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Hearing Date and Time: To Be Determined

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UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Brian F. Kimber and Malinda D. Kimber,	:	Adv. Proc. 12-02045-mg
Plaintiffs,	:	
v.	:	
GMAC Mortgage, LLC, et al.,	:	
Defendants.	:	
In re	:	
	:	Case No. 12-12020 (MG)
RESIDENTIAL CAPITAL, LLC, et al.,	:	
	:	Chapter 11
Debtors.	:	Jointly Administered

MOTION TO DISMISS ADVERSARY PROCEEDING PURSUANT TO BANKRUPTCY RULE 7012(b)(6) BY DEFENDANTS SUSAN TURNER AND MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.

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COME NOW Defendants Susan Turner ("Turner") and Mortgage Electronic Registration Systems, Inc. ("MERS" and collectively with Turner, the "Defendants") by and through their undersigned counsel, and respectfully ask that this Court enter an Order under Bankruptcy Rule 7012(b)(6) dismissing all claims and counts of Brian Kimber and Malinda Kimber ("Plaintiffs") against the Defendants, as asserted in the Plaintiffs' Complaint. In support of this Motion, Defendants state:

I. JURISDICTION AND VENUE

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.[1] Defendants submit that this is not a core proceeding pursuant to 28 U.S.C. §§ 157(b)(1) and (b)(2). Nonetheless, pursuant to Local Bankruptcy Rule 7012-1, Defendants consent 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. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

A. Factual Background.

1. On May 2, 2009, Plaintiffs executed a note in favor of Amerigroup Mortgage Corporation, a division of Mortgage Investors Corporation ("Amerigroup") in the amount of $175,950.00 (the "Note"). The Note was secured by the real property known as 6109 Bridgewood Drive, Killeen, Texas 76549 (the "Property"), pursuant to a *Deed of Trust* (the "DOT") executed contemporaneously with the Note. (*See* Compl., Exhibit "A").

[1] Venue is also proper under 28 U.S.C. § 1409 in the Bankruptcy Court for the Western District of Texas, where, as explained below, Plaintiffs filed an identical complaint in their own bankruptcy case.

2. In the DOT, MERS is named as (a) a nominee of Amerigroup and Amerigroup's successors and assigns and (b) a beneficiary, solely as nominee for Amerigroup and Amerigroup's successors and assigns.

3. The DOT was recorded in the land records of Bell County, Texas on May 13, 2009, as Instrument No. 2009-17147.

4. On June 6, 2012, MERS, as nominee under the DOT, executed that certain *Assignment Of Deed Of Trust* in favor of GMAC Mortgage, LLC ("GMACM"), transferring, assigning, and conveying to GMACM all of MERS' beneficial interest under the DOT (the "Assignment"). (*See* Compl., Exhibit "C"). The Assignment was recorded in the land records of Bell County, Texas on June 14, 2012, as Instrument No. 2012-23965.

B. Procedural History.

5. On May 14, 2012, Residential Capital, LLC and certain of its direct and indirect subsidiaries (collectively, the "ResCap Debtors"), including GMACM and Executive Trustee Service, LLC ("ETS" and collectively with GMACM, the "Debtor Defendants"), filed voluntary petitions for relief under Chapter 11 of the United States Bankruptcy Code in this Court. Pursuant to the *Order Under Bankruptcy Rule 1015 Authorizing Joint Administration of Debtors' Chapter 11 Cases* entered by this Court on May 14, 2012 [Docket No. 59], the ResCap Debtors' Chapter 11 cases are being jointly administered and under Case No. 12-12020 (MG) (the "ResCap Bankruptcy Case").

6. On August 7, 2012, Plaintiff Brian Kimber, individually, filed a Chapter 13 bankruptcy case, Case No. 12-11803-HCM (the "Original Kimber Bankruptcy"), in the United States Bankruptcy Court for the Western District of Texas (the "Texas Bankruptcy Court"). This case was subsequently dismissed in the *Order for Summary Dismissal of Case* [Docket No. 10]

on September 10, 2012, due to Plaintiff Brian Kimber's failure to "[t]imely file a Plan and/or Schedules."

7. On October 8, 2012, Plaintiff Brian Kimber, along with Plaintiff Malinda Kimber, filed their current Chapter 13 bankruptcy case, which is Case No. 12-61074-cag, in the Texas Bankruptcy Court.

