, as successor by merger to GMAC Mortgage Company ("GMAC"), and Balboa Insurance Company ("Balboa" and together with GMAC, the "Defendants"), alleges as follows:

NATURE OF THE ACTION

1. At all relevant times, ARE acquired, held and ultimately liquidated pools of non-performing residential mortgage loans (the "Loans") which are secured by real property (the "Mortgaged Properties").

2. GMAC is in the business of, among other things, servicing mortgage loans, and through a series of agreements, as amended (collectively, the "Servicing Agreement"), agreed to service the Loans. A true and correct copy of the Servicing Agreement (along with its amendments) is attached hereto as Exhibit "B."[1]

3. This is an action against GMAC for, among other things, breach of the Servicing Agreement, including GMAC's failure to perform its obligations and to timely and fully remit payments to ARE as required by the Servicing Agreement. Notably, the Servicing Agreement specifically required GMAC to retain all funds received by it in connection with the Loans and Mortgaged Properties "separate and apart from any of its own funds and general assets" and in a specifically identified trust account (the "Trust Account"). See Exhibit B § 2.04. Thus, any monies held by GMAC, or which should have been held by GMAC, in the Trust Account are not property of the Debtors' estates and should be immediately turned over to ARE.

4. ARE brings claims against GMAC for declaratory judgment, breach of contract, conversion, turnover, unjust enrichment and for an accounting.

[1] Capitalized terms not defined herein shall and do have the meaning ascribed to them in the Servicing Agreement attached hereto as Exhibit "B".

5. Separately, ARE also seeks damages (including punitive damages) for the fraud perpetrated by GMAC and Balboa in connection with a secret deal whereby GMAC placed insurance for certain of the Mortgaged Properties with Balboa at artificially inflated prices, with GMAC receiving undisclosed "commissions."

THE PARTIES

6. ARE is a limited liability company formed under the laws of the state of Delaware.

7. Upon information and belief, GMAC is a limited liability company formed under the laws of the State of Delaware that maintains its principal place of business in Horsham, Pennsylvania.

8. Upon information and belief, Balboa is a California corporation that maintains its principal place of business in California.

JURISDICTION AND VENUE

9. This Court has jurisdiction to consider this matter under 28 U.S.C. § 157 and 1334.

10. This is a core proceeding under 28 U.S.C. § 157.

11. Venue of these chapter 11 cases and this adversary proceeding in this district and before this Court is proper under 28 U.S.C. §§ 1408, and 1409.

12. The statutory and legal predicates for the relief requested by the Complaint are section 105 and 541 of the title 11, United States Code (the "Bankruptcy Code"), and Pennsylvania state law. See Ex. B § 13.07.

STATEMENTS OF FACTS

A. Background

13. ARE entered into the Trust Agreement on August 8, 2005.

14. Pursuant to the Trust Agreement, ARE, solely in its capacity as Trustee, was authorized to take title to certain mortgage loans and/or REO Property (as defined in Section 1.01 of the Servicing Agreement attached hereto as Exhibit "B") (collectively, the "Assets") on behalf of the beneficiaries of the Trust (the "Beneficiaries").

15. GMAC had actual and constructive knowledge that ARE was acting in its capacity of Trustee or on behalf of other third-parties. Upon commencement of servicing, all assets were titled in the names of the Beneficiaries or other entities on whose behalf ARE managed certain of the assets. Those parties, as third party beneficiaries of the servicing contract, conducted business directly with GMAC, transferring title of their assets into GMAC's name, and often receiving wires directly from GMAC. GMAC owed fiduciary duties to the beneficiaries.

16. The Beneficiaries and other third-parties, not ARE, are entitled to the earnings, avails and proceeds of the Assets held pursuant to the Trust Agreement.

17. ARE, as Trustee or asset manager, is entitled to, and obligated to pursue these claims on behalf of the Beneficiaries and/or third parties.

18. The loan portfolio held by ARE was largely acquired from Goldman Sachs.

19. Both Goldman Sachs and ARE utilized GMAC to service the Loans.

20. Specifically, on April 7, 2004, ARE and GMAC entered into a Commitment letter, later extended, pursuant to which GMAC began servicing the Loans. On or about July 29, 2004, ARE and GMAC signed a comprehensive Servicing Agreement pursuant to which GMAC agreed to service the Loans for ARE.

21. The Servicing Agreement was subsequently amended by amendments dated January 1, 2006, February 1, 2007, April 10, 2008, and February 6, 2009.

22. The Servicing Agreement required GMAC to perform, among other things, the following: maintain loan files and mortgage loan documents; communicate with borrowers; collect mortgage payments; administer, carry out and advance payments for the lender's obligations under the mortgage loan documents; ensure that the Mortgaged Properties are inspected, maintained, and adequately insured; ensure that the borrowers' obligations under the mortgage loan documents are maintained; handle all collection activity, including but not limited to, mortgage foreclosure proceedings upon borrower defaults; arrange and sell Mortgaged Properties recovered through foreclosure proceedings; and remit payments and reports to ARE in connection with the Mortgaged Properties (the foregoing duties and obligations, among others, are collectively referred to as the "Servicers' Duties", which Servicers' Duties are more fully set forth in Article II of the Servicing Agreement attached as Exhibit "B").

23. Pursuant to the terms of the Servicing Agreement, GMAC was also required to "segregate and hold all funds collected and received pursuant to the Mortgage Loans separate and apart from any of its own funds and general assets and [ ] establish one or more Custodial Accounts, in the form of time deposit or demand accounts, titled 'GMAC Mortgage Corporation, in trust for [ ] re: Fixed and Adjustable Rate B/C Residential Mortgage Loans.'"

24. Pursuant to the terms of the Servicing Agreement, each month, GMAC was required to remit to ARE, by wire transfer of immediately available funds, all funds in the

Custodial Accounts (net of proper charges under the Servicing Agreement), and all amounts GMAC was otherwise obligated to distribute pursuant to Section 3.04.

25. Pursuant to the terms of the Servicing Agreement, on each Remittance Date, GMAC was also required to provide to ARE a Remittance Report, with a trial balance report attached, in an agreed-upon form.

B. GMAC Breaches the Servicing Agreement

26. GMAC failed to comply with the terms of the Servicing Agreement and mismanaged the Assets in numerous ways, including, but not limited to:

a. Failing to diligently pursue foreclosures in an efficient or timely manner;

b. Failing to properly or adequately communicate with borrowers as required by law, or prudent in mitigating loan losses;

c. Maintaining, inspecting and/or reporting on the wrong property securing the Loans;

d. Failing to properly secure Mortgaged Properties and/or REO Properties from damage due to the elements and/or vandals;

e. Failing to properly maintain Mortgaged Properties and/or REO Properties, thereby subjecting them to violations of law and governmental fines;

f. Servicing Mortgaged Properties and/or REO Properties that were deemed a total loss as though they were in good condition;

g. Selling REO Properties in violation of its authority under the Servicing Agreement;

h. Over-insuring Mortgaged Properties and/or REO Properties;

i. Failing to timely file, or adequately pursue filed insurance claims;

j. Failing to exclude ARE's assets from the Homeowner's Affordability and Stability Plan and/or the federal HAMP program, despite ARE's written demand to exclude its assets from the program;

k. Failing to follow the approval matrix set forth in the Fourth Amendment to the Servicing Agreement;

l. Failing to timely provide ARE with required reports and properly requested information relating to the Loans and REO Properties;

m. Failing to provide backup documentation and invoices for advances and expenses billed to ARE;

n. Failing to furnish complete mortgage files to ALS, ARE's subsequent servicer, pursuant to the Servicing Agreement and the transfer instructions by ARE in its April 1, 2010 letter, adversely affecting ALS's ability to service the Loans and REO Properties;

o. Failing to pay ARE its April, 2010 remittance, consisting of trust monies held for the benefit of ARE, pursuant to Section 3.01 of the Servicing Agreement; and

p. Failing to remit to ARE sums which GMAC had collected on behalf of ARE, which were trust monies held for the benefit of ARE, and were rightfully owed to and owned by ARE.

27. In addition, GMAC continually refused or failed to properly allocate service charges between ARE and Goldman Sachs, pursuant to their agreement to do so. Instead, GMAC wrongfully over-charged ARE with servicing expenses that should have been billed to Goldman Sachs.

28. Moreover, in complete disregard of ARE's contractual right to "examine and audit any and all of the books, records, or other information" of GMAC, GMAC refused ARE's demand of an audit.

29. Finally, GMAC failed to timely and fully turnover to ARE all funds due to it under the Servicing Agreement.

COUNT I
(Declaratory Judgment against GMAC)

30. ARE repeats and realleges each of the foregoing facts as if fully set forth herein.

31. A controversy exists regarding whether the assets held in the Custodial Accounts established pursuant to Section 2.04 of the Servicing Agreement as of the date the Debtors filed for bankruptcy are property of the Debtors' estate or are property of ARE.

32. Declaratory relief from the Court will resolve and terminate the controversy. A judicial declaration is therefore necessary to determine the parties' rights and obligations under Section 2.04 of the Servicing Agreement.

33. ARE is entitled to a declaratory judgment that all assets held in the Custodial Accounts as of the date the Debtors filed for bankruptcy are not property of the Debtors' estate and are property of ARE.

COUNT II
(Breach of Contract against GMAC)

34. ARE repeats and realleges each of the foregoing facts as if fully set forth herein.

35. The Servicing Agreement is a valid, binding contract between ARE and GMAC.

36. ARE has performed all of its obligations under the Servicing Agreement.

37. GMAC has breached the Servicing Agreement by:

a. Failing to diligently pursue foreclosures in an efficient or timely manner;

b. Failing to properly or adequately communicate with borrowers as required by law or prudent in mitigating loan losses;

c. Maintaining, inspecting and/or reporting on the wrong property securing the Loans;

d. Failing to properly secure Mortgaged Properties and/or REO Properties from damage due to the elements and/or vandals;

e. Failing to properly maintain Mortgaged Properties and/or REO Properties, thereby subjecting them to violations of law and governmental fines;

f. Servicing Mortgaged Properties and/or REO Properties that were deemed a total loss as though they were in good condition;

g. Selling REO Properties in violation of their authority under the Servicing Agreement;

h. Over-insuring Mortgaged Properties and/or REO Properties;

i. Failing to timely file, or adequately pursue filed insurance claims;

j. Failing to exclude ARE's assets from the Homeowner's Affordability and Stability Plan and/or the federal HAMP program despite ARE's written demand to exclude its assets from the program;

k. Failing to follow the approval matrix set forth in the Fourth Amendment to the Servicing Agreement;

l. Failing to timely provide ARE with required reports and properly requested information relating to the Loans and REO Properties;

m. Failing to provide backup documentation and invoices for advances and expense billed to ARE;

n. Failing to furnish complete mortgage files to ALS pursuant to the Servicing Agreement and the transfer instructions by ARE in its April 1, 2010 letter, adversely affecting ALS's ability to service the Loans and REO Properties;

o. Failing to pay ARE its April, 2010 remittance pursuant to Section 3.01 of the Servicing Agreement;

p. Failing to timely and fully turnover to ARE all funds due it under the Servicing Agreement, all of which were trust monies held for the benefit of ARE, and rightfully owed to and owned by ARE;

q. Improperly allocating servicing expenses of other lenders, specifically Goldman Sachs, to ARE, over and improperly charging ARE servicing fees and refusing to itemize or account for these charges; and

r. Refusing to allow ARE to examine, or audit the books and records of GMAC, as properly requested by ARE.

38. As a direct and proximate result of GMAC's breaches of the Servicing Agreement, ARE has been damaged.

39. ARE is entitled to a judgment against GMAC for damages resulting from GMAC's breach of the Servicing Agreement in an amount to be determined at trial.

COUNT III
(Conversion against GMAC)

40. ARE repeats and realleges each of the foregoing facts as if fully set forth herein.

41. GMAC took into its possession cash proceeds of collections on ARE's loan portfolio. Instead of remitting all of those funds after expenses, per its contractual obligations, GMAC converted portions of them by exercising dominion and control over the funds belonging to ARE, keeping same for GMAC's own account ("GMAC's Retained Proceeds").

42. GMAC's retention of GMAC's Retained Proceeds has deprived and continues to deprive ARE of its lawful right to those proceeds.

43. GMAC's retention of GMAC's Retained Proceeds has been and continues to be without ARE's consent and without justification.

44. ARE is entitled to a judgment against GMAC in an amount to be determined at trial as a direct and proximate cause of GMAC's conversion of GMAC's Retained Proceeds.

COUNT IV
(Turnover Against GMAC)

45. ARE repeats and realleges each of the foregoing facts as if fully set forth herein.

46. GMAC holds assets that it received in its role as the Servicer of the Mortgage Loans.

47. The assets that GMAC holds under the Servicing Agreement belong to ARE.

48. ARE is entitled to a judgment directing GMAC to immediately turnover to ARE all assets held by GMAC under the Servicing Agreement.

COUNT V
(Accounting against GMAC)

49. ARE repeats and realleges each of the foregoing facts as if fully set forth herein.

50. ARE has a contractual and common law right to an accounting to determine (a) all money received by GMAC with respect to the Mortgage Loans that are the subject of the Servicing Agreement; (b) all expenses that were purportedly incurred with respect to the Servicing Agreement; (c) all expenses paid (including documentation indicating the date of payment, the amount of payment and the recipient of each payment) with respect to the Servicing Agreement; (d) all amounts currently retained by GMAC with respect to the Loans; (e) all amounts GMAC "paid itself" with respect to the Loans (including the dates and amounts); (f) all amounts GMAC actually paid to ARE under the Servicing Agreement, (g) all amounts paid with the proceeds from the Loans to any third-party, and invoices therefor, regardless of whether such payments were authorized or required under the Servicing Agreement; and (h) an itemization of allocations of servicing fees between ARE and Goldman Sachs.

51. GMAC has refused and continues to refuse to comply with ARE's contractual right for an audit.

52. ARE is entitled to a judgment directing GMAC to provide an accounting of all monies received, dispersed or held by it with respect to the Loans under the Servicing Agreement.

COUNT VI
(Fraud against GMAC and Balboa)

53. ARE repeats and realleges each of the foregoing facts as if fully set forth herein.

54. As part of the Servicers' Duties, GMAC was authorized to purchase property insurance to insure each Mortgaged Property subject to the Loans, if the owners of the Mortgaged Property failed to adequately maintain insurance on such Mortgaged Property.

55. The costs of force-placed insurance are initially incurred by the servicer, GMAC, which is responsible for advancing the money to pay the insurance premiums. GMAC, however, recoups any of its costs, expenses or advances it incurs "off the top" from ARE's proceeds of collection or liquidation of the loan collateral, before any money is passed through to ARE, the owner of the loans. This entitlement includes force-placed insurance premiums paid by GMAC, which are counted as reimbursable servicing advances under GMAC's agreement with ARE. Furthermore, if proceeds of a particular loan are insufficient to enable GMAC to recoup its advances on a particular loan, GMAC reimburses itself from the cash collected from Plaintiff's other loans covered by the Servicing Agreement.

56. GMAC utilized Balboa as its source for its force-placed insurance coverage with respect to Mortgaged Properties and the Loans. When GMAC force-placed coverage for the Loans with Balboa, GMAC then charged ARE for the cost incurred to Balboa.

57. However, GMAC and Balboa, acting in concert, had an arrangement which was secret as to ARE, pursuant to which Balboa "kicked back" to GMAC, directly or indirectly, sums of money labeled as "commissions." The kickbacks improperly inflated the cost of the insurance, as the premiums charged by Balboa to GMAC were intentionally increased to include the amount of the "kickback."

58. GMAC and Balboa entered into this scheme in 2003, prior to ARE entering into its contract with GMAC in 2004, and unbeknownst to ARE. Had ARE been aware of this kickback arrangement between the parties, ARE would never have entered into a contractual relationship with GMAC. ARE, on the contrary, relied on GMAC's high rating as an industry servicer, and its stated intention and ability to conduct the servicing of ARE's portfolio in the best interests of ARE and in transparent compliance with the Servicing Agreement.

59. ARE, through the duration of its relationship with GMAC and beyond, continued to rely on the premise that GMAC and Balboa had conducted their business fairly with ARE, and that there was no reason to question the authenticity or nature of their charges.

60. ARE has since discovered that GMAC reimbursed itself out of ARE's monies for artificially inflated costs of the forced placed insurance, made unnecessarily more expensive so that GMAC could make a profit at the expense of ARE, all the while hidden from ARE.

61. GMAC, aided and abetted by Balboa, grossly violated its duties owed to ARE by making a secret profit on the forced placed insurance with Balboa.

62. The above-described kickback scheme (the "Kickback Scheme") was carried out by GMAC with malice and knowledge that it had not disclosed to ARE the existence and nature of the scheme.

63. GMAC concealed the Kickback Scheme so as to induce ARE to rely upon the appearance that proper force-placed insurance coverage had been obtained on ARE's behalf and that nothing exceeding appropriate payment of premiums for that insurance coverage had been suffered.

64. Balboa, with malice, intentionally inflated its insurance premiums so that it could offer a kickback to loan servicers such as GMAC, undisclosed and to the detriment of the loan owners (i.e., ARE).

65. ARE believes that the nature of this illicit relationship, with its inherent conflict between servicer and its own clients, constitutes a breach of duty in of itself and led to further acts of betrayal where GMAC chose to elevate its own and Balboas' interests over those of its clients. Specific frauds committed by GMAC in pursuit and furtherance of the kickback scheme, included but are not limited to GMAC's intentional failure to submit insurable claims of ARE to Balboa, failure of GMAC to adequately pursue submitted claims of ARE to Balboa, GMAC causing ARE to obtain insurance from Balboa for higher value policies than necessary or reasonable, and/or for causing ARE to obtain policies from Balboa where forced-placed insurance was not warranted or was placed at inflated prices. ARE believes and alleges that GMAC and Balboa acted in concert, and GMAC had incentive to protect Balboa's financial interest, and often did so by failing to pursue ARE's insurable claims, and causing ARE to obtain unnecessary or inflated policies, to ARE's significant detriment.

