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

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	:	
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, BALBOA INSURANCE COMPANY, and ALLY FINANCIAL, INC.	:	
	:	
Defendants.	:	
-----X	:	
In re	:	Case No. 12-12020 (MG)
	:	
RESIDENTIAL CAPITAL, LLC, <i>et al.</i> ,	:	Chapter 11
	:	
Debtors	:	Jointly Administered
-----X	:	



**DEBTOR DEFENDANT'S RESPONSE TO PLAINTIFF ARE'S
SUPPLEMENTAL BRIEF WITH REGARD TO JURISDICTION AND
FORUM**

Debtor defendant GMAC Mortgage, LLC (the "Debtor")¹ submits this response (the "Response") to *Plaintiff ARE's Supplemental Brief with Regard to Jurisdiction and Forum* [Docket No. 55] (the "Supplemental Brief").

BACKGROUND

1. At the June 12, 2013 hearing on the motions of the Debtor and Balboa Insurance Company ("Balboa") to dismiss this adversary proceeding [Docket Nos. 35 and 33, respectively], the Court instructed Plaintiff American Residential Equities, LLC ("ARE") to file a supplemental brief addressing (1) the existence of this Court's subject matter jurisdiction, if any, over ARE's claims against Balboa, and (2) whether this Court should permissively abstain from adjudicating the adversary proceeding under 28 U.S.C. § 1334(c)(1) in favor of ARE's pending action against the Debtor (Case No. 1:10-cv-21943-ASG, the "Florida Action") in the U.S. District Court for the Southern District of Florida (the "Florida District Court"). Hearing Transcript 6/12/13, Docket No. 52, at 54:9-15. The Court also gave the Debtor the opportunity to file a pleading in response by July 10, 2013 to the extent the Debtor wished to do so. *Id.* at 55:14-16. This Response is limited to the abstention issue. The Debtors do not address the jurisdiction question, but as set forth below, even were the Court to have jurisdiction over Balboa, given the facts and circumstances of this proceeding, abstention is warranted.

2. In its Supplemental Brief, ARE argues that the Court should exercise its discretion to permissively abstain from adjudicating the adversary proceeding under 28 U.S.C. §

¹ Capitalized terms not defined herein shall have the meanings ascribed to them in *Debtor's Motion for Dismissal of Adversary Proceeding* [Docket No. 35].

1334(c)(1) because discovery in the Florida Action is well-advanced and litigating the issues in that forum would be more efficient and economical than starting from scratch before the bankruptcy court. Supp. Br. at 14. ARE submits that the “best way to implement a decision to abstain” would *not* be to have ARE seek to amend its pleadings in the Florida Action, but rather for this adversary proceeding to be transferred to the Florida District Court pursuant to 28 U.S.C. § 1404(a) as a case related to the Florida Action. *Id.* at 11.

RESPONSE

3. The Debtor respectfully submits that this Court should permissively abstain from adjudicating the adversary proceeding under 28 U.S.C. § 1334(c)(1) in light of the substantial factual and legal overlap between the claims in the adversary proceeding and in the Florida Action and the progress in discovery already made in that action. First and foremost, the Florida Action would serve as the sole forum by which to liquidate ARE’s proof of claim filed against the Debtor (Claim No. 5718, the “Proof of Claim”). In addition, the Florida District Court should have the opportunity to adjudicate the section 541(d) issues relevant to the complaint in the Florida Action.

4. Where the Debtor disagrees with ARE, however, is on the proper “way to implement a decision to abstain,” as ARE terms it. Supp. Br. at 11. The Debtor believes the Court should, upon abstaining, lift the automatic stay to permit the Florida Action to proceed on its own merits. In contrast, ARE asks this Court to transfer the adversary proceeding to a different venue pursuant to 28 U.S.C. § 1404(a).