8. On November 20, 2012, Plaintiffs filed a complaint [Docket No. 3] (the "Texas Complaint") initiating an adversary proceeding against Defendants and numerous other defendants in the Texas Bankruptcy Court under A.P. No. 12-06040-cag (the "Texas A.P.").

9. On November 26, 2012, Plaintiffs initiated the instant adversary proceeding (the "New York A.P.") by filing a complaint with this Court [Docket No. 1] (the "New York Complaint") that is identical to the Texas Complaint in substance.[2]

10. Defendants, accompanied by GMACM and ETS, filed a *Motion to Dismiss Pursuant to Federal rule of Civil Procedure 12(b)(6)* [Docket No. 16] in the Texas A.P. on December 20, 2012.

11. The Texas A.P. was dismissed on all counts as to Turner and MERS on February 21, 2013, as evidenced by the Texas Bankruptcy Court's *Order Granting In Part And Denying In Part Motion To Dismiss* [Docket No. 41] (the "Dismissal Order").[3] The Dismissal Order becomes final and non-appealable if not appealed within 14 days, or by March 7, 2013. A copy of the Dismissal Order is attached hereto as **Exhibit A**.

[2] The only difference between the Texas Complaint and the New York Complaint is that the Plaintiffs apparently forgot to attach Exhibits A-F in the Texas Complaint. Other than this, the two complaints are identical. They are literally the same complaint.

[3] The Dismissal Order also dismissed all Counts as to GMACM and ETS except Count One.

III. ARGUMENT

A. The Dismissal Standard Under Rule 12(b)(6).

Bankruptcy Rule 7012 incorporates by reference Rule 12(b) 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, and that a motion asserting any of these defenses may be made before pleading.

FRCP 12(b)(6) provides that an action may be dismissed for failure to state a claim upon which relief can be granted. The court must accept the 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 Court's review is limited to "the facts as asserted within the four corners of the complaint, the documents attached to the complaint as exhibits, and any documents incorporated in the complaint by reference." *McCarthy v. Dun & Bradstreet Corp.*, 482 F.3d 184, 191 (2d Cir. 2007).

To survive a motion to dismiss pursuant to FRCP 12(b)(6), a complaint must contain sufficient factual matter, which if accepted as true, "state[s] a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555 (citations omitted). Furthermore, the mere "possibility that a plaintiff might later establish some set of undisclosed facts to support recovery" is insufficient to survive a FRCP 12(b)(6) challenge. *Twombly*, 550 U.S. at 562 (internal quotation marks and brackets omitted).

While facts must be accepted as alleged, this does not automatically extend to bald assertions, subjective characterizations, or legal conclusions, which are not entitled to the assumption of truth. *Hirsch v. Arthur Andersen & Co.*, 72 F.3d 1085, 1088, 1092 (2d Cir. 1995). A court considering a motion to dismiss can disregard conclusory allegations and judge the complaint only on well-pleaded factual allegations. *Starr v. Sony BMG Music Entm't*, 592 F.3d 314, 321 (2d Cir. 2010); *see also Papasan v. Allain*, 478 U.S. 265, 286 (1986) (On a motion to dismiss, courts "are not bound to accept as true a legal conclusion couched as a factual allegation."). As noted by the United States Supreme Court in *Ashcroft v. Iqbal*:

> Rule 8 marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions . . . . [O]nly a complaint that states a plausible claim for relief survives a motion to dismiss . . . . Determining whether a complaint states a plausible claim for relief will, as the Court of Appeals observed, be a context-specific task that requires a reviewing court to draw on its judicial experience and common sense . . . . But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not "show[n]" – "that the pleader is entitled to relief."

556 U.S. 662, 678-79 (2009) (citations omitted).

Further, although complaints drafted by *pro se* plaintiffs are to be "construed liberally," claims asserted by *pro se* plaintiffs must nonetheless be supported by specific and detailed factual allegations sufficient to provide the court and the defendant with "a fair understanding of what the plaintiff is complaining about and . . . whether there is a legal basis for recovery." *Iwachiw v. N.Y. City Bd. of Elections*, 126 Fed. Appx. 27, 29 (2d Cir. 2005) (citations omitted).