66. In furtherance of the scheme to defraud Plaintiffs, GMAC and Balboa acted a co-conspirators, and agents, of the other. GMAC allowed Balboa to take over its own servicing functions in all aspects of evaluating insurance needs, a clear conflict, as Balboa would financially benefit from the "finding" of need for its services. Balboa employees acted as agents of GMAC, contacting borrowers, identifying themselves as GMAC employees, and discussing the insurance status and needs of Borrowers. Notices from GMAC in regard to insurance issues, although allegedly issued from GMAC's Insurance Department, per their letterhead, were in fact, issued by Balboa employees. Additionally, Balboa was permitted to manage the billing of force-

placed insurance to borrowers, with little to no oversight by GMAC, despite the clearly self-serving nature of same, and clear detriment to GMAC's clients. The existence of this agency relationship was never disclosed to Plaintiffs, and was, in fact, hidden from Plaintiffs, for the express purpose of furthering the fraudulent scheme.

67. GMAC has wrongfully collected commissions for providing insurance services that it has never provided to Plaintiffs.

68. The continuing nature of these fees, for as long as the force-placed insurance remains in place, often for as long as it takes to foreclose the property, also gave incentive to GMAC to improperly delay foreclosures for as long as possible. Once a foreclosure occurred, much cheaper insurance without profitable kickbacks to the servicer, were available to the lender, now owner of the real estate. Therefore, it became a conflict of interest that GMAC seized upon, to intentionally delay Plaintiffs' foreclosures for as long as possible to maximize their own profits, both through kickbacks and all servicing fees, and to the great financial detriment of Plaintiffs.

69. As a proximate result of the fraudulent concealment by GMAC and Balboa, ARE has been damaged. Additionally, the actions of GMAC and Balboa in regard to the above-described scheme are so willfully in violation of the rights of ARE as to warrant the imposition of substantial punitive damages against GMAC and Balboa so as to deter similar conduct in the future by GMAC and Balboa and others in the community.

70. ARE is entitled to a judgment against GMAC and Balboa, jointly and severally, for damages in an amount to be determined at trial, including an award of punitive damages.

COUNT VII
(Unjust Enrichment as to GMAC)

71. ARE repeats and realleges each of the foregoing facts as if fully set forth herein.

72. Pursuant to the Servicing Agreement, GMAC was to act as ARE's agent to obtain insurance coverage on properties securing the ARE loans in the event the borrower(s) failed to keep property insurance in place.

73. GMAC utilized its position as ARE's servicing agent, thus controlling in excess of 2,600 loan files, to negotiate with GMAC's contracted provider of such insurance, Balboa, a secret benefit for GMAC in the nature of a "commission" or "kickback" related to placing business with Balboa for procuring insurance coverage on the properties which secured the ARE loans being serviced by GMAC.

74. The secret profit taken by GMAC as described above was not authorized by ARE nor permitted by the Servicing Agreement. Any such savings should have been passed on by GMAC (as agent) to its principal, ARE. GMAC did not pass on to ARE the savings generated by the above-described commission arrangement, was wrongfully and fraudulently collected, and as a result, GMAC has unjustly enriched itself at the expense of ARE, and should be required to disgorge those wrongful gains.

WHEREFORE, ARE demands judgment against GMAC for damages in excess of $75,000 plus interest and costs.

CONCLUSION

WHEREFORE, ARE respectfully requests that the Court enter judgment as follows:

1. On Count I, a judgment declaring that any assets held in any Custodial Account created pursuant to the Servicing Agreement are property of ARE, and not property of any of the Debtors;

2. On Count II, a judgment for damages in an amount to be determined at trial;

3. On Count III, a judgment for damages in an amount to be determined at trial;

4. On Count IV, an order directing GMAC to immediately turnover to ARE all assets held by GMAC under the Servicing Agreement;

5. On Count V, an order directing GMAC to account for all monies received, dispersed or held by it with respect to the Mortgage Loans under the Servicing Agreement;

6. On Count VI, a judgment, jointly and severally against GMAC and Balboa, in an amount to be determined at trial, including an award of punitive damages;

7. On Count VII, a judgment against GMAC in an amount to be determined at trial;

8. On all counts, pre-judgment interest on any monetary award;

9. On all counts, post-judgment interest on all monetary awards;

10. An award of ARE's reasonable costs and expenses, including attorneys' fees, incurred in this action; and

11. Such other and further relief as the Court deems just and proper.

Dated: New York, New York
November 9, 2012

PACHULSKI STANG ZIEHL & JONES LLP

By: */s/ Bradford J. Sandler*
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Attorneys for Plaintiff

Exhibit K

SERVICING AGREEMENT

among

AMERICAN RESIDENTIAL EQUITIES, LLC
Owner

and

GMAC MORTGAGE CORPORATION
Servicer

Dated as of July 29, 2004

FIXED AND ADJUSTABLE RATE, SUB-PRIME RESIDENTIAL MORTGAGE LOANS

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SERVICING AGREEMENT

This Servicing Agreement ("Servicing Agreement" or "Agreement") is entered into as of July 29, 2004, by and among GMAC MORTGAGE CORPORATION, a Pennsylvania corporation (the "Servicer") and AMERICAN RESIDENTIAL EQUITIES, LLC, a Delaware limited liability corporation (the "Owner").

WHEREAS, the Owner has purchased and will purchase in the future conventional, residential, fixed and adjustable rate first- and second-lien mortgage loans (the "Mortgage Loans"); and

WHEREAS, the Owner and Servicer entered into a letter agreement dated April 7, 2004 ("the Letter Agreement") wherein the Servicer agreed to subservice certain mortgage loans on behalf of Owner on an interim basis until such time that the parties enter into a definitive subservicing agreement; and

WHEREAS, the Servicer regularly services residential mortgage loans and has agreed to service the mortgage loans that become subject to this Agreement, including the mortgage loans serviced pursuant to the Letter Agreement, and the parties desire to provide the terms and conditions of such servicing by the Servicer.

NOW, THEREFORE, in consideration of the mutual premises and agreements set forth herein and for other good and valuable consideration, the receipt and the sufficiency of which are hereby acknowledged, the parties hereto hereby agree as follows:

ARTICLE I.

DEFINITIONS

Section 1.01 Definitions. The following terms are defined as follows:

Accepted Servicing Practices: With respect to any Mortgage Loan or REO Property, those mortgage servicing practices of mortgage lending institutions which service mortgage loans of the same type as such Mortgage Loan in the jurisdiction where the related Mortgaged Property is located, exercising the same care in performing those practices that the Servicer customarily employs and exercises in servicing and administering mortgage loans for its own account (including, compliance with all applicable federal, state and local laws).

Adjustable Rate Mortgage Loan: An adjustable rate Mortgage Loan.

Affiliate: With respect to any specified Person, any other Person controlling or controlled by or under common control with such specified Person. For the purposes of this definition, "control" when used with respect to any specified Person means the power to direct the management and policies of such Person, directly or indirectly, whether through the ownership of voting securities, by contract or otherwise and the terms "controlling" and "controlled" have meanings correlative to the foregoing.

Ancillary Income: All income derived from the Mortgage Loans other than payments of principal, interest and Escrow Payments (excluding Servicing Fees and prepayment penalties attributable to the Mortgage Loans), including but not limited to interest received on funds deposited in the Custodial Account or any Escrow Account (to the extent permitted by applicable law), all late charges, assumption fees, escrow account benefits, reinstatement fees, fees received with respect to checks on bank drafts returned by the related bank for insufficient funds, assumption fees, and similar types of fees arising from or in connection with any Mortgage Loan to the extent not otherwise payable to the Mortgagor under applicable law or pursuant to the terms of the related Mortgage Note.

Appraised Value: The value of the Mortgaged Property at the time of the Mortgage Loan's origination as used by the originating lender in underwriting such Mortgage Loan.

Assignment of Mortgage: An assignment of the Mortgage, notice of transfer or equivalent instrument in recordable form, sufficient under the laws of the jurisdiction wherein the related Mortgaged Property is located to reflect the sale of the Mortgage to the Owner.

BPO: A broker price opinion.

Business Day: Any day other than (i) a Saturday or Sunday, or (ii) a day on which banking and savings and loan institutions are closed for business in the States of New York, New Jersey or Pennsylvania.

Catastrophic Advance: A Servicing Advance made in good faith by the Servicer that would not be a Nonrecoverable Advance except for the later occurrence of a catastrophic event (e.g., a natural disaster) that substantially reduces the value of the Mortgaged Property.

Code: Internal Revenue Code of 1986, as amended.

Condemnation Proceeds: All awards or settlements in respect of a Mortgaged Property, whether permanent or temporary, partial or entire, by exercise of the power of eminent domain or condemnation, to the extent not required to be released to a Mortgagor in accordance with the terms of the related Mortgage Loan Documents.

Custodial Account: The separate account or accounts created and maintained pursuant to Section 2.06.

Custodial Agreement: The agreement governing the retention of the originals of each Mortgage Note, Mortgage, Assignment of Mortgage and other Mortgage Loan Documents.

Custodian: The custodian of the Mortgage Loan Documents as specified under the related Custodial Agreement.

Deboarding Fee: With respect to each Mortgage Loan, the deboarding fee set forth in the Term Sheet.

Default: A Mortgage Loan shall be considered in default where more than one Monthly Payment is due.

Determination Date: The last Business Day of the month prior to the related Remittance Date.

Due Date: The day of the month on which the Monthly Payment is due on a Mortgage Loan, exclusive of any days of grace.

Due Period: With respect to each Remittance Date, the period commencing on the day after the Determination Date prior to the immediately prior Determination Date and ending on the immediately prior Determination Date.

Eligibility Criteria: The eligibility criteria for residential mortgage loans to be delivered by Owner after the the date of this Agreement to be serviced by Servicer under this Agreement, as specified in **Exhibit 11**, as the same may be amended from time to time with the mutual consent of both parties.

Eligible Investments: Any one or more of the obligations and securities listed below which investment provides for a date of maturity not later than one day prior to the Remittance Date in each month (or such other date as permitted under this Agreement):

(i) direct obligations of, and obligations fully guaranteed as to timely payment of principal and interest by, the United States of America or any agency or instrumentality of the United States of America the obligations of which are backed by the full faith and credit of the United States of America ("Direct Obligations");

(ii) federal funds, demand and time deposits in, certificates of deposits of, or bankers' acceptances issued by, any depository institution or trust company (including U.S. subsidiaries of foreign depositories) incorporated or organized under the laws of the United States of America or any state thereof and subject to supervision and examination by federal or state banking authorities, so long as at the time of such investment or the contractual commitment providing for such investment the commercial paper or other short-term debt obligations of such depository institution or trust company (or, in the case of a depository institution or trust company which is the principal subsidiary of a holding company, the commercial paper or other short-term debt or deposit obligations of such holding company or deposit institution, as the case may be) have been rated by each Rating Agency in its highest short-term rating category or one of its two highest long-term rating categories;

(iii) repurchase agreements collateralized by Direct Obligations or securities guaranteed by Fannie Mae or Freddie Mac with any registered broker/dealer subject to Securities Investors' Protection Corporation jurisdiction or any commercial bank insured by the FDIC, if such broker/dealer or bank has an uninsured, unsecured and unguaranteed obligation rated by each Rating Agency in its highest short-term rating category;

(iv) securities bearing interest or sold at a discount issued by any corporation incorporated under the laws of the United States of America or any state thereof which have a credit rating from each Rating Agency, at the time of investment or the contractual commitment providing for such investment, at least equal to one of the two highest long-term credit rating categories of each Rating Agency; *provided, however,* that securities issued by any particular corporation will not be Eligible Investments to the extent that investment therein will cause the then outstanding principal amount of securities issued by such corporation to exceed 20% of the aggregate principal amount of all Eligible Investments in the Custodial Accounts and the Escrow Accounts; provided, further, that such securities will not be Eligible Investments if they are published as being under review with negative implications from either Rating Agency;

(v) commercial paper (including both non-interest-bearing discount obligations and interest-bearing obligations payable on demand or on a specified date not more than 180 days after the date of issuance thereof) rated by each Rating Agency in its highest short-term rating category;

(vi) certificates or receipts representing direct ownership interests in future interest or principal payments on obligations of the United States of America or its agencies or instrumentalities (which obligations are backed by the full faith and credit of the United States of America) held by a custodian in safekeeping on behalf of the holders of such receipts; and

(vii) any other demand, money market, common trust fund or time deposit or obligation, or interest-bearing or other security or investment rated in the highest rating category by each Rating Agency;

provided, however, that (a) any such instrument shall be acceptable to the Rating Agencies, and (b) no such instrument shall be an Eligible Investment if such instrument evidences either (i) a right to receive only interest payments with respect to the obligations underlying such instrument, or (ii) both principal and interest payments derived from obligations underlying such instrument and the principal and interest payments with respect to such instrument provide a yield to maturity of greater than 120% of the yield to maturity at par of such underlying obligations.

Errors and Omissions Insurance Policy: An errors and omissions insurance policy to be maintained by the Servicer pursuant to Section 2.12.

Escrow Account: The separate account or accounts created and maintained pursuant to Section 2.06.

Escrow Payment: With respect to any Mortgage Loan, the amounts constituting ground rents, taxes, assessments, water rates, sewer rents, municipal charges, mortgage insurance premiums, fire and hazard insurance premiums, condominium charges, and any other payments required to be escrowed by the Mortgagor with the mortgagee pursuant to the Mortgage or any other document.

Event of Default: Any one of the conditions or circumstances enumerated in Section 11.01.

Fannie Mae: The Federal National Mortgage Association, or any successor thereto.

Fannie Mae Guides: The Fannie Mae Sellers' Guide and the Fannie Mae Servicers' Guide and all amendments or additions thereto.

FDIC: The Federal Deposit Insurance Corporation, or any successor thereto.

FHA: The Federal Housing Authority, or any successor thereto.

FHLMC or Freddie Mac: The Federal Home Loan Mortgage Corporation, or any successor thereto.

Fidelity Bond: A fidelity bond to be maintained by the Servicer pursuant to Section 2.12.

Fitch: Fitch, Inc., or its successor in interest.

Forbearance: Shall have the meaning set forth in Section 2.01(a).

Foreclosure Commencement: The delivery of the applicable file to the Servicer's foreclosure counsel for initiation of foreclosure proceedings.

Freddie Mac: The Federal Home Loan Mortgage Corporation, or any successor thereto.

Gross Margin: With respect to each Adjustable Rate Mortgage Loan, the fixed percentage amount set forth in the related Mortgage Note which amount is added to the Index in accordance with the terms of the related Mortgage Note to determine on each Interest Rate Adjustment Date the Mortgage Interest Rate for such Mortgage Loan.

HOEPA Loan: A Mortgage Loan subject to the Home Ownership and Equity Protection Act of 1994 ("HOEPA").

Index: With respect to each Adjustable Rate Mortgage Loan, the index set forth in the related Mortgage Note.

Insurance Proceeds: With respect to each Mortgage Loan, proceeds of insurance policies insuring the Mortgage Loan or the related Mortgaged Property.

Interest Rate Adjustment Date: With respect to each Adjustable Rate Mortgage Loan, the date, specified in the related Mortgage Note and the Mortgage Loan Schedule, on which the Mortgage Interest Rate is adjusted.

Lifetime Rate Cap: The provision of each Mortgage Note related to an Adjustable Rate Mortgage Loan which provides for an absolute maximum Mortgage Interest

Rate thereunder. The Mortgage Interest Rate during the terms of each Adjustable Rate Mortgage Loan shall not at any time exceed the Mortgage Interest Rate at the time of origination of such Adjustable Rate Mortgage Loan by more than the amount per annum set forth on the Mortgage Loan Schedule.

Liquidation Proceeds: Cash received in connection with the liquidation of a defaulted Mortgage Loan, whether through the sale or assignment of such Mortgage Loan, trustee's sale, foreclosure sale or otherwise, or the sale of the related Mortgaged Property if the Mortgaged Property is acquired in satisfaction of the Mortgage Loan.

Loan-to-Value Ratio or LTV: With respect to any Mortgage Loan, the most recent ratio (expressed as a percentage) of the outstanding principal amount of the Mortgage Loan, to the lesser of (a) the Appraised Value and (b) if the Mortgage Loan was made to finance the acquisition of the related Mortgaged Property, the purchase price of the Mortgaged Property.

MERS: Mortgage Electronic Registration Systems, Inc., a corporation organized and existing under the laws of the state of Delaware, or any successor thereto.

Monthly Payment: The scheduled monthly payment of principal and interest on a Mortgage Loan.

Monthly Remittance Advice: As described in Section 3.02.

Moody's: Moody's Investors Service, Inc., and any successor thereto.

Mortgage: The mortgage, deed of trust or other instrument securing a Mortgage Note, which creates a first or second lien, as applicable, on an unsubordinated estate in fee simple in real property securing the Mortgage Note; except that with respect to real property located in jurisdictions in which the use of leasehold estates for residential properties is a widely-accepted practice, the mortgage, deed of trust or other instrument securing the Mortgage Note may secure and create a first or second lien, as applicable, upon a leasehold estate of the Mortgagor.

Mortgage File: The items pertaining to a particular Mortgage Loan referred to as the Mortgage File in Exhibit 8 annexed hereto to the extent received by the Servicer from the prior servicer, sub-servicer or originator, and any additional documents required to be added to the Mortgage File pursuant to this Agreement.

Mortgage Interest Rate: The annual rate of interest borne on a Mortgage Note with respect to each Mortgage Loan.

Mortgage Loan: An individual mortgage loan which is the subject of this Agreement, including those mortgage loans subserviced by Servicer pursuant to the Letter Agreement, each mortgage loan originally sold and subject to this Agreement being identified on the Mortgage Loan Schedule, which mortgage moan includes without limitation the Mortgage File, the Monthly Payments, Principal Prepayments, Liquidation Proceeds, Condemnation Proceeds, Insurance Proceeds, Servicing Rights and all other rights, benefits, proceeds and

obligations arising from or in connection with such mortgage loan, excluding replaced or repurchased mortgage loans.

Mortgage Loan Documents: The documents listed on Exhibit 8 attached hereto pertaining to any Mortgage Loan.

Mortgage Loan Schedule: The schedule of Mortgage Loans, provided by the prior Servicer, setting forth, to the extent available, the following information with respect to each Mortgage Loan: (1) the loan seller's Mortgage Loan identifying number; (2) the Mortgagor's name; (3) the street address of the Mortgaged Property including the city, state and zip code; (4) a code indicating whether the Mortgaged Property is owner-occupied, a second home or investment property; (5) the number and type of residential units constituting the Mortgaged Property (i.e. a single family residence, a 2-4 family residence, a unit in a condominium project or a unit in a planned unit development, manufactured housing); (6) the original months to maturity or the remaining months to maturity from the Transfer Date, in any case based on the original amortization schedule and, if different, the maturity expressed in the same manner but based on the actual amortization schedule; (7) the Loan-to-Value Ratio at origination; (8) with respect to First Lien Loans, the LTV and with respect to second lien loans, the CLTV; (9) the Mortgage Interest Rate as of the Transfer Date; (10) the date on which the Monthly Payment was due on the Mortgage Loan and, if such date is not consistent with the Due Date currently in effect, such Due Date; (11) the stated maturity date; (12) the amount of the Monthly Payment as of the Transfer Date; (13) the last payment date on which a Monthly Payment was actually applied to pay interest and the outstanding principal balance; (14) the original principal amount of the Mortgage Loan; (15) the principal balance of the Mortgage Loan as of the close of business on the Transfer Date, after deduction of payments of principal due and collected on or before the Transfer Date; (16) with respect to Adjustable Rate Mortgage Loans, the Interest Rate Adjustment Date; (17) with respect to Adjustable Rate Mortgage Loans, the Gross Margin; (18) with respect to Adjustable Rate Mortgage Loans, the Lifetime Rate Cap under the terms of the Mortgage Note; (19) with respect to Adjustable Rate Mortgage Loans, a code indicating the type of Index; (20) with respect to Adjustable Rate Mortgage Loans, the Periodic Rate Cap under the terms of the Mortgage Note; (21) with respect to Adjustable Rate Mortgage Loans, the Periodic Rate Floor under the terms of the Mortgage Note; (22) the type of Mortgage Loan (i.e., fixed rate, adjustable rate, first lien, second lien); (23) a code indicating the purpose of the loan (i.e., purchase, rate and term refinance, equity take-out refinance); (24) a code indicating the documentation style (i.e. full, alternative or reduced); (25) the loan credit classification (as described in the underwriting guidelines); (26) whether such Mortgage Loan provides for a prepayment penalty; (27) the prepayment penalty period of such Mortgage Loan, if applicable; (28)) a description of the prepayment penalty, if applicable; (29) the Mortgage Interest Rate as of origination; (30) the credit risk score (FICO score) at origination; (31) the date of origination; (32) the Mortgage Interest Rate adjustment period; (33) the Mortgage Interest Rate adjustment percentage; (34) the Mortgage Interest Rate floor; (35) the Mortgage Interest Rate calculation method (i.e., 30/360, simple interest, other); (36) a code indicating whether the Mortgage Loan is a HOEPA Loan; (37) a code indicating whether the Mortgage Loan is assumable; (38) a code indicating whether the Mortgage Loan has been modified; (39) the one year payment history; (40) the Due Date for the first Monthly Payment; (41) the original Monthly Payment due; (42) with respect to the related Mortgagor, the debt-to-income ratio; (43) the Appraised Value of the Mortgaged Property; (44) the sales price of the Mortgaged Property if the Mortgage Loan was

originated in connection with the purchase of the Mortgaged Property; (45) with respect to second lien loans, the outstanding principal balance of the superior lien; (46) a twelve month history for the Mortgage Loan and the number of times thirty, sixty, and ninety days delinquent in the past twelve months; (47) a code indicating the payment status of the Mortgage Loan (i.e. bankruptcy, foreclosure, REO, other litigation); (48) a twelve month history for the prior Mortgage Loan and the number of times thirty, sixty, and ninety days delinquent in the past twelve months; and (49) if subject to a Forbearance, the terms of such Forbearance. With respect to the Mortgage Loans in the aggregate, the Mortgage Loan Schedule shall set forth the following information: (1) the number of Mortgage Loans; (2) the current aggregate outstanding principal balance of the Mortgage Loans; (3) the weighted average Mortgage Interest Rate of the Mortgage Loans; and (4) the weighted average maturity of the Mortgage Loans.

Mortgage Note: The note or other evidence of the indebtedness of a Mortgagor secured by a Mortgage.

Mortgaged Property: The real property (or leasehold estate, if applicable) securing repayment of the debt evidenced by a Mortgage Note.

Mortgagor: The obligor on a Mortgage Note.

New Loan Data File: With respect to each Mortgage Loan delivered, or caused to be delivered, after the date of this Agreement by Owner to be subserviced by Servicer under this Agreement, the data file produced by Owner or the prior servicer pursuant to the Transfer Instructions, which is used to enable Servicer to set up each Mortgage Loan on its loan servicing system.

Nonrecoverable Advance: Any Servicing Advance previously made or proposed to be made in respect of a Mortgage Loan which, in the good faith judgment of the Servicer, will not or, in the case of a proposed advance, would not, be ultimately recoverable from related Insurance Proceeds, Liquidation Proceeds or otherwise from such Mortgage Loan. The determination by the Servicer that it has made a Nonrecoverable Advance or that any proposed advance, if made, would constitute a Nonrecoverable Advance, shall be evidenced by an Officer's Certificate delivered to the Owner.

Officer's Certificate: A certificate signed by the Chairman of the Board or the Vice Chairman of the Board or a President or Vice President or Senior Vice President and by the Treasurer or the Secretary or one of the Assistant Treasurers or Assistant Secretaries of the Servicer, and delivered to the Owner.

Opinion of Counsel: A written opinion of counsel, who may be counsel for the Servicer, reasonably acceptable to the Owner.

Originator: With respect to a Mortgage Loan, the originator of the related Mortgage Loan.

Pass-Through Transfer: The direct or indirect sale or transfer of some or all of the Mortgage Loans by the Owner to a trust to be formed as part of a publicly offered or privately placed mortgage-backed securities transaction.

Periodic Rate Cap: With respect to each Adjustable Rate Mortgage Loan, the provision of each Mortgage Note which provides for an absolute maximum amount by which the Mortgage Interest Rate therein may increase on an Interest Rate Adjustment Date above the Mortgage Interest Rate previously in effect.

Periodic Rate Floor: With respect to each Adjustable Rate Mortgage Loan, the provision of each Mortgage Note which provides for an absolute maximum amount by which the Mortgage Interest Rate therein may decrease on an Interest Rate Adjustment Date below the Mortgage Interest Rate previously in effect.

Person: Any individual, corporation, partnership, limited liability company, joint venture, association, joint-stock company, trust, unincorporated organization, government or any agency or political subdivision thereof.

Prime Rate: The prime rate announced to be in effect from time to time, as published as the average rate in The Wall Street Journal (Northeast edition).

Principal Prepayment: Any payment or other recovery of principal on a Mortgage Loan which is received in advance of its scheduled Due Date, including any prepayment penalty or premium thereon and which is not accompanied by an amount of interest representing scheduled interest due on any date or dates in any month or months subsequent to the month of prepayment.

Principal Prepayment Period: The month preceding the month in which the related Remittance Date occurs.

Qualified Depository: A depository the accounts of which are insured by the FDIC.

Rating Agency: Any of Fitch, Moody's or Standard & Poor's, or their respective successors designated by the Owner.

Reconstitution: Either a Whole Loan Transfer or a Pass-Through Transfer.

Reconstitution Agreements: As defined in Section 13.13 hereof.

Reconstitution Date: As defined in Section 13.13 hereof.

Recourse Obligation: With respect to any Mortgage Loan, any obligation or liability (actual or contingent) of the Servicer or its Affiliates, as applicable (i) for loss of principal incurred in connection with the foreclosure or other disposition of, or other realization or attempt to realize upon the collateral securing such Mortgage Loan (including, but not limited to, damages relating to loss mitigation, obtaining deeds in lieu of foreclosure, VA No_Bid Instructions, or VA partial guaranties); (ii) to repurchase such Mortgage Loan in the event that the Mortgagor of such Mortgage Loan has filed for bankruptcy protection, the Mortgaged Property is the subject of foreclosure or other litigation proceedings; or (iii) to repurchase such Mortgage Loan in the event of a delinquency or other payment default thereunder by the Mortgagor.

REMIC: A "real estate mortgage investment conduit" within the meaning of Section 860D of the Code.

REMIC Provisions: Provisions of the federal income tax law relating to a REMIC, which appear at Section 860A through 860G of Subchapter M of Chapter 1, Subtitle A of the Code, and related provisions and regulations, rulings or pronouncements promulgated thereunder, as the foregoing may be in effect from time to time.

Remittance Date: The 18th day (or if such 18th day is not a Business Day, the Business Day immediately following such 18th day) of the month following the Determination Date.

REO Property: A Mortgaged Property acquired by the Servicer on behalf of the Owner through foreclosure or by deed in lieu of foreclosure, as described in Section 2.15.

RESPA: Real Estate Settlement Procedures Act, as amended from time to time.

Securitization Servicing Fee: The servicing fee payable to the Servicer in a Pass-Through Transfer as agreed by the Servicer and the Owner.

Servicer Employees: As defined in Section 2.12 hereof.

Servicing Advances: All customary, reasonable and necessary "out of pocket" costs and expenses (including reasonable attorneys' fees and disbursements) incurred in the performance by the Servicer of its servicing obligations, including, but not limited to, the cost of (a) the preservation, restoration and protection of the Mortgaged Property, (b) any fees relating to any enforcement or judicial proceedings, excluding foreclosures, (c) foreclosure actions per FHLMC attorney fees and costs guidelines, (d) the management and liquidation of the Mortgaged Property if the Mortgaged Property is acquired in satisfaction of the Mortgage, (e) taxes, assessments, water rates, sewer rents and other charges which are or may become a lien upon the Mortgaged Property and (f) compliance with the obligations pursuant to the provisions of this Agreement.

Servicing Fee: With respect to each Mortgage Loan, the amount of the fee the Owner shall pay to the Servicer, as set forth in the Term Sheet.

Servicing File: With respect to each Mortgage Loan, the file retained by the Servicer consisting of originals, if provided, or copies of all documents in the Mortgage File which are not delivered to the Owner, its designee or the Custodian and copies of the Mortgage Loan Documents.

Servicing Performance Standards: The servicing standards set forth on Exhibit 16.

Servicing Rights: Any and all of the following: (a) any and all rights to service the Mortgage Loans; (b) any payments to or monies received by the Servicer for servicing the Mortgage Loans; (c) any Ancillary Income with respect to the Mortgage Loans; (d) all agreements or documents creating, defining or evidencing any such servicing rights to the extent

they relate to such servicing rights and all rights of the Servicer thereunder; (e) any and all rights to and in the Escrow Payments or other similar payments with respect to the Mortgage Loans and any amounts actually collected by the Servicer with respect thereto; (f) all accounts and other rights to payment related to any of the property described in this paragraph; and (g) any and all documents, files, records, servicing files, servicing documents, servicing records, data tapes, computer records, or other information pertaining to the Mortgage Loans or pertaining to the past, present or prospective servicing of the Mortgage Loans.

Servicing Transfer Date: The date on or dates which the physical servicing of the Mortgage Loans is transferred to the Servicer pursuant to this Agreement.

Standard & Poor's: Standard & Poor's Ratings Services, a division of The McGraw-Hill Companies Inc., and any successor thereto.

Stated Principal Balance: As to each Mortgage Loan, (i) the principal balance of the Mortgage Loan at the Transfer Date after giving effect to payments of principal due on or before such date, whether or not received, minus (ii) all amounts previously distributed to the Owner with respect to the related Mortgage Loan representing payments or recoveries of principal or advances in lieu thereof.

Term Sheet: The Term Sheet attached hereto as Exhibit 15.

Transfer Date: With respect to each Mortgage Loan, the date Servicer physically assumes its obligations of servicing pursuant to this Agreeement.

Transfer Instructions: The transfer instructions used by the Servicer provided in connection with any given transfer of additional Mortgage Loans for servicing under this Agreement, attached as Exhibit 10.

VA: The United States Department of Veterans Affairs, or any successor thereto.

VA No-Bid Instruction: An instruction given by the VA to the effect that the VA will not accept conveyance of the REO Property related to the foreclosure of a Mortgage Loan or when the VA pays all or part of the difference between the net sale proceeds and the total indebtedness on a VA guaranteed loan following the private sale of the property where the proceeds are insufficient to fully payoff the existing Mortgage.

Whole Loan Transfer: The sale or transfer by Owner of some or all of the Mortgage Loans in a whole loan or participation format.

ARTICLE II.

SERVICING

Section 2.01 Servicer to Act as Servicer.

From and after the date of this Agreement, the Servicer, as an independent contractor, shall service and administer each Mortgage Loan, including those Mortgage Loans subserviced pursuant to the Letter Agreement, and shall have full power and authority, acting alone, to do any and all things in connection with such servicing and administration which the Servicer may deem necessary or desirable, consistent with the terms of this Agreement, Accepted Servicing Practices and the Servicing Performance Standards. Servicer shall only modify Mortgage Loans in accordance with Fannie Mae Guides.

From and after the date of this Agreement, Servicer shall assume responsibility under this Agreement to subservice and administer additional Mortgage Loans upon the delivery, in accordance with the Transfer Instructions, of the related New Loan Data File and all related Mortgage Loan documentation by or on behalf of Owner (including deliveries by the applicable prior servicer pursuant to directions by Owner) provided that any new Mortgage Loans that Owner desires to make subject to this Agreement meet the Eligibility Criteria then in effect. Owner shall provide or cause to be provided by the applicable prior servicer, the New Loan Data File for each Mortgage Loan to Servicer promptly upon purchase or origination of the Mortgage Loan by Owner, and in no event later than five (5) days before Servicer is expected to perform subservicing on that Mortgage Loan. Owner shall notify Servicer within two (2) Business Days, in writing, of any changes in the information contained in the New Loan Data File. Owner agrees to provide Servicer, within two (2) Business Days after Servicer's request, copies of the Mortgage Note, the Mortgage or any other documents Owner has with respect to a Mortgage Loan that Servicer deems reasonably necessary in connection with its performance of the Servicing of said Mortgage Loan.

In servicing and administering the Mortgage Loans, the Servicer shall employ Accepted Servicing Practices except and to the extent that such practices conflict with the requirements of this Agreement. The Servicer shall retain adequate personnel to effect such servicing and administration of the Mortgage Loans.

In the event that any Mortgage in Default or, in the judgment of the Servicer, such a Default is reasonably foreseeable, the Servicer, consistent with Accepted Servicing Practices, may also waive, modify or vary any term of such Mortgage Loan (including modifications that would change the Mortgage Interest Rate, forgive the payment of principal or interest, or waive, in whole or in part, a prepayment penalty), accept payment from the related Mortgagor of an amount less than the Stated Principal Balance in final satisfaction of such Mortgage Loan, or consent to the postponement of strict compliance with any such term or otherwise grant indulgence to any Mortgagor (any and all such waivers, modifications, payment plans, variances, forgiveness of principal or interest, postponements, or indulgences collectively referred to herein as "Forbearance"). The Servicer's analysis supporting any Forbearance and the conclusion that any Forbearance meets the standards of this section shall be reflected as appropriate in the Servicer's records.

Without limiting the generality of the foregoing, the Servicer shall continue, and is hereby authorized and empowered, to execute and deliver on behalf of itself and the Owner, all instruments and documents necessary to carry out its servicing and administrative duties under this Agreement including but not limited to instruments in connection with foreclosures; satisfaction or cancellation, or of partial or full release, discharge and all other comparable instruments, with respect to the Mortgage Loans and with respect to the Mortgaged Properties. The Owner shall furnish the Servicer with a corporate resolution in the form of Exhibit 13 appropriate to enable the Servicer to carry out its servicing and administrative duties under this Agreement. If reasonably required by the Servicer, the Owner shall furnish the Servicer with any powers of attorney and other documents necessary or appropriate to enable the Servicer to carry out its servicing and administrative duties under this Agreement.

The Servicer's computer system shall clearly reflect the ownership of each Mortgage Loan. The Servicer shall release from its custody the contents of any Servicing File retained by it only in accordance with this Agreement or at the written direction of the Owner.

With respect to the performance of any service required to be provided for Servicer hereunder, including, without limitation, the obtainment of credit report data, the provision of field or other inspections, the provision of title-related services, and the sale or management of REO properties, the Servicer may obtain such services from an Affiliate if such services are provided on a commercially reasonable basis with respect to the price and quality of such services.

Section 2.02 Liquidation of Mortgage Loans.

In the event that any payment due under any Mortgage Loan and not postponed pursuant to Section 2.01 is not paid when the same becomes due and payable, or in the event the Mortgagor fails to perform any other covenant or obligation under the Mortgage Loan and such failure continues beyond any applicable grace period, the Servicer shall take such action as is consistent with Accepted Servicing Practices. In the event that any payment due under any Mortgage Loan is not postponed pursuant to Section 2.01 and remains delinquent for a period of 90 days or any other default continues for a period of 90 days beyond the expiration of any grace or cure period (or such other period as is required by law in the jurisdiction where the related Mortgaged Property is located) or earlier as determined by the Servicer, the Servicer shall cause a Foreclosure Commencement in accordance with Accepted Servicing Practices. In such connection, the Servicer shall from its own funds make all necessary and proper Servicing Advances, provided, however, that the Servicer shall not be required to expend its own funds in connection with any foreclosure or towards the restoration or preservation of any Mortgaged Property, unless it shall determine (a) that such preservation, restoration and/or foreclosure will increase the proceeds of liquidation of the Mortgage Loan to Owner after reimbursement to itself for such expenses and (b) that such expenses will be recoverable by it either through Liquidation Proceeds (respecting which it shall have priority for purposes of withdrawals from the Custodial Account pursuant to Section 2.05) or through Insurance Proceeds (respecting which it shall have similar priority).