Finally, courts may also dismiss complaints upon a Rule 12(b)(6) motion on res judicata grounds. *E.g., White v. White*, 2012 WL 3041660, at *3 (S.D.N.Y. July 20, 2012) (quoting *Bd. of Managers of 195 Hudson St. Condo. v. Jeffrey M. Brown Assocs., Inc.*, 652 F. Supp. 2d 463, 470 (S.D.N.Y. 2009) ("It is well settled that a court may dismiss a claim on res judicata or

collateral estoppel grounds on a Rule 12(b)(6) motion.")). While courts' inquiries on a Rule 12(b)(6) motion are normally limited to the face of the complaint and any attachments thereto, they clearly may consider facts of which they make take judicial notice. *White*, 2012 WL, at *3 (quoting *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153 (2d Cir. 2002) (citation and quotation marks omitted)).

B. This Court Should Dismiss The Plaintiffs' Complaint Based On The Res Judicata Effect Of The Texas Bankruptcy Court's Dismissal Order.

As noted above, the Texas Bankruptcy Court entered its Dismissal Order on February 21, 2013, dismissing Defendants from the Texas A.P.

"'The doctrine of res judicata, or claim preclusion, holds that 'a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action.'" *Mahmood v. Research in Motion Ltd.*, 2012 WL 5278470, at *2 (S.D.N.Y. Oct. 25, 2012) (quoting *Allen v. McCurry*, 449 U.S. 90, 94 (1980) (citing *Cromwell v. Cnty. of Sac.*, 94 U.S. 351, 352 (1876))). "Courts give res judicata effect to final judgments to 'relieve parties of the cost and vexation of multiple lawsuits, [to] conserve judicial resources, and, by preventing inconsistent decisions, [to] encourage reliance on adjudication.'" *Id.* at *2 (quoting *Allen*, 449 U.S. at 94*)* (citing *Montana v. United States*, 440 U.S. 147, 153–54 (1979))).

"To make out an affirmative defense of res judicata, 'a party must show that (1) the previous action involved [a final] adjudication on the merits; (2) the previous action involved the plaintiffs or those in privity with them; [and] (3) the claims asserted in the subsequent action were, or could have been, raised in the prior action.'" *Id.* at *2 (citing *Monahan v. N.Y.C. Dep't of Corr.*, 214 F.3d 275, 285 (2d Cir. 2000) (citing *Allen*, 449 U.S. at 94))).

All of the elements of res judicata are met here. First, the Dismissal Order was a final judgment on the merits.[4] *See, e.g., Teltronics Servs., Inc. v. L M Ericsson Telecomms., Inc.*, 642 F.2d 31, 34 (2d Cir. 1981) ("'[Judgments] under Rule 12(b)(6) are on the merits, with res judicata effects . . . .'" (quoting *Exch. Nat'l Bank of Chi. v. Touche Ross & Co.*, 544 F.2d 1126, 1130-31 (2d Cir. 1976)); *Access 4 All Inc. v. Trump Intern. Hotel and Tower Condo.*, 2007 WL 633951, at *4 n.5 (S.D.N.Y. Feb. 26, 2007). Second, the Texas Bankruptcy Court, where the Plaintiffs' bankruptcy case is pending, is clearly a court of competent jurisdiction. Third, the claims asserted by the Plaintiffs in the Texas Complaint are identical to the claims asserted here in the New York Complaint. Fourth, the exact same parties are involved in the Texas A.P. as are involved here in the New York A.P.

Accordingly, the Plaintiffs' claims are due to be dismissed on res judicata, or claim preclusion grounds.

C. Plaintiffs' Complaint Should Be Dismissed In Its Entirety For Failing To State A Claim Upon Which Relief May Be Granted.

The New York A.P. should be dismissed pursuant to Bankruptcy Rule 7012(b)(6) because Plaintiffs have failed to state a claim against Defendants upon which relief can be granted. It is difficult to discern from Plaintiffs' Complaint what their precise claims are and to which of the numerous defendants their claims are directed. Recognizing that the Plaintiffs are proceeding *pro se*, Defendants have endeavored to identify all of the Plaintiffs' possible claims. These possible claims can be drawn from (a) the various allegations in the "PARTIES" section beginning on page 4; and (b) the specific allegations in each Count.