The Servicer shall provide the Owner with access to its online mortgage loan servicing data system (the "Data System") during business hours (generally, Monday through Friday, between 7 a.m. and 9 p.m. EST, and Saturday between 8 a.m. and 2 p.m. EST) with respect to the Mortgage Loans; provided, that Owner shall be responsible for all costs associated with such access.

The Servicer acknowledges and agrees that it shall take and initiate any legal actions with respect to any Mortgage Loans and REO Properties, including, without limitation, any foreclosure actions, acceptance of deeds-in-lieu of foreclosure, and any collection actions with respect to any Mortgage Loans or REO Properties on behalf of the Owner, but only in the name of the Servicer and without reference to the Owner. Except as otherwise required by law or with the consent of the Owner, under no circumstances shall any such action be taken in the name of, or with any reference to, the Owner. The Servicer shall provide prior written notice to the Owner if the Servicer is required by applicable law to take any legal actions with respect to the Mortgage Loan or REO Properties in the name of, or with reference to, the Owner. Owner agrees to provide all the documentation, appropriately recorded, if applicable, necessary for Servicer to initiate legal actions in its own name. Owner agrees to reimburse Servicer for any costs or expenses associated with assigning Mortgage Loans to Servicer or MERS as the case may be.

Notwithstanding anything to the contrary contained herein, (a) all actions must be approved by the Owner relating to any Mortgaged Property that is determined to be contaminated by hazardous or toxic substances or wastes and (b), in connection with a foreclosure, in the event the Servicer has reasonable cause to believe that a Mortgaged Property is contaminated by hazardous or toxic substances or wastes, or if the Owner otherwise requests an environmental inspection or review of such Mortgaged Property to be conducted by a qualified inspector the Servicer shall cause the Mortgaged Property to be so inspected at the Owner's expense. Upon completion of the inspection, the Servicer shall promptly provide the Owner with a written report of the environmental inspection.

Notwithstanding anything to the contrary contained herein, after reviewing the environmental inspection report, the Owner shall determine how the Servicer shall proceed with respect to the Mortgaged Property; provided, that Servicer may determine in its sole discretion that it will not proceed with a foreclosure or acceptance of a deed in lieu of foreclosure with respect to a Mortgaged Property that has been determined to be contaminated by hazardous or toxic substances or wastes and with respect to which Servicer would be expected to take title in its own name. In the event (a) the environmental inspection report indicates that the Mortgaged Property is contaminated by hazardous or toxic substances or wastes and (b) the Owner directs the Servicer to proceed with foreclosure or acceptance of a deed in lieu of foreclosure, the Servicer shall be reimbursed for all reasonable costs associated with such foreclosure or acceptance of a deed in lieu of foreclosure and any related environmental clean up costs, as applicable, from the related Liquidation Proceeds, or if the Liquidation Proceeds are insufficient to fully reimburse the Servicer, the Servicer shall be entitled to be reimbursed from amounts in the Custodial Account pursuant to Section 2.05 hereof. In the event the Owner directs the Servicer not to proceed with foreclosure or acceptance of a deed in lieu of foreclosure, the Servicer shall be reimbursed for all Servicing Advances made with respect to the related Mortgaged Property from the Custodial Account pursuant to Section 2.05 hereof.

With respect to any Mortgage Loan that is collateralized by a Mortgaged Property and the Servicer is not proceeding to liquidation as a result of environmental contamination, the Servicer shall be entitled to be reimbursed for its Servicing Advances from amounts in the Custodial Account pursuant to Section 2.05 hereof.

Section 2.03 Collection of Mortgage Loan Payments.

Following the date of this Agreement, the Servicer shall proceed diligently to collect all payments due under each of the related Mortgage Loans when the same shall become due and payable and shall take reasonable care in ascertaining and estimating Escrow Payments, to the extent applicable, and all other charges that will become due and payable with respect to the Mortgage Loans and each related Mortgaged Property, to the extent that the installments payable by the Mortgagors will be sufficient to pay such charges as and when they become due and payable.

Section 2.04 Establishment of and Deposits to Custodial Account.

The Servicer shall segregate and hold all funds collected and received pursuant to the Mortgage Loans separate and apart from any of its own funds and general assets and shall establish one or more Custodial Accounts, in the form of time deposit or demand accounts, titled "GMAC Mortgage Corporation, in trust for [ ] re: Fixed and Adjustable Rate B/C Residential Mortgage Loans". The Custodial Account shall be established with a Qualified Depository acceptable to the Owner, it being acknowledged that any Qualified Depository that is an Affiliate of Servicer is hereby deemed acceptable to the Owner. Any funds deposited in the Custodial Account shall at all times be fully insured to the full extent permitted under applicable law and any amounts therein may be invested in Eligible Investments. The creation of any Custodial Account shall be evidenced by a certification in the form of Exhibit 2 hereto, in the case of an account established with the Servicer, or by a letter agreement in the form of Exhibit 3 hereto, in the case of an account held by a depository other than the Servicer. A copy of such certification or letter agreement shall be furnished to the Owner and, upon request, to any subsequent Owner.

The Servicer shall deposit in the Custodial Account no more than two (2) Business Days following receipt thereof, and retain therein, the following collections received by the Servicer and payments made by the Servicer after the applicable Transfer Date, other than payments of principal and interest due on or before the related Transfer Date, or received by the Servicer prior to the related Transfer Date but allocable to a period subsequent thereto:

(i) all payments on account of principal on the Mortgage Loans, including all Principal Prepayments;

(ii) all payments on account of interest on the Mortgage;

(iii) all Liquidation Proceeds and any amount received with respect to REO Property;

(iv) all Insurance Proceeds including amounts required to be deposited pursuant to Section 2.10 (other than proceeds to be held in a suspense account and applied to the restoration

or repair of the Mortgaged Property or released to the Mortgagor in accordance with Section 2.14), and Section 2.13;

(v) all Condemnation Proceeds which are not applied to the restoration or repair of the Mortgaged Property or released to the Mortgagor in accordance with Section 2.14;

(vi) any amount required to be deposited in the Custodial Account pursuant to Section 2.09, 2.12, 2.16, 3.01, 3.04 or 4.02;

(vii) any prepayment penalties received with respect to any Mortgage Loan; and

(viii) any amounts required to be deposited by the Servicer pursuant to Section 2.11 in connection with the deductible clause in any blanket hazard insurance policy.

The foregoing requirements for deposit into the Custodial Account shall be exclusive, it being understood and agreed that, without limiting the generality of the foregoing, unless otherwise provided herein, payments in the nature of the Servicing Fee and Ancillary Income need not be deposited by the Servicer into the Custodial Account. Any interest paid on funds deposited in the Custodial Account by the depository institution or any other non-interest benefits shall accrue to the benefit of the Servicer and the Servicer shall be entitled to retain and withdraw such interest from the Custodial Account pursuant to Section 2.05 or retain such other benefits, as the case may be.

Section 2.05 Permitted Withdrawals From Custodial Account.

Subject to Section 3.01, the Servicer shall be entitled to withdraw funds from the Custodial Account for the following purposes:

(i) to make payments to the Owner in the amounts and in the manner provided Section 3.01;

(ii) [reserved];

(iii) to pay to itself the Servicing Fee (to the extent the Servicer has not retained the Servicing Fee);

(iv) to reimburse itself for unreimbursed Servicing Advances (except to the extent reimbursed pursuant to Section 2.07), any accrued but unpaid Servicing Fees and for unreimbursed advances of Servicer funds made pursuant to Section 2.15, the Servicer's right to reimburse itself pursuant to this subclause (iii) with respect to any Mortgage Loan being limited to related Liquidation Proceeds, Condemnation Proceeds, Insurance Proceeds and such other amounts as may be collected by the Servicer from the Mortgagor or otherwise relating to the Mortgage Loan, it being understood that, in the case of any such reimbursement, the Servicer's right thereto shall be prior to the rights of the Owner;

(v) following the liquidation of a Mortgage Loan, to reimburse itself from amounts unrelated to the Mortgage Loan for any unpaid Servicing Fees to the extent not

recoverable from Liquidation Proceeds, Insurance Proceeds or other amounts received with respect to the related Mortgage Loan under Section 2.05(iii);

(vi) to reimburse itself for any unreimbursed Nonrecoverable Advances made by the Servicer in accordance with this Agreement;

(vii) to invest funds in Eligible Investments in accordance with Section 2.09;

(viii) to withdraw funds deposited in error;

(ix) to pay itself any interest earned on funds deposited in the Custodial Account (all such interest to be withdrawn monthly not later than each Remittance Date); and

(x) to clear and terminate the Custodial Account upon the termination of this Agreement.

Section 2.06 Establishment of and Deposits to Escrow Account.

The Servicer shall segregate and hold all funds collected and received pursuant to a Mortgage Loan constituting Escrow Payments separate and apart from any of its own funds and general assets and shall establish and maintain one or more Escrow Accounts, in the form of time deposit or demand accounts, titled, "GMAC Mortgage Corporation, in trust for Owners of Residential Fixed and Adjustable Rate Mortgage Loans, and various Mortgagors". The Escrow Account shall be established with a Qualified Depository, in a manner which shall provide maximum available insurance thereunder. Funds deposited in the Escrow Accounts may be drawn on by the Servicer in accordance with Section 2.07. The creation of any Escrow Account shall be evidenced by a certification in the form of Exhibit 4 hereto, in the case of an account established with the Servicer, or by a letter agreement in the form of Exhibit 5 hereto, in the case of an account held by a depository other than the Servicer. A copy of such certification shall be furnished to the Owner and, upon request, to any subsequent Owner.

The Servicer shall deposit in the Escrow Account or Accounts on a daily basis, and retain therein all Escrow Payments collected on account of the Mortgage Loans, for the purpose of effecting timely payment of any such items as required under the terms of this Agreement.

The Servicer shall deposit in a suspense account on a daily basis, and retain therein all amounts representing Insurance Proceeds or Condemnation Proceeds which are to be applied to the restoration or repair of any Mortgaged Property. The suspense account shall be established with a Qualified Depository, in a manner which shall provide maximum available insurance thereunder.

The Servicer shall make withdrawals from the Escrow Account only to effect such payments as are required under this Agreement, as set forth in Section 2.07. The Servicer shall be entitled to retain any interest paid on funds deposited in the Escrow Account or a suspense account by the depository institution, other than interest on escrowed funds required by law to be paid to the Mortgagor. To the extent required by law, the Servicer shall pay from its own funds interest on escrowed funds to the Mortgagor notwithstanding that the Escrow Account may be non-interest bearing or that interest paid thereon is insufficient for such purposes.

Section 2.07 Permitted Withdrawals From Escrow Account.

Withdrawals from the Escrow Account or Accounts may be made by the Servicer only:

(i) to effect timely payments of ground rents, taxes, assessments, water rates, mortgage insurance premiums, condominium charges, fire and hazard insurance premiums or other items constituting Escrow Payments for the related Mortgage;

(ii) to reimburse the Servicer for any Servicing Advance made by the Servicer pursuant to Section 2.10 with respect to a related Mortgage Loan, but only from amounts received on the related Mortgage Loan which represent late collections of Escrow Payments thereunder;

(iii) to refund to any Mortgagor any funds found to be in excess of the amounts required under the terms of the related Mortgage Loan or applicable federal or state law or judicial or administrative ruling;

(iv) for transfer to the Custodial Account and application to reduce the principal balance of the Mortgage Loan in accordance with the terms of the related Mortgage and Mortgage Note;

(v) [Reserved];

(vi) to pay to the Servicer, or any Mortgagor to the extent required by law, any interest paid on the funds deposited in the Escrow Account; and

(vii) to clear and terminate the Escrow Account on the termination of this Agreement.

Section 2.08 Payment of Taxes, Insurance and Other Charges.

With respect to each Mortgage Loan that provides for Escrow Payments, the Servicer shall maintain accurate records reflecting the status of ground rents, taxes, assessments, water rates, sewer rents, and other charges which are or may become a lien upon the Mortgaged Property and the status fire and hazard insurance coverage and shall obtain, from time to time, all bills for the payment of such charges (including renewal premiums) and shall effect payment thereof prior to the applicable penalty or termination date, employing for such purpose deposits of the Mortgagor in the Escrow Account which shall have been estimated and accumulated by the Servicer in amounts sufficient for such purposes, as allowed under the terms of the Mortgage.

To the extent that any Mortgage Loan does not provide for Escrow Payments, the Servicer shall determine that any such payments are made by the Mortgagor. With respect to each Mortgage Loan, subject to Accepted Servicing Practices, the Servicer assumes full responsibility for the timely payment of all such bills and shall effect payments of all such bills irrespective of the Mortgagor's faithful performance in the payment of same or the making of the Escrow Payments and shall make Servicing Advances from its own funds to effect such payments within the time period required to avoid penalties and interest and no later than to avoid the loss of the related Mortgaged Property by foreclosure from a tax or other lien.

Notwithstanding the foregoing, if the Servicer determines that such Servicing Advance would be a Nonrecoverable Advance, the Servicer shall have no obligation to make such Servicing Advance. If Servicer fails to make a Servicing Advance with respect to any payment prior to the date on which any late payment penalties or costs related to protecting the lien accrue, except in the case of a Nonrecoverable Advance, the Servicer shall pay any such penalties or costs which accrued after the date which was thirty (30) Business Days after the date on which the Servicer had knowledge that such payment had not been made by the Mortgagor.

Section 2.09 Protection of Accounts.

The Servicer may transfer the Custodial Account or the Escrow Account to a different Qualified Depository from time to time. Such transfer shall be made only upon obtaining the consent of the Owner, which consent shall not be withheld unreasonably.

The Servicer shall bear any expenses, losses or damages sustained by the Owner because the Custodial Account and/or Escrow Account are not demand deposit accounts.

Amounts on deposit in the Custodial Account may at the option of the Servicer be invested in Eligible Investments. Any such Eligible Investment shall mature no later than one day prior to the Remittance Date in each month; *provided, however*, that if such Eligible Investment is an obligation of a Qualified Depository (other than the Servicer) that maintains the Custodial Account, then such Eligible Investment may mature on the related Remittance Date. Any such Eligible Investment shall be made in the name of the Servicer in trust for the benefit of the Owner. All income on or gain realized from any such Eligible Investment shall be for the benefit of the Servicer and may be withdrawn at any time by the Servicer. Any losses incurred in respect of any such investment shall be deposited in the Custodial Account, by the Servicer out of its own funds immediately as realized. If, at any time, the amount on deposit in the Custodial Account exceeds the amount of the applicable FDIC insurance, such excess above the amount of the applicable FDIC insurance shall be invested in Eligible Investments.

All suspense and clearing account in which funds relating to the Mortgage Loans are deposited shall be established with a Qualified Depository, in a manner which shall provide maximum available insurance thereunder.

Section 2.10 Maintenance of Hazard Insurance.

The Servicer shall cause to be maintained for each Mortgage Loan, hazard insurance such that all buildings upon the Mortgaged Property are insured by a generally acceptable insurer acceptable under the Fannie Mae Guides against loss by fire, hazards of extended coverage and such other hazards as are required to be insured pursuant to the Fannie Mae Guides, in an amount which is at least equal to the lesser of (i) the maximum insurable value of the improvements securing such Mortgage Loan or (ii) the outstanding principal balance of the Mortgage Loan provided that such amount represents at least 80% of the insurable value of the Mortgaged Property.

If required by the National Flood Insurance Act of 1968, as amended, each Mortgage Loan is, and shall continue to be, covered by a flood insurance policy meeting the requirements of the current guidelines of the Federal Insurance Administration is in effect with a generally acceptable insurance carrier acceptable under the Fannie Mae Guides in an amount representing coverage not less than the lesser of (i) the aggregate unpaid principal balance of the Mortgage Loan, (ii) maximum amount of insurance which is available under the National Flood Insurance Act of 1968, as amended (regardless of whether the area in which such Mortgaged Property is located is participating in such program), and (iii) the full replacement value of the improvements which are part of such Mortgaged Property. If a Mortgaged Property is located in a special flood hazard area and is not covered by flood insurance or is covered in an amount less than the amount required by the National Flood Insurance Act of 1968, as amended, the Servicer shall notify the related Mortgagor that the Mortgagor must obtain such flood insurance coverage, and if said Mortgagor fails to obtain the required flood insurance coverage within forty five (45) days after such notification, the Servicer shall immediately force place the required flood insurance on the Mortgagor's behalf.

If a Mortgage is secured by a unit in a condominium project, the Servicer shall verify that the coverage required of the owner's association, including hazard, flood, liability, and fidelity coverage, is being maintained in accordance with then current Fannie Mae requirements, and secure from the owner's association its agreement to notify the Servicer promptly of any change in the insurance coverage or of any condemnation or casualty loss that may have a material effect on the value of the Mortgaged Property as security.

The Servicer shall cause to be maintained on each Mortgaged Property such other or additional insurance as may be required pursuant to such applicable laws and regulations as shall at any time be in force and as shall require such additional insurance, or pursuant to the requirements of any private mortgage guaranty insurer, or as may be required to conform with Accepted Servicing Practices.

In the event that the Owner or the Servicer shall determine that the Mortgaged Property should be insured against loss or damage by hazards and risks not covered by the insurance required to be maintained by the Mortgagor pursuant to the terms of the Mortgage, the Servicer shall communicate and consult with the Mortgagor with respect to the need for such insurance and bring to the Mortgagor's attention the desirability of protection of the Mortgaged Property.

All policies required hereunder shall name the Servicer and its successors and assigns as a mortgagee and loss payee and shall be endorsed with non contributory standard or New York mortgagee clauses which shall provide for at least 30 days prior written notice of any cancellation, reduction in amount or material change in coverage.

The Servicer shall not interfere with the Mortgagor's freedom of choice in selecting either his insurance carrier or agent, provided, however, that the Servicer shall not accept any such insurance policies from insurance companies unless such companies are acceptable under the Fannie Mae Guides and are licensed to do business in the jurisdiction in which the Mortgaged Property is located. The Servicer shall determine that such policies provide sufficient risk coverage and amounts as required pursuant to the Fannie Mae Guides, that

they insure the property owner, and that they properly describe the property address. The Servicer shall furnish to the Mortgagor a formal notice of expiration of any such insurance in conformance with Servicer's standard practices; provided, however, that in the event that no such notice is furnished by the Servicer, the Servicer shall ensure that replacement insurance policies (whether forced placed or other insurance policies) are in place in the required coverages and the Servicer shall be solely liable for any losses in the event coverage is not provided.

Pursuant to Section 2.06, any amounts collected by the Servicer under any such policies (other than amounts to be deposited in a suspense account and applied to the restoration or repair of the related Mortgaged Property, or property acquired in liquidation of the Mortgage Loan, or to be released to the Mortgagor, in accordance with the Servicer's normal servicing procedures as specified in Section 2.14) shall be deposited in the Custodial Account subject to withdrawal pursuant to Section 2.05.

Section 2.11 Maintenance of Blanket Hazard Insurance Coverage.

In the event that the Servicer shall obtain and maintain a blanket policy insuring against losses arising from fire and hazards covered under extended coverage on all of the Mortgage Loans, then, to the extent such policy provides coverage in an amount equal to the amount required pursuant to Section 2.10 and otherwise complies with all other requirements of Section 2.10, it shall conclusively be deemed to have satisfied its obligations as set forth in Section 2.10. Any amounts collected by the Servicer under any such policy relating to a Mortgage Loan shall be deposited in the Custodial Account subject to withdrawal pursuant to Section 2.05. Such policy may contain a deductible clause, in which case, in the event that there shall not have been maintained on the related Mortgaged Property a policy complying with Section 2.10, and there shall have been a loss which would have been covered by such policy, the Servicer shall deposit in the Custodial Account at the time of such loss the amount not otherwise payable under the blanket policy because of such deductible clause, such amount to be deposited from the Servicer's funds, without reimbursement therefor. Upon request of the Owner, the Servicer shall cause to be delivered to the Owner a certified true copy of such policy and a statement from the insurer thereunder that such policy shall in no event be terminated or materially modified without 30 days' prior written notice to the Owner.

Section 2.12 Maintenance of Fidelity Bond and Errors and Omissions Insurance.

The Servicer shall maintain with responsible companies, at its own expense, a blanket Fidelity Bond and an Errors and Omissions Insurance Policy, with broad coverage on all officers, employees or other persons acting in any capacity requiring such persons to handle funds, money, documents or papers relating to the Mortgage Loans ("Servicer Employees"). Any such Fidelity Bond and Errors and Omissions Insurance Policy shall be in the form of the Mortgage Banker's Blanket Bond and shall protect and insure the Servicer against losses, including forgery, theft, embezzlement, fraud, errors and omissions and negligent acts of such Servicer Employees. Such Fidelity Bond and Errors and Omissions Insurance Policy also shall protect and insure the Servicer against losses in connection with the release or satisfaction of a Mortgage Loan without having obtained payment in full of the indebtedness secured thereby. No provision of this Section 2.12 requiring such Fidelity Bond and Errors and Omissions Insurance Policy shall diminish or relieve the Servicer from its duties and obligations as set forth

in this Agreement. The Servicer shall maintain minimum coverage amounts under any such Fidelity Bond and Errors and Omissions Insurance Policy acceptable to Fannie Mae and Freddie Mac. Upon the request of the Owner, the Servicer shall cause to be delivered to the Owner a certified true copy of such Fidelity Bond and Errors and Omissions Insurance Policy.

Section 2.13 Inspections.

The Servicer shall inspect the Mortgaged Property as often as is deemed necessary by the Servicer to assure itself that the value of the Mortgaged Property is being preserved; provided that, if any Mortgage Loan is more than 60 days delinquent, the Servicer shall immediately inspect the Mortgaged Property and shall conduct subsequent inspections as often as is deemed necessary by the Servicer to assure itself that the value of the Mortgaged Property is being preserved in accordance with Accepted Servicing Practices; provided further that if the Servicer determines that any Mortgage Property is vacant, the Servicer shall immediately inspect the Mortgaged Property and shall conduct subsequent inspections every 25 to 35 days to assure itself that the value of the Mortgaged Property is being preserved in accordance with Accepted Servicing Practices. The Servicer shall maintain appropriate records of each such inspection.

Section 2.14 Restoration of Mortgaged Property.

The Servicer need not obtain the approval of the Owner prior to releasing any Insurance Proceeds or Condemnation Proceeds to the Mortgagor to be applied to the restoration or repair of the Mortgaged Property if such release is in accordance with Accepted Servicing Practices and the terms of this Agreement. At a minimum, the Servicer shall comply with the following conditions in connection with any such release of Insurance Proceeds or Condemnation Proceeds:

(i) the Servicer shall receive satisfactory independent verification of completion of repairs and issuance of any required approvals with respect thereto;

(ii) the Servicer shall take all steps necessary to preserve the priority of the lien of the Mortgage, including, but not limited to requiring waivers with respect to mechanics' and materialmen's liens;

(iii) the Servicer shall verify that the Mortgage Loan is not in default; and

(iv) pending repairs or restoration, the Servicer shall place the Insurance Proceeds or Condemnation Proceeds in a suspense account.

If the Owner is named as an additional loss payee, the Servicer is hereby empowered to endorse any loss draft issued in respect of such a claim in the name of the Owner.

Section 2.15 Title, Management and Disposition of REO Property.

In the event that title to any Mortgaged Property is acquired in foreclosure or by deed in lieu of foreclosure, the deed or certificate of sale shall be taken in the name of the Servicer on behalf of the Owner and without reference to the Owner except as otherwise required

by law. The Person or Persons holding such title other than the Owner shall acknowledge in writing that such title is being held as nominee for the Owner.

The Servicer shall manage, conserve, protect and operate each REO Property for the Owner solely for the purpose of its prompt disposition and sale. The Servicer, either itself or through an agent selected by the Servicer, shall manage, conserve, protect and operate the REO Property in the same manner that it manages, conserves, protects and operates other foreclosed property for its own account. The Servicer shall attempt to sell the same (and may temporarily rent the same for a period not greater than one year, except as otherwise provided below) on such terms and conditions as the Servicer deems to be in the best interest of the Owner. The Servicer shall notify the Owner from time to time as to the status of each REO Property.

The Servicer shall use its commercially reasonable efforts to dispose of the REO Property as soon as possible and shall sell such REO Property in any event within one year after title has been taken to such REO Property, unless the Servicer determines, and gives an appropriate notice to the Owner to such effect, that a longer period is necessary for the orderly liquidation of such REO Property. If a period longer than one year is permitted under the foregoing sentence and is necessary to sell any REO Property, the Servicer shall report monthly to the Owner as to the progress being made in selling such REO Property.

The Servicer shall also maintain on each REO Property fire and hazard insurance with extended coverage in an amount which is at least equal to the maximum insurable value of the improvements which are a part of such property, liability insurance and, to the extent required and available under the National Flood Insurance Act of 1968, as amended, flood insurance in the amount required in Section 2.10 hereof.

The disposition of REO Property shall be carried out by the Servicer at such price, and upon such terms and conditions, as the Servicer deems to be in the best interests of the Owner. The proceeds of sale of the REO Property shall be promptly deposited in the Custodial Account. As soon as practical thereafter, the expenses of such sale shall be paid and the Servicer shall reimburse itself for any related unreimbursed Servicing Advances and unpaid Servicing Fees made pursuant to this Section, and on the Remittance Date immediately following the Principal Prepayment Period in which such sale proceeds are received the net cash proceeds of such sale remaining in the Custodial Account shall be distributed to the Owner.

With respect to each REO Property, the Servicer shall hold all funds collected and received in connection with the operation of the REO Property in the Custodial Account. The Servicer shall cause to be deposited on a daily basis upon the receipt thereof in each Custodial Account all revenues received with respect to the conservation and disposition of the related REO Property.

Section 2.16 Permitted Withdrawals with Respect to REO Property.

The Servicer shall withdraw funds on deposit in the Custodial Account with respect to each related REO Property necessary for the proper operation, management and maintenance of the REO Property, including the cost of maintaining any hazard insurance pursuant to Section 2.10 and the fees of any managing agent acting on behalf of the Servicer.

The Servicer shall make monthly distributions on each Remittance Date to the Owner of the net cash flow from the REO Property (which shall equal the revenues from such REO Property net of the expenses described in Section 2.17 and of any reserves reasonably required from time to time to be maintained to satisfy anticipated liabilities for such expenses).

Section 2.17 Real Estate Owned Reports.

Together with the statement furnished pursuant to Section 2.19, the Servicer shall furnish to the Owner on or before the 5th Business Day of each month a statement with respect to any REO Property covering the operation of such REO Property for the previous month and the Servicer's efforts in connection with the sale of such REO Property and any rental of such REO Property incidental to the sale thereof for the previous month. That statement shall be accompanied by such other information as the Owner shall reasonably request.

Section 2.18 Liquidation Reports.

Upon the foreclosure sale of any Mortgaged Property or the acquisition thereof by the Owner pursuant to a deed in lieu of foreclosure, the Servicer shall submit to the Owner a liquidation report with respect to such Mortgaged Property.

Section 2.19 Reports of Foreclosures and Abandonments of Mortgaged Property.

Following the foreclosure sale or abandonment of any Mortgaged Property, the Servicer shall report such foreclosure or abandonment as required pursuant to Section 6050J of the Code.

Section 2.20 Notification of Adjustments.

With respect to each Adjustable Rate Mortgage Loan, the Servicer shall adjust the Mortgage Interest Rate on the related Interest Rate Adjustment Date in compliance with the requirements of applicable law and the related Mortgage and Mortgage Note. The Servicer shall execute and deliver any and all necessary notices required under applicable law and the terms of the related Mortgage Note and Mortgage regarding the Mortgage Interest Rate and the Monthly Payment adjustments. The Servicer shall promptly upon written request thereof, deliver to the Owner any applicable data regarding such adjustments and the methods used to calculate and implement such adjustments. Upon the discovery by the Servicer, or the Owner that the Servicer has failed to adjust a Mortgage Interest Rate or a Monthly Payment pursuant to the terms of the related Mortgage Note and Mortgage, the Servicer shall immediately deposit in the Custodial Account from its own funds the amount of any interest loss caused the Owner thereby.

ARTICLE III.

PAYMENTS TO OWNER

Section 3.01 Remittances.

On each Remittance Date the Servicer shall remit by wire transfer of immediately available funds to the Owner (a) all amounts deposited in the Custodial Account as of the close of business on the Determination Date (net of charges against or withdrawals from the Custodial Account pursuant to Section 2.05), plus (b) all amounts, if any, which the Servicer is obligated to distribute pursuant to Section 3.04.

With respect to any funds deposited in the Custodial Account after the Business Day following the Business Day on which such deposit was required to be made, the Servicer shall pay to the Owner interest on any such late payment at an annual rate equal to the Prime Rate, adjusted as of the date of each change, plus one percentage point, but in no event greater than the maximum amount permitted by applicable law. Such interest shall be deposited in the Custodial Account by the Servicer on the date such late payment is made and shall cover the period commencing with the Business Day following the Business Day on which such payment was due and ending with the Business Day on which such payment is made, both inclusive. Such interest shall be remitted along with the distribution payable on the next succeeding Remittance Date. The payment by the Servicer of any such interest shall not be deemed an extension of time for payment or a waiver of any Event of Default by the Servicer.

Section 3.02 Statements to Owner.

Not later than each Remittance Date, the Servicer shall furnish to the Owner a Remittance Advice, with a trial balance report attached thereto, in the form of Exhibit 1 annexed hereto in hard copy and electronic medium mutually acceptable to the parties as to the preceding remittance and the period ending on the preceding Determination Date.

In addition, not more than 90 days after the end of each calendar year, the Servicer shall furnish to each Person who was a Owner at any time during such calendar year an annual statement in accordance with the requirements of applicable federal income tax law as to the aggregate of remittances for the applicable portion of such year.

Such obligation of the Servicer shall be deemed to have been satisfied to the extent that substantially comparable information shall be provided by the Servicer pursuant to any requirements of the Internal Revenue Code as from time to time are in force.

The Servicer shall prepare and file any and all tax returns, information statements or other filings required to be delivered to any governmental taxing authority or to the Owner pursuant to any applicable law with respect to the Mortgage Loans and the transactions contemplated hereby. In addition, the Servicer shall provide the Owner with such information concerning the Mortgage Loans as is necessary for the Owner to prepare its federal income tax return as the Owner may reasonably request from time to time and which is reasonably available to the Servicer.

Section 3.03 Advances by Servicer.

Except as otherwise provided herein, the Servicer shall be entitled to first priority reimbursement pursuant to Section 2.05 hereof for Servicing Advances from recoveries from the related Mortgagor or from all Liquidation Proceeds and other payments or recoveries (including Insurance Proceeds and Condemnation Proceeds) with respect to the related Mortgage Loan.

Section 3.04 [Reserved]

Section 3.05 [Reserved]

ARTICLE IV.

GENERAL SERVICING PROCEDURES

Section 4.01 Transfers of Mortgaged Property.

The Servicer shall be required to enforce any "due-on-sale" provision contained in any Mortgage or Mortgage Note and to deny assumption by the person to whom the Mortgaged Property has been or is about to be sold whether by absolute conveyance or by contract of sale, and whether or not the Mortgagor remains liable on the Mortgage and the Mortgage Note. When the Mortgaged Property has been conveyed by the Mortgagor, the Servicer shall, to the extent it has knowledge of such conveyance, exercise its rights to accelerate the maturity of such Mortgage Loan under the "due-on-sale" clause applicable thereto, provided, however, that the Servicer shall not exercise such rights if prohibited by law from doing so.

If the Servicer reasonably believes it is unable under applicable law to enforce such "due-on-sale" clause, the Servicer, shall, to the extent permitted by applicable law, enter into (i) an assumption and modification agreement with the person to whom such property has been conveyed, pursuant to which such person becomes liable under the Mortgage Note and the original Mortgagor remains liable thereon or (ii) in the event the Servicer is unable under applicable law to require that the original Mortgagor remain liable under the Mortgage Note and the Servicer has the prior consent of the primary mortgage guarantee insurer, a substitution of liability agreement with the purchaser of the Mortgaged Property pursuant to which the original Mortgagor is released from liability and the purchaser of the Mortgaged Property is substituted as Mortgagor and becomes liable under the Mortgage Note. If an assumption fee is collected by the Servicer for entering into an assumption agreement, such fee will be retained by the Servicer as additional servicing compensation. In connection with any such assumption, neither the Mortgage Interest Rate borne by the related Mortgage Note, the term of the Mortgage Loan nor the outstanding principal amount of the Mortgage Loan shall be changed.

To the extent that any Mortgage Loan is assumable, the Servicer shall inquire diligently into the creditworthiness of the proposed transferee, and shall follow Accepted Servicing Practices including but not limited to Servicer conducting a review of the credit and financial capacity of the individual receiving the property, and may approve the assumption if it believes the recipient is capable of assuming the mortgage obligations. If the credit of the proposed transferee does not satisfy the relevant underwriting criteria and the transfer of ownership actually occurs, the Servicer diligently shall, to the extent permitted by the Mortgage or the Mortgage Note and by applicable law, accelerate the maturity of the Mortgage Loan.

Section 4.02 Satisfaction of Mortgages and Release of Mortgage Files.

Upon the payment in full of any Mortgage Loan, or the receipt by the Servicer of a notification that payment in full will be escrowed in a manner customary for such purposes, the Servicer shall notify the Owner in the Monthly Remittance Advice as provided in Section 3.02, and may request the release of any Mortgage Loan Documents from the Owner in accordance with this Section 4.02 hereof. The Servicer shall obtain discharge of the related Mortgage Loan as of record within any related time limit required by applicable law; provided that the Owner has provided, or caused to be provided, all necessary documents requested by the Servicer.

If the Servicer satisfies or releases a Mortgage without first having obtained payment in full of the indebtedness secured by the Mortgage (or such lesser amount in connection with a discounted payoff accepted by the Servicer with respect to a defaulted Mortgage Loan) or should the Servicer otherwise prejudice any rights the Owner may have under the mortgage instruments, upon written demand of the Owner, the Servicer shall deposit the amount of any shortfall thereof in the Custodial Account within 5 Business Days of receipt of such demand by the Owner or such longer period if the Servicer is able to reasonably demonstrate that it will be able to cause the amount of the unpaid indebtedness to be reinstated and secured under the related Mortgage. The Servicer shall maintain the Fidelity Bond and Errors and Omissions Insurance Policy as provided for in Section 2.14 insuring the Servicer against any loss it may sustain with respect to any Mortgage Loan not satisfied in accordance with the procedures set forth herein.

Section 4.03 Servicing Compensation.

As consideration for servicing the Mortgage Loans pursuant to this Agreement, the Servicer shall be entitled to retain the applicable Servicing Fee from payments on the Mortgage Loans or to withdraw the applicable Servicing Fee with respect to each Mortgage Loan from the Custodial Account pursuant to Section 2.05 hereof.

Additional servicing compensation in the form of Ancillary Income shall be retained by the Servicer to the extent not required to be deposited in the Custodial Account. The Servicer shall be required to pay all expenses incurred by it in connection with its servicing activities hereunder and shall not be entitled to reimbursement thereof except as specifically provided for herein.

Section 4.04 Annual Statement as to Compliance.

The Servicer shall deliver to the Owner, on or before March 31st each year beginning March 31, 2005, and on the final Transfer Date, an Officer's Certificate, stating that (i) a review of the activities of the Servicer during the preceding calendar year and of performance under this Agreement has been made under such officer's supervision, and (ii) to the best of such officer's knowledge, based on such review, the Servicer has fulfilled all its obligations under this Agreement throughout such year, or, if there has been a default in the fulfillment of any such obligation, specifying each such default known to such officer and the nature and status thereof and the action being taken by the Servicer to cure such default.