[4] Because it is directly relevant to the instant motion to dismiss, this Court may take judicial notice of the Dismissal Order entered by the Texas Bankruptcy Court. *E.g., U.S. Airlines Pilots Ass'n ex rel. Cleary v. US (cont'd)*

1. *Plaintiffs' Count One Should Be Dismissed Because Plaintiffs Fail To State A Claim Upon Which Relief May Be Granted.*

In Count One, Plaintiffs allege that "Defendant," or "Defendants," without specifying which of the thirteen named defendants, "violated 11 U.S.C. 362(a)" during the Original Kimber Bankruptcy because they "knew of [Plaintiff Kimber's] bankruptcy case" but failed to prevent the scheduled foreclosure sale from continuing. (Compl., ¶¶ 22, 24-25). Plaintiffs do not make any allegations that the Defendants were specifically involved in the foreclosure sale that allegedly violated the automatic stay. (Compl., ¶¶ 19-29).

The new *Iqbal*/*Twombly* standard requires plausibility, not mere possibility, and requires facts to be stated such that they rise above a mere speculative level. The Complaint alleges no facts against either of the Defendants with respect to the foreclosure that allegedly violated the automatic stay, much less speculative facts. Accordingly, Count One should be dismissed with respect to both Defendants.

2. *Plaintiffs' Counts Two, Three, And Four Should Be Dismissed Because Plaintiffs Fail To State A Claim Upon Which Relief May Be Granted.*

Plaintiffs' Counts Two through Four[5] essentially attack the validity of the DOT and Assignment in an effort to avoid the DOT. However, just as with Count One, Plaintiffs fail to mention a specific factual allegation against either of the Defendant. (Compl., ¶¶ 30-25). Accordingly, the *Iqbal*/*Twombly* standard bars it as well.

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Airways, Inc., 859 F. Supp. 2d 283, 287 n.2 (E.D.N.Y. 2012); *In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.*, 402 F. Supp. 2d 434, 438 n.15 (S.D.N.Y. 2005).

[5] Plaintiffs' Count Four is entitled "Turnover," but it appears to seek the same avoidance of the DOT as Counts Two and Three.

a. Validity Of The DOT.

Plaintiffs make only two allegations with respect to the DOT itself in Count Two. First, Plaintiffs claim that the DOT "fails to contain the requisite Affidavit of Consideration and Affidavit of Disbursement." (Compl., ¶ 34). This allegation is directed to the original DOT, to which Defendants were not parties. Accordingly, it fails to state a claim against Defendants.[6]

Second, Plaintiffs allege that the DOT is "defective and invalid" pursuant to Texas Property Code § 12.0011. (Compl., ¶ 34). Again, Defendants were not parties to the DOT, and therefore, no claim with respect to it can be made against the Defendants.[7] As such, the *Iqbal*/*Twombly* standard again bars Plaintiffs' claims, as they allege no facts at all (not even speculative facts) which support a violation of this statute.

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[6] Plaintiffs do not support such a requirement on a deed of trust with any law, and Defendants have not found any law that sets forth any such requirement.

[7] Plaintiffs do not explain how the DOT violates section 12.0011, which provides:

> (a) For the purposes of this section, "paper document" means a document received by a county clerk in a form that is not electronic.
>
> (b) A paper document concerning real or personal property may not be recorded or serve as notice of the paper document unless:
>
> (1) the paper document contains an original signature or signatures that are acknowledged, sworn to with a proper jurat, or proved according to law; or
>
> (2) the paper document is attached as an exhibit to a paper affidavit or other document that has an original signature or signatures that are acknowledged, sworn to with a proper jurat, or proved according to law.
>
> (c) An original signature may not be required for an electronic instrument or other document that complies with the requirements of Chapter 15 of this code, Chapter 195, Local Government Code, Chapter 43, Business & Commerce Code, or other applicable law.

Texas Property Code (2012). This statute imposes no obligations on Defendants. Rather, it prevents the recording of real property documents unless the document contains an original signature or the proper acknowledgement. The copy of the DOT provided by Plaintiffs shows a signature for both of them. (*See* Compl., Exhibit "A"). It is also clear that the DOT was actually recorded, and the Plaintiffs admit in Paragraph 31 that the DOT was recorded in the land records of Bell County, Texas on May 13, 2009, at Instrument No. 2009-17147. As such, the recording of the DOT complied with the statute.

b. The DOT Cannot Be Avoided Based Upon The Allegation Made With Respect To The Assignment.

Plaintiffs make numerous allegations with respect to the Assignment in the "PARTIES" section of their Complaint. (Compl., ¶¶ 5-18). To wit:

i. Turner "purportedly" signed the Assignment. (Compl., ¶ 13).
ii. Turner's signature is "fraudulent," "making the Assignment unenforceable." (Compl., ¶ 34).
iii. Turner "does not appear to be a MERS employee." (Compl., ¶ 14).
iv. Plaintiffs "have concerns about the integrity of that Assignment." (Compl., ¶ 13).
v. GMACM and Turner are parties "to the creation of a negotiation trail of all Defendants' negotiable instruments in a way to create an appearance of propriety under the Uniform Commercial Code." (Compl., ¶ 12).

But the validity of the Assignment has nothing to do with the validity of the DOT and the lien on the Property conveyed thereunder. Again, Plaintiffs' Counts Two, Three, and Four are directed at avoidance of the lien under the DOT and are not related at all to the Assignment. Infirmity of the Assignment simply cannot logically or legally affect the validity of the DOT. Regardless, Plaintiffs' attacks on the Assignment are due to fail as a matter of law for two additional reasons.

First, Plaintiffs' claims fail under the *Iqbal*/*Twombly* standard. Claims that allege something "appears" one way, that facts are "purported," or that plaintiffs have "concerns" about a fact, without more, are the classic type of claims that are pure speculation and do not meet the "plausibility" standard. *See, e.g.*, *Scheiner v. Bloomberg*, 2009 WL 691449, at *2 (S.D.N.Y. Mar. 17, 2009) ("[A]llegations that defendants engaged in non-legislative conduct--that they used 'improper and potentially illegal pressures to intimidate others' (Compl. P 29)--are far too speculative and imprecise 'to state a claim to relief that is plausible on its face.'" (citing *Twombly*, 550 U.S. at 570)); *Capitol Records, Inc. v. Mp3tunes, LLC*, 611 F. Supp. 2d 342, 347 (S.D.N.Y. 2009) ("An allegation that there is a possibility" that something may be true "is too

speculative to meet the *Twombly* standard."). Facing such claims, defendants in a lawsuit cannot possibly defend against them, as they do not know what are the "concerns," why a fact is "purported," or why an alleged fact is "apparent." Accordingly, these claims are due to be dismissed.

Second, as a non-party to the Assignment, Plaintiffs lack standing to attack it. Literally scores, if not hundreds, of courts across the country have held that plaintiffs who are not parties to an assignment from MERS to an assignee have no standing to challenge such assignment.[8] As mentioned, the parties to the Assignment were MERS and GMACM, not the Plaintiffs. Because the Plaintiffs were not a party to the Assignment, they cannot challenge it.

As Plaintiffs have failed to demonstrate that the DOT is not in compliance with Section 12.0011; make at best only speculative factual allegations; and have no standing to challenge the Assignment, Counts Two through Four should be dismissed.

IV. CONCLUSION

For the foregoing reasons, Defendants respectfully move to dismiss Plaintiffs' Complaint in its entirety as to the Defendants.[9]

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[8] *E.g., Halajian v. Deutsche Bank Nat'l Trust Co.*, 2013 WL 593671, at *7 (E.D. Cal. Feb. 14, 2013) (citing *In re Correia*, 452 B.R. 319, 324 (1st Cir. BAP 2011)); *Reynolds v. Bank of Am., N.A.*, 2013 WL 592176, at *8 (N.D. Tex. Feb. 14, 2013) (numerous citations omitted)); *Duran v. Mortg. Elec. Registration Sys., Inc.*, 2013 WL 444450, at *5 (N.D. Ohio Feb. 13, 2013) (collecting cases); *Courtney v. U.S. Bank, N.A.*, 2013 WL 452941, at *3 (D. Mass. Feb. 6, 2013) (citing *Oum v. Wells Fargo*, N.A., 842 F. Supp. 2d 407, 412 (D. Mass. 2012) (collecting cases)); *Brodie v. Nw. Trustee Servs., Inc.*, 2012 WL 6192723, at *2 (E.D. Wash. Dec. 12, 2012) (numerous citations omitted); *Edward v. Bank of Am., N.A.*, 2012 WL 4327073, at *7 (N.D. Ga. Aug. 1, 2012) (Magistrate report rejected in part by District Court on other grounds) (numerous citations omitted); *Wolf v. Fed. Nat'l Mortg. Ass'n*, 830 F. Supp. 2d 153, 161-62 (W.D. Va. 2011) (numerous citations omitted).