Section 4.05 Annual Independent Public Accountants' Servicing Report.

On or before March 31st of each year beginning March 31, 2005, the Servicer, at its expense, shall cause a firm of independent public accountants which is a member of the American Institute of Certified Public Accountants to furnish a statement to the Owner to the effect that such firm has examined certain documents and records for the preceding fiscal year (or during the period from the date of commencement of such Servicer's duties hereunder until the end of such preceding fiscal year in the case of the first such certificate), and that, on the basis of such examination conducted substantially in compliance with the Uniform Single Attestation Program for Mortgage Bankers, such firm is of the opinion that the Servicer's overall servicing operations have been conducted in compliance with the Uniform Single Attestation Program for Mortgage Bankers except for such exceptions that, in the opinion of such firm, the Uniform Single Attestation Program for Mortgage Bankers requires it to report, in which case such exceptions shall be set forth in such statement.

Section 4.06 Right to Examine Servicer Records.

The Owner shall have the right to examine and audit any and all of the books, records, or other information of the Servicer, whether held by the Servicer or by another on its behalf, with respect to or concerning this Agreement or the Mortgage Loans, during normal business hours or as otherwise acceptable to the Servicer, upon reasonable advance notice; provided that the Owner shall not so audit more than once per quarter.

Section 4.07 Compliance with Gramm-Leach-Bliley Act of 1999.

With respect to each Mortgage Loan and the related Mortgagor, each party shall as required comply with Title V of the Gramm-Leach-Bliley Act of 1999 and all applicable regulations promulgated thereunder, and shall provide all notices required of the party thereunder.

Section 4.08 Losses and Expenses.

(a) Subject to Section 4.08(b) and (c) hereof (and except as may otherwise be expressly provided in this Agreement), Owner shall remain responsible, as between Owner and Servicer, for losses related to Owner's investment in the Servicing or, as applicable, the Mortgage Loans owned by Owner, as distinct from (and which shall not include) costs and expenses related to the performance of the Servicing duties delegated to Servicer hereunder, for which Servicer shall be responsible. Losses of the type referred to above for which Owner shall remain responsible include, but are not limited to: investor repurchase demands, Recourse Obligations, pool insurance premiums, special hazard insurance premiums, earthquake losses, losses resulting from the absence or inadequacy of hazard insurance or flood insurance for a Mortgaged Property in accordance with Accepted Servicing Practices, foreclosure losses, REO losses, VA No-Bid Instructions, VA partial guaranties, interest shortfalls due to timing of prepayments and liquidations required under the terms of the Fannie Mae Guides, which are in excess of the amounts specified in Section 2.3(c)(ii), Servicing Advances, Nonrecoverable Advances and Catastrophic Advances, including, without limitation, those that may be required in connection with the Soldiers and Sailors Relief Act.

(b) Owner shall reimburse Servicer for the following reimbursable expenses ("Reimbursable Expenses"): (i) any out-of-pocket expense Servicer incurs with the prior approval of Owner in connection with its servicing and administrative obligations set forth in this Agreement to the extent such expense is not ordinary to the servicing function (but not including salaries, rent and other general operating expenses of Owner normally classified as overhead); (ii) expenses that Owner has expressly agreed to pay or be liable for hereunder; and (iii) expenses incurred in connection with the performance by Servicer at the request of Owner of any activity that is not specifically required to be performed by Servicer under this Agreement and is not reasonably ancillary to any specific requirements of Owner under this Agreement. Except as otherwise expressly provided in this Agreement, each Party shall pay its own expenses incurred in connection with the preparation of and performance under this Agreement, including, without limitation, its own legal fees and expenses of preparing and delivering the notices, documents, reports, accountings and any other information required of it hereunder.

Out-of-pocket collection expenses incurred by Servicer to and billed by third parties on a monthly basis that will be reimbursed by Owner without approval of Owner include Reimbursable Expenses associated with the following: appraisals (pre- and post-foreclosure), title work, attorney fees (foreclosure, bankruptcy, and other), legal filing fees, inspection fees (interviews, drive-bys, clean out inspections after vacated, professional services such as property surveys, repair inspections, Environmental Protection Agency inspections, etc.), property maintenance (utilities, lawn care, snow removal, securing costs, repairs, winterization, removal of debris, clean-up after vacated), condominium expenses (condo fees, association fees, etc.), insurance (premiums and deductibles), taxes (property, estate, assessments), photographs, loss drafts, and travel (transportation, meals, lodging, rental cars).

(c) (i) Owner shall be solely responsible for all guaranty fees, credit enhancement fees, custodial fees (and related shipping costs), and trustee fees.

(ii) Except as otherwise expressly set forth in this Agreement, Servicer shall be solely responsible for the direct and indirect internal and administrative costs associated with its obligations as subservicer of the Mortgage Loans hereunder, said costs to include but not be limited to: personnel, facilities; supplies; mailing and electronic data processing) system expenses, regardless of whether Servicer elects to contract with third party vendors to perform all or any portion of such internal and administrative functions. Servicer shall pay interest due to Mortgagors on amounts held in tax and insurance escrow accounts in accordance with Applicable Requirements .

ARTICLE V.

SERVICER TO COOPERATE

Section 5.01 Provision of Information.

During the term of this Agreement, the Servicer shall furnish to the Owner all reports required hereunder, including those set forth on Exhibit 11 hereto, and such other periodic, special, or other reports or information, whether or not provided for herein, as shall be reasonably requested by the Owner or the purposes of this Agreement to the extent such reports

or information are readily accessible to the Servicer without undue expense. All such reports or information shall be provided by and in accordance with all reasonable instructions and directions which the Owner may give.

The Servicer shall execute and deliver all such instruments and take all such action as the Owner may reasonably request from time to time, in order to effectuate the purposes and to carry out the terms of this Agreement.

Section 5.02 Financial Statements; Servicing Facilities.

In connection with marketing the Mortgage Loans or a proposed Reconstitution, the Owner may make available to a prospective purchaser audited financial statements of the consolidated group that includes the Servicer for the most recently completed five fiscal years for which such statements are available, as well as a Consolidated Statement of Condition at the end of the last two fiscal years covered by any Consolidated Statement of Operations; provided that this requirement shall not apply for any year in which Servicer's financial statements are consolidated into those of a corporation subject to the periodic reporting requirements of the Securities Act of 1934. The Servicer also shall make available any comparable interim statements to the extent any such statements have been prepared by or on behalf of the corporate group that includes the Servicer (and are available upon request to members or stockholders of the corporate group that includes the Servicer or to the public at large). The Servicer shall furnish promptly to the Owner or a prospective purchaser copies of the statements specified above.

The Servicer shall make available to the Owner or any prospective Owner a knowledgeable financial or accounting officer for the purpose of answering questions respecting recent developments affecting the Servicer or the financial statements of the corporate group that includes the Servicer, and to permit any prospective purchaser to inspect the Servicer's servicing facilities for the purpose of satisfying such prospective purchaser that the Servicer has the ability to service the Mortgage Loans as provided in this Agreement.

ARTICLE VI.

TERMINATION

Section 6.01 Termination.

(a) This Agreement shall terminate upon either: (i) the later of the final payment or other liquidation (or any advance with respect thereto) of the last Mortgage Loan or the disposition of any REO Property with respect to the last Mortgage Loan and the remittance of all funds due hereunder; or (ii) mutual consent of the Servicer and the Owner in writing.

(b) The Owner may terminate, at its sole option, the Agreement with respect to some or all of the Mortgage Loans or REO Property, without cause. The Owner shall use its best efforts to provide written notice of such termination to the Servicer by registered mail at least 30 days prior to the effective date of termination; provided that in no event shall the Owner

provide such notice less than 20 days prior to the effective date of such termination. In the event the Owner terminates the Servicer without cause with respect to some or all of the Mortgage Loans, the Owner shall be required to pay to the Servicer the applicable Deboarding Fee, all related costs and expenses of transfer (including, but not limited to, costs and expenses associated with (i) preparing, delivering and/or recording assignments, or (ii) effecting beneficiary name changes on Mortgage Loans registered with MERS, each as applicable) and amounts due under Section 6.02(b).

(c) Servicer may terminate, at its sole option, the Agreement with respect to some or all of the Mortgage Loans or REO Property, without cause. Such termination shall not be become effective until the earlier of: (i) 90 days after the date on which notice of termination is provided by the Servicer in writing and delivered to the Owner by registered mail, or (ii) a successor shall have assumed the Servicer's responsibilities and obligations hereunder in the manner provided in Section 6.02. In the event the Servicer terminates the Agreement without cause with respect to some or all of the Mortgage Loans, the Owner shall not be required to pay to the Servicer the applicable Deboarding Fee and Servicer shall pay all its costs and expenses of transfer; provided, however, that the Servicer shall be entitled to reimbursement of amounts due under Section 6.02(b) hereof.

(d) Servicer may terminate this Agreement upon the determination that its duties hereunder are no longer permissible under applicable law and such incapacity cannot be cured by the Servicer. Any such determination permitting the resignation of the Servicer shall be evidenced by an Opinion of Counsel to such effect delivered to the Owner. No such resignation shall become effective until a successor shall have assumed the Servicer's responsibilities and obligations hereunder in the manner provided in Section 6.02.

Section 6.02 Transfer Procedures.

In the event the Servicer is replaced pursuant to the terms of this Agreement, the Servicer agrees to cooperate reasonably with the Owner and with any party designated as the successor servicer or subservicer in transferring the servicing to such successor servicer. In addition, the Servicer shall be responsible for notifying the related mortgagors of any transfer of servicing in accordance with the requirements of RESPA and the Cranston Gonzalez National Affordable Housing Act of 1990. On or before the date upon which servicing is transferred from the Servicer to any successor servicer (the "Transfer Date"), the Servicer shall prepare, execute and deliver to the successor servicer any and all documents and other instruments, place in such successor's possession all Mortgage Loan Documents in the possession of the Servicer which are necessary or appropriate to effect the purposes of such notice of termination, including but not limited to the transfer and endorsement or assignment of the related Mortgage Loans and related documents. The Servicer shall reasonably cooperate with the Owner and such successor in effecting the termination of the Servicer's responsibilities and rights hereunder.

On the related Transfer Date, the Servicer shall comply with all of the provisions of this Agreement to effect a complete transfer of the servicing with respect to the related Mortgage Loans. Except as otherwise provided in this Agreement, on the related Transfer Date for each related Mortgage Loan, this Agreement, except for Articles VI, VIII, IX and X and

Sections 13.01, 13.05, 13.11, 13.14 and 13.15 which shall survive the related Transfer Date, shall terminate with respect to such Mortgage Loan.

(a) Mortgage Loans in Foreclosure. The servicing with respect to Mortgage Loans in foreclosure on or before the related Transfer Date shall not be transferred from the Servicer to the Owner or the successor servicer, as the case may be, and such Mortgage Loans shall continue to be serviced by the Servicer pursuant to the terms of this Agreement. However, if the Owner so elects, the Owner may waive the provisions of this paragraph (a) and accept transfer of servicing of such Mortgage Loans and all amounts received by the Servicer thereunder.

(b) Servicing Advances. The Servicer shall be entitled to be reimbursed for all unreimbursed Servicing Advances and any other advances made by the Servicer pursuant to this Agreement with respect to any Mortgage Loan on the related Transfer Date, but only if the servicer after the related Transfer Date is not the Servicer or an Affiliate. In addition, the Owner shall cause the Servicer to be reimbursed for any accrued and unpaid Servicing Fees and for any trailing expenses representing Servicing Advances for which invoices are received by the Servicer after the Transfer Date; provided, that the Owner shall not be liable for any amounts pursuant to this paragraph unless the Servicer has requested reimbursement and delivered appropriate evidence of such reimbursable expense.

ARTICLE VII.

BOOKS AND RECORDS

Section 7.01 Possession of Servicing Files Prior to the related Transfer Date.

Prior to the related Transfer Date, the contents of each Servicing File are and shall be held in trust by the Servicer for the benefit of the Owner as the owner thereof. The Servicer shall maintain in the Servicing File a copy of the contents of each Mortgage File and the originals of the documents in each Mortgage File not delivered to the Owner. The possession of the Servicing File by the Servicer is at the will of the Owner for the sole purpose of servicing the related Mortgage Loan, pursuant to this Agreement, and such retention and possession by the Servicer is in its capacity as Servicer only and at the election of the Owner; provided that Servicer may keep copies of any records it deems necessary for compliance with any state or federal record retention requirements or as it deems advisable for use in defending any litigation, action or claim. The Servicer shall release its custody of the contents of any Servicing File only in accordance with written instructions from the Owner, unless such release is required as incidental to the Servicer's servicing of the Mortgage Loans pursuant to this Agreement.

The Servicer shall be responsible for maintaining, and shall maintain, a complete set of books and records for each Mortgage Loan which shall be marked clearly to reflect the ownership of each Mortgage Loan by the Owner. In particular, the Servicer shall maintain in its possession, available for inspection by the Owner or its designee, and shall deliver to the Owner or its designee upon demand, evidence of compliance with this Agreement, with all federal, state and local laws, rules and regulations, including but not limited to documentation as to the

method used in determining the applicability of the provisions of the National Flood Insurance Act of 1968, as amended, to the Mortgaged Property, documentation evidencing insurance coverage and eligibility of any condominium project for approval by Fannie Mae and periodic inspection reports as required by Section 2.13. To the extent that original documents (other than documents evidencing the Mortgage Loans) are not required for purposes of realization of Liquidation Proceeds or Insurance Proceeds, documents maintained by the Servicer may be in the form of microfilm or microfiche or such other reliable means of recreating original documents, including but not limited to, optical imagery techniques so long as the Servicer complies with the requirements of the Fannie Mae Guide.

The Servicer shall keep at its servicing office books and records in which, subject to such reasonable regulations as it may prescribe, the Servicer shall note transfers of Mortgage Loans. With respect to any assignment or transfer made by the Owner pursuant to Section 8.05 of this Agreement, upon receipt of notice of such assignment or transfer, the Servicer shall cause its books and records to reflect the ownership of the Mortgage Loans of such assignee, and shall release the previous Owner from its obligations hereunder with respect to the Mortgage Loans sold or transferred arising following the date of such sale or transfer. For the purposes of this Agreement, the Servicer shall be under no obligation to deal with any person with respect to this Agreement or the Mortgage Loans unless the books and records show such person as the owner of the Mortgage Loan.

ARTICLE VIII.

INDEMNIFICATION AND ASSIGNMENT

Section 8.01 Indemnification.

(a) The Servicer shall defend and indemnify the Owner, its employees, officers, Affiliates, agents and representatives against any and all assessments, judgments, claims (brought by any Person including, without limitation, any third parties, including any governmental authorities), liabilities, losses, costs, damages or expenses whatsoever (including, without limitation, interest penalties and reasonable attorneys' fees, expenses and disbursements in connection with any action, suit or proceeding and any such reasonable attorneys' fees, expenses and disbursements incurred in enforcing any right of indemnification against any indemnitor) (each a "Liability"), sustained by Owner or any of the Persons or entities referenced above resulting from or related to the failure of the Servicer to perform its duties under this Agreement or the Servicer's breach of the terms of this Agreement, including any of the Servicer's representations, warranties, or covenants contained in this Agreement.

(b) [Reserved.]

(c) The Owner shall defend and indemnify the Servicer, its employees, officers, affiliates, agents and representatives (the "Servicer Indemnified Parties"), against any and all Liability that the Servicer Indemnified Parties may sustain which are caused by or result from (directly or indirectly, in whole or in part):

(i) (A) the Servicer taking any action, or refraining from taking any action, with respect to any Mortgage Loan or REO Property at or in conformity with the express written direction of the Owner or this Agreement or (B) the Servicer taking and initiating any legal actions with respect to any Mortgage Loans and REO Properties or taking title to any REO Properties on behalf of the Owner, in the name of the Servicer or an Affiliate thereof (in each case, unless such action or omission is taken with a standard of care in contravention of any standard of care required under the Agreement and such contravention is the proximate cause of the claim or action);

(ii) any breach by the Owner of the terms of this Agreement, including any of the Owner's representations, warranties or covenants contained in this Agreement;

(iii) the refusal of the Owner or any trustee or custodian in possession of original Mortgage Loan Documents to provide to the Servicer the originals of any Mortgage Loan Documents within a reasonable amount of time after a request for such documents has been received in order to allow the Servicer sufficient time to process satisfactions, payoffs and releases;

(iv) any act or omission to act of any servicer, sub-servicer, owner or originator of a Mortgage Loan or Mortgaged Property (or any other Person) prior to the Servicing Transfer Date, including, without limitation, any data integrity issue (and any related costs of correcting such issues); provided, however, should the Servicer have actual knowledge of any data integrity error which is likely to materially affect any Mortgage Loan, the Servicer, in consultation with the Owner and at the Owner's expense, will take reasonable efforts to correct such error;

(v) perpetuating the acts or omissions of prior servicers, including, without limitation, any debt-collector related liability (including, without limitation, effects of abusive or deceptive collection costs, improperly initiated foreclosures and imposition of improper fees or interest charges) unless (A) the Servicer has actual knowledge that perpetuating such act or omission will result in Liability to the Servicer and in conscious disregard of such actual knowledge, nonetheless perpetuates such act or omission, (B) the Servicer knowingly performs an act or omission and such act or omission as a singular act, not in combination with any other act or omission of any prior servicer(s), results in Liability to the Servicer, or (C) the acts or omissions are based on a mistaken or false conception of the law that is obvious, gross and significant and the Servicer, over a period of time, in more than a single instance, continues in its course of servicing to perpetuate such acts or omissions;

(vi) a prior servicer's failure to comply with the Servicer's Transfer Instructions;

(vii) advances initially assumed by the Servicer that ultimately are not recoverable from the Mortgagor or other proceeds;

(viii) a Mortgage Loan being classified as "high cost" under the Home Ownership and Equity Protection Act of 1994; or "high cost", or "predatory" under any other applicable state, federal or local law.

(ix) any Environmental Liability.

The term "Environmental Liability" shall mean any and all claims, losses, damages, liabilities, judgments, penalties, fines, forfeitures, reasonable legal fees and expenses, and any and all related costs and/or expenses of litigation, administrative and/or regulatory agency proceedings, and any other costs, fees and expenses, suffered or incurred by the Servicer or Owner arising out of or resulting from the introduction of environmentally hazardous materials on any Mortgaged Property before and/or after the date of the Servicer's knowledge thereof, including, without limitation, (a) any liability under or on account of the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C, Section 9601 et seq., as the same may be amended from time to time, and/or any other federal or state environmental laws, and specifically including, without limitation, any liability relating to asbestos and asbestos containing materials, polychlorinated biphenyls, radon gas, petroleum and petroleum products, urea formaldehyde and any substances classified as being "in inventory", "usable work in process" or similar classification which would, if classified as unusable, be included in the foregoing definition, including the assertion of any lien thereunder, (b) claims brought by third parties for loss or damage incurred or sustained subsequent to the date hereof, and (c) liability with respect to any other matter affecting the Mortgaged Property within the jurisdiction of the federal Environmental Protection Agency or state environmental regulatory agencies pursuant to any state laws, and in the regulations adopted pursuant to any of said laws; provided, however, that the indemnity for Environmental Liability shall not be effective with respect to any liability caused by the Servicer that would otherwise be imposed by reason of the Servicer's willful misfeasance or bad faith in the performance of or failure to perform its duties hereunder.

The Owner shall not be required to indemnify, or otherwise be liable to, the Servicer or those referenced above, however, for any Liability which the Servicer is required to indemnify for pursuant to Section 8.01(a) above.

Section 8.02 Limitation on Liability of Servicer and Others.

(a) Notwithstanding Section 8.01, neither the Servicer nor any of the directors, officers, employees or agents of the Servicer shall be under any liability to the Owner for any action taken or for refraining from the taking of any action in good faith pursuant to this Agreement, or for errors in judgment, provided, however, that this provision shall not protect the Servicer or any such Person against any breach of warranties or representations made herein, its own negligent actions, or failure to perform its obligations in compliance with any standard of care set forth in this Agreement, or any liability which would otherwise be imposed by reason of any breach of the terms and conditions of this Agreement. The Servicer and any director, officer, employee or agent of the Servicer may rely in good faith on any document of any kind prima facie properly executed and submitted by any Person respecting any matters arising hereunder. The Servicer shall not be under any obligation to appear in, prosecute or defend any legal action which is not incidental to its duties to service the Mortgage Loans in accordance with this Agreement and which in its opinion may involve it in any expense or liability, provided, however, that the Servicer may undertake any such action which it may deem necessary or desirable in respect to this Agreement and the rights and duties of the parties hereto. In such event, the Servicer shall be entitled to reimbursement from the Owner of the reasonable legal expenses and costs of such action.

(b) Notwithstanding Section 8.01, the Servicer shall not be required to indemnify, or otherwise be liable to, the Owner or those referenced above for any Liability which the Owner is required to indemnify for pursuant to Section 8.01(c) above.

Section 8.03 Limitation on Assignment and Resignation by Servicer.

The Owner has entered into this Agreement with the Servicer and subsequent purchasers will purchase the Mortgage Loans in reliance upon the independent status of the Servicer, and the representations as to the adequacy of its servicing facilities, plant, personnel, records and procedures, its integrity, reputation and financial standing, and the continuance thereof. Therefore, the Servicer shall not (a) assign this Agreement or the servicing hereunder or delegate its rights hereunder or any portion hereof without the prior written consent of the Owner, which consent shall not be unreasonably withheld; provided that the Servicer may assign this Agreement to an Affiliate controlled by General Motors Corporation and capable of performing all of the Servicer's obligations hereunder without the consent of the Owner; or (b) sell or otherwise dispose of all or substantially all of its property or assets without providing at least 90 days written notice to the Owner.

Notwithstanding the foregoing, the Servicer may, without the consent of the Owner, retain third party contractors to perform certain servicing and loan administration functions, including without limitation, hazard insurance administration, tax payment and administration, flood certification and administration, collection services and similar functions; provided, that the retention of such contractors by Servicer shall not limit the obligation of the Servicer to service the Mortgage Loans pursuant to the terms and conditions of this Agreement.

Without in any way limiting the generality of this Section 8.03, in the event that the Servicer either shall assign this Agreement or the servicing responsibilities hereunder or delegate its duties hereunder or any portion thereof without the prior written consent of the Owner (other than to an Affiliate as permitted by Section 8.03(a)) or sell or otherwise dispose of all or substantially all of its property or assets without providing 90 days written notice to the Owner, then the Owner shall have the right to terminate this Agreement upon notice given as set forth in Section 6.01 hereof, without any payment of any penalty or damages and without any liability whatsoever to the Servicer or any third party.

Notwithstanding any provision in this Agreement to the contrary, the Servicer may at any time upon notice to the Owner, or trustee in the case of a Reconstitution, and without the consent of any party, solely in connection with a financing or other facility (any such arrangement, an "Advance Facility"), assign as collateral security or pledge to another Person all its rights, title and interest under this Agreement to the Servicing Rights and its rights to reimbursement of Servicing Advances.

Except as provided for in Section 6.01 of this Agreement, the Servicer shall not resign from the obligations and duties hereby imposed on it.

Section 8.04 Operation of Indemnities.

If any Person has made any indemnity payments to any other Person pursuant to this Article VIII and such other Person thereafter collects any of such amounts from others, such

other Person will repay such amounts collected, together with any interest collected thereon. The provisions of this Article VIII shall survive any termination of this Agreement, the liquidation of any Mortgage Loan, or the transfer or assignment by the Owner to another Person of any Mortgage Loan or REO Property or any interest in any Mortgage Loan or REO Property.

Section 8.05 Assignment by Owner.

No transfer of a Mortgage Loan may be made unless such transfer is in compliance with the terms hereof. The Owner shall have the right to assign its interest under this Agreement with respect to some or all of the Mortgage Loans, and designate any Person to exercise any rights of the Owner hereunder; provided that (a) Owner and such Person execute a mutually agreeable Assignment and Assumption Agreement substantially in the form of Exhibit 12 and such agreement is delivered to the Servicer; (b) such Person has a tangible net worth of $20 million or such Person is otherwise acceptable to the Servicer, in its sole and absolute discretion, (c) there shall not be more than three owners of the Mortgage Loans exclusive of the Mortgage Loans included in a Pass-Through Transfer, and (d) the Owner provides the Servicer with written notice of the transfer 30 days prior to the effective date of such transfer.

Upon such assignment of rights and assumption of obligations, the assignee or designee shall accede to the rights and obligations hereunder of the Owner with respect to such Mortgage Loans and the Owner as assignor shall be released from all obligations hereunder with respect to such Mortgage Loans from and after the date of such assignment and assumption (except that Articles VI, VIII, IX and X and Sections 13.01, 13.05, 13.11, 13.14 and 13.15 shall survive such transfer). All references to the Owner in this Agreement shall be deemed to include its permitted assignee or designee.

Section 8.06 Merger or Consolidation of the Servicer.

Any Person into which the Servicer may be merged or consolidated, or any corporation resulting from any merger, conversion or consolidation to which the Servicer shall be a party, or any Person succeeding to the business of the Servicer, shall be the successor of the Servicer hereunder, without the execution or filing of any paper or any further act on the part of any of the parties hereto, anything herein to the contrary notwithstanding; provided, however, that the successor or surviving Person shall be an institution whose deposits are insured by FDIC or a company whose business includes the servicing of mortgage loans and shall have a tangible net worth not less than $25,000,000.

ARTICLE IX.

REPRESENTATIONS, WARRANTIES AND COVENANTS OF OWNER

As of the date of this Agreement, the Owner warrants and represents to, and covenants and agrees with, the Servicer as follows:

Section 9.01 Organization and Good Standing; Licensing.

The Owner is a Delaware limited liability corporation duly organized and validly existing and has the power and authority to own its assets and to transact the business in which it is currently engaged.

Section 9.02 Authorization; Binding Obligations.

The Owner has the power and authority to make, execute, deliver and perform this Agreement, and perform all of the transactions contemplated to be performed by it under this Agreement, and has taken all necessary action to authorize the execution, delivery and performance of this Agreement. When executed and delivered, this Agreement will constitute the legal, valid and binding obligation of the Owner enforceable in accordance with its terms, except as enforcement may be limited by bankruptcy, insolvency or similar laws affecting the enforcement of creditors' rights generally and by the availability of equitable remedies.

Section 9.03 No Consent Required.

The Owner is not required to obtain the consent of any other party or any consent, license, approval or authorization from, or registration or declaration with, any governmental authority, bureau or agency in connection with the execution, delivery, performance, validity or enforceability of this Agreement, except such as have been obtained or made or as to which the failure to obtain or make will not materially adversely affect the ability of the Owner to perform all obligations hereunder.

Section 9.04 No Violations.

The execution, delivery and performance of this Agreement by the Owner will not violate any provision of any existing law or regulation or any order or decree of any court applicable to the Owner, except for violations that will not adversely affect the Owner's ability to perform its obligations under this Agreement or the certificate of incorporation of the Owner, or constitute a material breach of any mortgage, indenture, contract or other agreement to which the Owner is a party or by which the Owner may be bound.

Section 9.05 Litigation.

No litigation or administrative proceeding of or before any court, tribunal or governmental body is currently pending or to the knowledge of the Owner threatened, against the Owner or with respect to this Agreement, which if adversely determined would have a material adverse effect on the transactions contemplated by this Agreement.

Section 9.06 Ownership.

With respect to each Mortgage Loan, Owner is the owner of all right, title, and interest in and to the Mortgage Loan (and the servicing rights appurtenant thereto). Each Mortgage Loan is a valid and collectible obligation of the respective Mortgagor; and no Mortgage Loan is subject to the Home Ownership and Equity Protection Act of 1994.

Section 9.07 Service Contracts.

The Owner shall reimburse the Servicer for any costs or expenses incurred to transfer tax service contracts and flood service contracts or to obtain contracts that are not existing or transferable to the Servicer.

Section 9.08 Accuracy.

To the Owner's knowledge, the information provided in the Mortgage Loan Schedule is, in the aggregate, true and correct in all material respects as of the Servicing Transfer Date.

ARTICLE X.

REPRESENTATIONS AND WARRANTIES OF SERVICER

As of the date of this Agreement, the Servicer warrants and represents to, and covenants and agrees with, the Owner as follows:

Section 10.01 Due Organization and Authority.

The Servicer is a corporation duly organized, validly existing and in good standing under the laws of the state of its incorporation as now being conducted and is licensed, qualified and in good standing in each state where a Mortgaged Property is located if the laws of such state require licensing or qualification in order to conduct business of the type conducted by the Servicer, and in any event the Servicer is in compliance with the laws of any such state to the extent necessary to ensure the enforceability of the related Mortgage Loan in accordance with the terms of this Agreement. The Servicer has the power and authority to make, execute, deliver and perform this Agreement, and perform all of the transactions contemplated to be performed by it under this Agreement, and has taken all necessary action to authorize the execution, delivery and performance of this Agreement. When executed and delivered, this Agreement will constitute the legal, valid and binding obligation of the Servicer enforceable in accordance with its terms, except as enforcement may be limited by bankruptcy, insolvency or similar laws affecting the enforcement of creditors' rights generally and by the availability of equitable remedies.

Section 10.02 Ordinary Course of Business.

The consummation of the transactions contemplated by this Agreement are in the ordinary course of business of the Servicer.

Section 10.03 No Violation.

The execution, delivery and performance of this Agreement by the Servicer will not violate any provision of any existing law or regulation or any order or decree of any court applicable to the Servicer, except for violations that will not adversely affect the Servicer's ability to perform its obligations under this Agreement or the certificate of incorporation of the Servicer, or constitute a material breach of any mortgage, indenture, contract or other agreement

to which the Servicer is a party or by which the Servicer may be bound.

Section 10.04 Ability to Service.

The Servicer has the facilities, procedures, and experienced personnel necessary for the sound servicing of mortgage loans of the same type as the Mortgage Loans. The Servicer is in good standing to enforce and service mortgage loans in the jurisdiction wherein the Mortgaged Properties are located.

Section 10.05 Ability to Perform.

The Servicer does not believe, nor does it have any reason or cause to believe, that it cannot perform each and every covenant contained in this Agreement.

Section 10.06 Litigation.

No litigation or administrative proceeding of or before any court, tribunal or governmental body is currently pending or to the knowledge of the Servicer threatened, against the Servicer or with respect to this Agreement, which if adversely determined would have a material adverse effect on the transactions contemplated by this Agreement.

Section 10.07 No Consent Required.

The Servicer is not required to obtain the consent of any other party or any consent, license, approval or authorization from, or registration or declaration with, any governmental authority, bureau or agency in connection with the execution, delivery, performance, validity or enforceability of this Agreement, except such as have been obtained or made or as to which the failure to obtain or make will not materially adversely affect the ability of the Servicer to perform all obligations hereunder.

ARTICLE XI.

DEFAULT

Section 11.01 Events of Default.

The following shall constitute an Event of Default under this Agreement on the part of the Servicer:

(a) any failure by the Servicer to remit to the Owner any payment required to be made under the terms of this Agreement which continues unremedied for a period of two Business Days after the date upon which notice of such failure is given to the Servicer, requiring the same to be remedied, shall have been given to the Servicer by the Owner; or

(b) the failure by the Servicer duly to observe or perform in any material respect any other of the covenants or agreements on the part of the Servicer set forth in this Agreement or in the Custodial Agreement which continues unremedied for a period of 30 days after the date on which notice of such failure, requiring the same to be remedied, shall have been

given to the Servicer by the Owner (the date of delivery of such notice, the "Notice Date"); *provided, however*, that in the case of a failure that cannot be cured within thirty (30) days after the Notice Date, the cure period may be extended if the Servicer can demonstrate to the reasonable satisfaction of the Owner that the failure can be cured and the Servicer is diligently pursuing remedial action; or

(c) a decree or order of a court or agency or supervisory authority having jurisdiction for the appointment of a conservator or receiver or liquidator in any insolvency, bankruptcy, readjustment of debt, marshaling of assets and liabilities or similar proceedings, or for the winding-up or liquidation of its affairs, shall have been entered against the Servicer and such decree or order shall have remained in force undischarged or unstayed for a period of 60 days; or

(d) the Servicer shall consent to the appointment of a conservator or receiver or liquidator in any insolvency, bankruptcy, readjustment of debt, marshaling of assets and liabilities or similar proceedings of or relating to the Servicer or of or relating to all or substantially all of its property; or

(e) the Servicer shall admit in writing its inability to pay its debts generally as they become due, file a petition to take advantage of any applicable insolvency or reorganization statute, make an assignment for the benefit of its creditors, or voluntarily suspend payment of its obligations; or

(f) the Servicer fails to maintain its license to do business or service residential mortgage loans in any jurisdiction where the Mortgaged Properties are located which failure continues unremedied for a period of 45 days after receiving actual notice of such failure and such failure has a material and adverse effect on the Servicer's ability to perform its obligations under the Agreement; or

(g) the Servicer attempts to assign its right to servicing compensation hereunder or the Servicer attempts, without the consent of the Owner, to assign this Agreement or the servicing responsibilities hereunder or to delegate its duties hereunder or any portion thereof in a manner not permitted under this Agreement.

In each and every such case, so long as an Event of Default shall not have been remedied, in addition to whatsoever rights the Owner may have at law or equity to damages, including injunctive relief and specific performance, the Owner, by notice in writing to the Servicer, may terminate without compensation all the rights and obligations of the Servicer under this Agreement and in and to the Mortgage Loans and the proceeds thereof.

Upon receipt by the Servicer of such written notice, all authority and power of the Servicer under this Agreement, whether with respect to the Mortgage Loans or otherwise, shall pass to and be vested in the successor appointed pursuant to Section 6.02. Upon written request from the Owner, the Servicer shall prepare, execute and deliver any and all documents and other instruments, place in such successor's possession all Mortgage Files, and do or accomplish all other acts or things reasonably necessary or appropriate to effect the purposes of such notice of termination, whether to complete the transfer and endorsement or assignment of the Mortgage

Loans and related documents, or otherwise, at the Servicer's sole expense. The Servicer agrees to cooperate reasonably with the Owner and such successor in effecting the termination of the Servicer's responsibilities and rights hereunder, including, without limitation, the transfer to such successor for administration by it of all cash amounts which shall at the time be credited by the Servicer to the Custodial Account or Escrow Account or thereafter received with respect to the Mortgage Loans.

Section 11.02 Waiver of Defaults.

The Owner may waive any default by the Servicer in the performance of its obligations hereunder and its consequences. Upon any such waiver of a past default, such default shall cease to exist, and any Event of Default arising therefrom shall be deemed to have been remedied for every purpose of this Agreement. No such waiver shall extend to any subsequent or other default or impair any right consequent thereon except to the extent expressly so waived.

ARTICLE XII.

CLOSING

Section 12.01 Closing Documents.

The Closing Documents for the Mortgage Loans to be serviced hereunder shall consist of fully executed originals of the following documents:

1. this Agreement (to be executed and delivered only as of the date of this Agreement);

2. with respect to the date hereof a custodial account letter agreement or a custodial account certification, as applicable, as required hereunder, in the form of either Exhibit 2 or 3 hereto;

3. with respect to the date hereof an escrow account letter agreement or an escrow account certification, as applicable, as required hereunder, in the form of either Exhibit 4 or 5 hereto;

4. with respect to the date hereof an officer's certificate, in the form of Exhibit 7 hereto, with respect to the Servicer, including all attachments thereto; with respect to subsequent dates, an officer's certificate upon request of the Owner;

5. with respect to the date hereof, an opinion of counsel to the Servicer (who may be an employee of the Servicer), in the form of Exhibit 6 hereto ("Opinion of Counsel to the Servicer"); and

6. with respect to the date hereof, a corporate resolution in the form of Exhibit 13 hereto.