[9] Before the Texas Bankruptcy Court entered the Dismissal Order, Plaintiffs' Complaint likely would have been due to be dismissed based on the "first-filed action" rule. *Kytel Intern. Group, Inc. v. Rent A Center, Inc.*, 43 Fed. Appx. 420, 422 (2d Cir. 2002) ("The first filed rule, a change of venue principle, permits the transfer or dismissal of subsequently commenced litigation involving the same parties and the same issues when both suits are pending in federal courts.") (citing *First City Nat'l Bank & Trust Co. v. Simmons*, 878 F.2d 76, 77, 79 (2d Cir. 1989)).

(cont'd)

Respectfully submitted this the 6th day of March, 2013.

/s/ Glenn E. Glover
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Additionally, permissive abstention under 28 U.S.C. § 1334(c)(1) is appropriate in this case. Almost all the factors in the 14-factor test for permissive abstention (*see Allstate Ins. Co. v. CitiMortgage, Inc.*, 2012 WL 967582, at *6 (S.D.N.Y. Mar. 13, 2012)) weigh in favor of this Court's abstention from exercising jurisdiction over the New York A.P. The Court's abstention from the New York A.P., which involves the validity of a deed of trust and an assignment of a note would have virtually no effect on the administration of the Debtor Defendants' estates. Conversely, however, exercising jurisdiction would likely encourage many other similarly-situated parties to initiate non-core adversary proceedings before this Court, potentially swamping the Court's docket and distracting both the Court and the Debtor Defendants' professionals from the critical issues affecting the Debtor Defendants' restructuring efforts.

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of this motion upon:

Brian Kimber
6109 Bridgewood Dr.
Killeen, TX 76549

Malinda Denise Kimber
6109 Bridgewood Dr.
Killeen, TX 76549

by placing a copy of same in the United States Mail, certified mail with return receipt requested, and addressed to their regular mailing addresses on this 6th day of March, 2013.

/s/ Glenn E. Glover
Glenn E. Glover

Exhibit A

Dismissal Order

February 21, 2013

IT IS HEREBY ADJUDGED and DECREED that the below described is SO ORDERED.

Dated: February 21, 2013.

Craig A. Gargotta

CRAIG A. GARGOTTA
UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

BRIAN KIMBER AND MALINDA KIMBER,	)	
	)	**ADVERSARY PROCEEDING**
PLAINTIFFS,	)	**NO. 12-6040**
	)	
VS.	)	**CASE NO. 12-61074**
	)	
GMAC MORTGAGE, INC., d/b/a GMAC MORTGAGE, LLC, ET AL.,	)	
	)	
DEFENDANTS.	)	

ORDER GRANTING IN PART AND DENYING IN PART MOTION TO DISMISS

This matter came before the Court on the *Motion To Dismiss Pursuant To Federal Rule Of Civil Procedure 12(b)(6)* [Docket No. 16] (the "Motion to Dismiss") filed by defendants GMAC Mortgage, LLC, f/k/a GMAC Mortgage, Inc. ("GMACM"), Executive Trustee Services, LLC ("ETS"), Mortgage Electronic Registration Systems, Inc. ("MERS"), and Susan Turner ("Turner" and with GMACM, ETS, and MERS collectively, the "GMACM Defendants").

The Court, having considered the arguments of the GMACM Defendants in the Motion to Dismiss and the arguments of the GMACM Defendants and plaintiffs Brian and Melinda Kimber

(collectively, the "Plaintiffs") at the hearing before the Court on February 19, 2012, and for good cause shown, hereby **ORDERS** that:

1. The Motion to Dismiss is GRANTED with prejudice as to Counts II, III, and IV against all GMACM Defendants.

2. The Motion to Dismiss is GRANTED with prejudice as to Count I against Defendants Turner and MERS.

3. The Motion to Dismiss is DENIED without prejudice as to Count I against Defendants GMACM and ETS.

4. Plaintiffs are ORDERED to file an amended complaint as to Count I against GMACM and ETS on or before March 6, 2013. The amended complaint must make specific factual allegations about the notice they gave GMACM and ETS of the Chapter 13 bankruptcy case they filed in the United States Bankruptcy Court for the Western District of Texas, Austin Division on August 7, 2012 (Case No. 12-11803). If Plaintiffs do not file an amended complaint on or before March 6, 2013, or if Plaintiffs do file an amended complaint on or before March 6, 2013 but the amended Complaint does not make the specific factual allegations stated above, this Court may dismiss Count I against Defendants GMACM and ETS.

###END OF ORDER###

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