ARTICLE XIII.

MISCELLANEOUS PROVISIONS

Section 13.01 Notices.

All notices, requests, demands and other communications which are required or permitted to be given under this Agreement shall be in writing and shall be deemed to have been duly given upon the delivery or mailing thereof, as the case may be, sent by registered or certified mail, return receipt requested:

(a) If to Owner to:

American Residential Equities, LLC
848 Brickell Ave.
Miami, FL 33131
Attention: Russell Johnson
Telecopier No: (305) 374 6941

(b) If to Servicer:

GMAC Mortgage Corporation
100 Witmer Road
Horsham, PA 19044
Attention: Executive Vice President of National Loan Administration
Telecopier No: (215) 682 1300

With a Copy to:

GMAC Mortgage Corporation
3451 Hammond Ave.
Waterloo, IA 50702-5345
Attention: General Manager
Telecopier No: (319) 236-5175

With a Copy to:

GMAC Mortgage Corporation
100 Witmer Road
Horsham, PA 19044
Attention: General Counsel
Telecopier No: (215) 682-1467

Section 13.02 Waivers.

The Servicer or the Owner may, by written notice to the others:

(a) Waive compliance with any of the terms, conditions or covenants required to be complied with by the others hereunder; and

(b) Waive or modify performance of any of the obligations of the others hereunder.

The waiver by any party hereto of a breach of any provision of this Agreement shall not operate or be construed as a waiver of any other subsequent breach.

Section 13.03 Entire Agreement; Amendment.

This Agreement, including all documents and exhibits incorporated by reference herein, constitutes the entire agreement between the parties with respect to servicing of the Mortgage Loans. This Agreement may be amended and any provision hereof waived, but, only in writing signed by the party against whom such enforcement is sought.

Section 13.04 Execution; Binding Effect.

This Agreement may be executed in one or more counterparts and by the different parties hereto on separate counterparts, each of which, when so executed, shall be deemed to be an original; such counterparts, together, shall constitute one and the same agreement. Subject to Sections 8.03 and 8.04, this Agreement shall inure to the benefit of and be binding upon the Servicer and the Owner and their respective permitted successors and assigns.

Section 13.05 Confidentiality of Information.

The Servicer and the Owner each agree that any information and documents that are furnished for the purposes of performing under this Agreement or that are produced or are otherwise furnished to or come to the attention of either party are proprietary and shall be used only for the purposes of this Agreement. This information includes the terms of this Agreement, technical specifications and operating manuals, services and information concerning current, future, or proposed products and services and combinations of products and services; product and services descriptions; financial information; information related to mergers or acquisitions; passwords and security procedures; computer programs, loan servicing systems, software, and software documentation; customer and/or prospective client lists , mortgage loan files, and all other information relating in any way to the customer and/or prospective client; printouts; records; policies, practices and procedures; and any or all other information, data or materials relating to the business, trade secrets and technology of either party, its customers, clients, employees, business affairs, affiliates, subsidiaries and the affiliates of its parent organization (all of the foregoing collectively referred to as "Confidential Information").

Each party shall maintain the Confidential Information of the other in confidence using the same care and discretion to avoid disclosure of Confidential Information as it uses to protect its own confidential information that it does not want disclosed, but in no event less than a reasonable standard of care. The Owner specifically agrees that it will not use non-public personal information about the Servicer's customers in any manner prohibited by the Gramm-Leach-Bliley Act. Each party further agrees to (a) restrict disclosure of Confidential Information of the disclosing party solely to persons who need to know the Confidential Information to perform under this Agreement, (b) not to disclose any Confidential Information to any third party or copy Confidential Information without written approval of the disclosing party, and (c) inform

those third parties and other persons who receive Confidential Information of its confidential nature and obtain their agreement to abide by the obligations set forth herein.

The obligations imposed under this Agreement shall not apply to Confidential Information that is (a) made public by the party whose Confidential Information is disclosed, (b) generally available to the public other than by a breach of this Agreement by the receiving party, its employees or agents, or (c) rightfully received from a third person having the legal right to disclose the Confidential Information free of any obligation of confidence, nor shall the section be deemed to prohibit any disclosure by a party that is necessary or appropriate in such party's work with legal counsel, accountants, auditor or as required by applicable law or regulation. In the event that the receiving party, or any of such party's agents or employees, becomes legally compelled (by deposition, interrogatory, request for documents, subpoena, civil or criminal investigative demand or similar process) to disclose any Confidential Information of the disclosing party, such receiving party shall provide prompt prior notice to the disclosing party so that it may seek a protective order or other appropriate remedy. In the event that such protective order or other remedy is not obtained, or that the disclosing party waives compliance with the provisions of this section the receiving party will furnish only that portion of the Confidential Information which in the judgment of its counsel is legally required and will exercise reasonable efforts to obtain assurances that confidential treatment will be accorded the Confidential Information.

Each party acknowledges and agrees that any breach or threatened breach of any of the provisions of this section by the other party will result in immediate and irreparable harm and that any remedies at law in such event will be inadequate. The parties agree that such breaches, whether threatened or actual, will give the disclosing party the right to obtain injunctive relief to restrain such disclosure or use. This right shall, however, be in addition to and not in lieu of any other remedies at law or in equity.

Upon termination of the Agreement, all copies of the Confidential Information will either be destroyed or returned to the disclosing party immediately upon such party's request. Each party agrees that it will not retain any copy, summary or extract of the Confidential Information or any related work papers on any storage medium whatsoever. Notwithstanding anything to the contrary contained herein, Servicer shall in no event have any obligation hereunder to destroy Mortgage Loan files or any documents related thereto.

Section 13.06 Headings.

Headings of the Articles and Sections in this Agreement are for reference purposes only and shall not be deemed to have any substantive effect.

Section 13.07 Applicable Law.

THIS AGREEMENT SHALL BE CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE COMMONWEALTH OF PENNSYLVANIA AND THE OBLIGATIONS, RIGHTS AND REMEDIES HEREUNDER SHALL BE DETERMINED IN ACCORDANCE WITH THE SUBSTANTIVE LAWS OF THE COMMONWEALTH

OF PENNSYLVANIA (WITHOUT REGARD TO CONFLICTS OF LAWS PRINCIPLES), EXCEPT TO THE EXTENT PREEMPTED BY FEDERAL LAW.

Section 13.08 Relationship of Parties.

Nothing herein contained shall be deemed or construed to create a partnership or joint venture between the parties. The duties and responsibilities of the Servicer shall be rendered by it as an independent contractor and not as an agent of the Owner. The Servicer shall have full control of all of its acts, doings, proceedings, relating to or requisite in connection with the discharge of its duties and responsibilities under this Agreement.

Section 13.09 Severability of Provisions.

If any one or more of the covenants, agreements, provisions or terms of this Agreement shall be held invalid for any reason whatsoever, then such covenants, agreements, provisions or terms shall be deemed severable from the remaining covenants, agreements, provisions or terms of this Agreement and shall in no way affect the validity or enforceability of the other provisions of this Agreement.

Section 13.10 Recordation of Assignments of Mortgage.

To the extent permitted by applicable law, each of the Assignments of Mortgage is subject to recordation in all appropriate public offices for real property records in all the counties or other comparable jurisdictions in which any or all of the Mortgaged Properties are situated, and in any other appropriate public recording office or elsewhere, such recordation to be effected by the Owner or the Owner's designee.

Section 13.11 Exhibits.

The exhibits to this Agreement are hereby incorporated and made a part hereof and are integral parts of this Agreement.

Section 13.12 Counterparts.

This Agreement may be executed simultaneously in any number of counterparts. Each counterpart shall be deemed to be an original, and all such counterparts shall constitute one and the same instrument.

Section 13.13 No Solicitation.

From and after the date hereof, neither the Servicer nor any Affiliate of the Servicer shall solicit the Mortgagors for purposes of prepayment or refinance or modification of the Mortgage Loans, except as otherwise provided herein. Nothing in this Section 13.11 shall prohibit the Servicer from generalized advertising, including on its website, monthly account statements which are not targeted exclusively at the Mortgagors, or VRU (i.e. voice response unit) recorded communications or otherwise engaging in a program directed to the general public at large to encourage or recommend mortgage loan products and other products and services provided by the Servicer or such Affiliate or from taking applications for refinance from

Mortgagors as a result therefrom. Servicer may solicit the Mortgagors for non-mortgage loan products with the consent of the Owner, which consent shall not be unreasonably withheld.

Section 13.14 Cooperation of Servicer with a Reconstitution.

The Servicer and the Owner agree that with respect to some or all of the Mortgage Loans, the Owner may effect either:

(1) one or more Whole Loan Transfers;

(2) one or more Pass-Through Transfers.

The Servicer and the Owner acknowledge and agree that the Servicer is not obligated hereunder to act as servicer in any Reconstitution and the Owner is not obligated hereunder to offer the Servicer the opportunity to act as servicer in any Reconstitution.

The Servicer shall reasonably cooperate with the Owner in connection with any Whole Loan Transfer or Pass-Through Transfer contemplated by the Owner pursuant to this Section 13.13, provided, however, that under no circumstances and in no event shall such cooperation include any act of the Servicer or any event affecting the Servicer which would materially increase the Servicer's liabilities or obligations beyond those liabilities and obligations contained in this Agreement (except as otherwise set forth in this Section 13.12).

In connection with any Reconstitution in which the Owner and the Servicer have agreed that the Servicer shall act as the servicer in the Reconstitution, the Owner shall deliver any agreement (the "Reconstitution Agreement") or other document related to the Whole Loan Transfer or Pass Through Transfer to the Servicer at least 20 Business Days prior to such transfer; the Servicer's refusal to cooperate with Owner based on late delivery of such documents shall result in no liability to the Servicer. Such Reconstitution Agreement may, in the Owner's discretion, contain contractual provisions not set forth in this Agreement, including, but not limited to, (i) customary certificate payment delays, (ii) servicer advance requirements for the advancing of delinquent scheduled payments of principal and interest through liquidation (unless deemed non-recoverable), (iii) servicer obligations to pay compensating interest for prepayment interest shortfalls (to the extent of the monthly servicing fee payable to the servicer), (iv) representations and warranties (dated as of the Reconstitution Date) of the Servicer conforming in all material respects to the representations and warranties in this Agreement, and (v) such provisions with regard to servicing responsibilities, investor reporting, segregation and deposit of principal and interest payments, custody of the Mortgage Loans, and other provisions that conform to secondary market standards for mortgage-backed securities backed by mortgage loans similar to the Mortgage Loans or as may be required by one or more Rating Agencies. The Servicer shall promptly review such Reconstitution Agreement and/or related documents, and provided that such Reconstitution Agreement contains servicing provisions substantially similar to those herein or otherwise acceptable to the Servicer in its sole discretion, shall execute such Reconstitution Agreement and/or related documents. The Servicer's refusal to execute any Reconstitution Agreement or related documents may be based on any provision which materially (a) increases the liability of the Servicer and/or (b) affects Servicer's profitability from that contemplated in this Agreement. The Owner hereby agrees to pay the Servicer for reasonable

expenses incurred by the Servicer that relate to reviewing and commenting on the Reconstitution Agreement for such Whole Loan Transfer or Pass-Through Transfer in the amount of (i) $2,500 if Servicer uses internal counsel or (ii) $10,000 if Servicer uses external counsel. Any cooperation from the Servicer in connection with any Whole Loan Transfer or Pass-Through Transfer contemplated by this Section shall include delivery of a legal opinion relating to the Servicer substantially similar to that attached hereto as Exhibit 14, the furnishing of information for use in an offering document for such Pass-Through Transfer, conforming to market standards for Pass-Through Transfers of this type, relating to the Servicer and its servicing practices and portfolio (the "Servicer Information") substantially similar to that attached hereto as Exhibit 14. The Servicer shall indemnify the Owner, each Affiliate of the Owner participating in any such Reconstitution and each Person who controls the Owner or such Affiliate, and their respective officers and directors, and hold each of them harmless from and against any losses, damages, penalties, fines, forfeitures, reasonable and necessary legal fees and related costs, judgments, and any other costs, fees and expenses that each of them may sustain in any way related to the Servicer Information. The Owner shall indemnify the Servicer and each Person who controls the Servicer or such Affiliate and hold each of them harmless from and against any losses, damages, penalties, fines, forfeitures, reasonable and necessary legal fees and related costs, judgments, and any other costs, fees and expenses that each of them may sustain in any way related to any information provided by the Owner in any offering document prepared in connection with any Reconstitution.

If requested by the Owner in connection with any Reconstitution, the Servicer and the Owner shall execute a letter agreement setting forth the indemnification obligations set forth in this Section 13.12. In the event that the Servicer is not the master servicer, servicer or sub-servicer with respect to a Reconstitution, any and all reasonable costs, fees and expenses incurred by Servicer in connection with the foregoing shall be reimbursed by Owner after receipt of an invoice therefor in accordance with Section 6.4. Any execution of a subservicing agreement or pooling and servicing agreement by the Servicer shall be conditioned on the Servicer receiving the Securitization Servicing Fee or such other servicing fee acceptable to Servicer. Notwithstanding any provision to the contrary in this Agreement, in the event that the Servicer is the master servicer, servicer or sub-servicer with respect to a Reconstitution, the Owner agrees that in such Reconstitution any servicing performance termination triggers shall be approved by the Servicer in its reasonable discretion; provided, that in the event that the Servicer does not approve any servicing performance termination triggers, the Owner shall, with respect to the Reconstitution, have the right to terminate the Servicer hereunder (a "Servicing Performance Trigger Termination") and designate a successor servicer to act as master servicer, servicer or sub-servicer. In the event of a Servicing Performance Trigger Termination, (a) if the successor servicer charges a boarding fee or other similar fee to assume the servicing of the Mortgage Loans, the Servicer shall entitled to an amount equal to one-half of the applicable Deboarding Fee with respect to such Mortgage Loans, and (b) if the successor servicer does not charge a boarding fee or other similar fee, the Servicer shall be entitled to the applicable Deboarding Fee.

All Mortgage Loans not sold or transferred pursuant to a Whole Loan Transfer or Pass-Through Transfer shall be subject to this Agreement and shall continue to be serviced in accordance with the terms of this Agreement and with respect thereto this Agreement shall remain in full force and effect.

Section 13.15 Force Majeure.

A Party will not be responsible for delays or failures in performance of its obligations under this Agreement resulting from acts of God, strikes, riots, acts of war, terrorism, earthquakes or other similar events. A Party excused from performance pursuant to this Section shall exercise reasonable efforts to continue to perform its obligations hereunder and shall thereafter continue with reasonable due diligence and good faith to remedy its inability to so perform, except that nothing herein shall obligate either Party to settle a strike or labor dispute when it does not wish to do so

Section 13.16 Waiver of Trial by Jury.

THE SERVICER AND THE OWNER EACH KNOWINGLY, VOLUNTARILY AND INTENTIONALLY WAIVES TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW ANY RIGHT IT MAY HAVE TO A TRIAL BY JURY OF ANY DISPUTE ARISING UNDER OR RELATING TO THIS AGREEMENT OR THE TRANSACTIONS CONTEMPLATED HEREBY.

Section 13.17 LIMITATION OF DAMAGES.

NOTWITHSTANDING ANYTHING CONTAINED HEREIN TO THE CONTRARY, THE PARTIES AGREE THAT NEITHER PARTY SHALL BE LIABLE TO THE OTHER FOR ANY SPECIAL, CONSEQUENTIAL OR PUNITIVE DAMAGES WHATSOEVER, WHETHER IN CONTRACT, TORT (INCLUDING NEGLIGENCE AND STRICT LIABILITY), OR ANY OTHER LEGAL OR EQUITABLE PRINCIPLE, PROVIDED, HOWEVER, THAT SUCH LIMITATION SHALL NOT BE APPLICABLE WITH RESPECT TO THIRD PARTY CLAIMS MADE AGAINST A PARTY.

Section 13.18 SUBMISSION TO JURISDICTION; WAIVERS.

The Servicer hereby irrevocably and unconditionally:

(a) SUBMITS FOR ITSELF IN ANY LEGAL ACTION OR PROCEEDING RELATING TO THIS AGREEMENT, OR FOR RECOGNITION AND ENFORCEMENT OF ANY JUDGMENT IN RESPECT THEREOF, TO THE NON-EXCLUSIVE GENERAL JURISDICTION OF THE COURTS OF THE COMMONWEALTH OF PENNSYLVANIA, THE FEDERAL COURTS OF THE UNITED STATES OF AMERICA FOR THE EASTERN DISTRICT OF PENNSYLVANIA, AND APPELLATE COURTS FROM ANY THEREOF;

(b) CONSENTS THAT ANY SUCH ACTION OR PROCEEDING MAY BE BROUGHT IN SUCH COURTS AND, TO THE EXTENT PERMITTED BY LAW, WAIVES ANY OBJECTION THAT IT MAY NOW OR HEREAFTER HAVE TO THE VENUE OF ANY SUCH ACTION OR PROCEEDING IN ANY SUCH COURT OR THAT SUCH ACTION OR PROCEEDING WAS BROUGHT IN AN INCONVENIENT COURT AND AGREES NOT TO PLEAD OR CLAIM THE SAME;

(c) AGREES THAT NOTHING HEREIN SHALL AFFECT THE RIGHT TO EFFECT SERVICE OF PROCESS IN ANY OTHER MANNER PERMITTED BY LAW OR SHALL LIMIT THE RIGHT TO SUE IN ANY OTHER JURISDICTION.

[SIGNATURES APPEAR ON NEXT PAGE]

IN WITNESS WHEREOF, the parties have caused their names to be signed hereto by their respective officers thereunto duly authorized as of the date first above written.

[American Residential Equities, LLC
(Owner)

By: _____
Name: Jeffrey Kiesel
Title: President

GMAC MORTGAGE CORPORATION
(Servicer)

By: _____
Name: Wesley B. Howland
Title: Vice President