5. Under 28 U.S.C. § 1404(a), a court may transfer a civil action to another district where the case might have been brought if the transfer serves “the convenience of parties and witnesses, [and is] in the interest of justice.” 28 U.S.C. § 1404(a); *Atlantic Recording Corp.*

v. Project Playlist, Inc., 603 F.Supp.2d 690, 694-95 (S.D.N.Y. 2009). In deciding whether a proceeding should be transferred, courts consider a variety of factors, weighing the competing needs and interests of the parties, as well as the purpose of the Bankruptcy Code. *In re Legend Industries, Inc.*, 49 B.R. 935, 938 (Bankr. E.D.N.Y. 1985). Factors which courts have considered in deciding motions for change of venue, include, among others: (1) judicial efficiency, (2) the economic administration of the estate, (3) practical problems that make trial of a case easy, expeditious, and inexpensive, (4) the relative economic harm to debtors and creditors caused by the transfer, and (5) the presumption in favor of the “home court.” *See Blanton v. IMN Financial Corp.*, 260 B.R. 257, 266-67 (M.D.N.C. 2001); *In re Hoffman Advertising Group, Inc.*, 62 B.R. 823, 829 (Bankr. S.D. N.Y. 1986); *In re Texaco Inc.*, 89 B.R. 382, 387 (Bankr. S.D.N.Y. 1988). The most important factor to be considered in determining a change of venue motion, in the view of some courts, is the economic and efficient administration of the estate. *In re GEX Kentucky, Inc.*, 85 B.R. 431, 435 (Bankr. N.D. Ohio 1987), citing *In re Commonwealth Oil Refining Co., Inc.*, 596 F.2d 1239 (5th Cir. 1979) (other citations omitted).

6. Transfer of this adversary proceeding to the Florida District Court would not be in the interests of justice because, as previously argued by the Debtor (*see* Debtor’s Motion for Dismissal at ¶ 18), ARE’s filing of this adversary complaint represents a clear attempt to circumvent adverse rulings in the Florida Action and to obtain a “do over” of the action. ARE’s attempt to accomplish as much through a transfer of venue should not be countenanced in the interests of justice. To the extent this adversary proceeding asserts claims against the Debtor beyond those at issue in the Florida Action, the Debtor would consent to allowing amendment of the pleadings in the Florida Action for purpose of adding those claims, subject to any defenses of the Debtors, including that any such amendment constitutes an

untimely amendment to the Proof of Claim. The Proof of Claim relies entirely on ARE's initial adversary complaint [Docket No. 1]. The amended complaint [Docket No. 26] was filed well after the bar date of November 16, 2012 established in the Chapter 11 cases.

7. Moreover, transferring the adversary proceeding to the Florida District Court with Balboa as a defendant would not lead to the efficient administration of the Debtor's estate because it would expand the scope of the Florida Action beyond issues relating to the liquidation of ARE's claims against the Debtor (on which discovery is well-advanced) to include third party claims between ARE and Balboa. If the Florida District Court determines that ARE should be permitted to expand the long-pending litigation in that forum by adding claims against Balboa, then ARE will be afforded an opportunity to do so. However, the Debtor respectfully submits that such a determination should be left to the Florida District Court and should not be accomplished by this Court indirectly as part of a motion to transfer venue under 28 U.S.C. § 1404(a).

8. That abstention in favor of the Florida Action could potentially leave ARE unable to sue Balboa in the Florida Action does not counsel against abstention. *Cf. Taub v. Hershkowitz (In re Taub)*, 417 B.R. 186, 194 (Bankr. E.D.N.Y. 2009) (permissively abstaining from adjudicating adversary proceeding even where there was no action between all parties pending in another forum). ARE has been, and continues to be, free to bring suit against Balboa in any forum (to the extent permitted by applicable law). It should not be authorized to do so at the Debtor's expense.

CONCLUSION

9. In sum, permissive abstention is amply warranted by the procedural and substantive posture of the Florida Action. The Debtor is prepared to stipulate to relief from the

automatic stay with respect to the Florida Action for purposes of liquidating ARE's Proof of Claim, determining any section 541(d) issues, and adjudicating the Debtor's counter-claims asserted against ARE in the Florida Action. As part of such a stipulation, the Florida District Court should be the sole forum for adjudicating claims between ARE and the Debtor. In addition the Debtor's defense of the Florida Action should be treated as an objection to the Proof of Claim under section 502 of the Bankruptcy Code and the Proof of Claim should be deemed a "disputed claim" for all purposes in these Chapter 11 cases. The Debtor is prepared to confer with ARE and prepare an appropriate form of order mutually acceptable to the parties.

10. The Debtor does not consent, however, to a transfer of venue of the adversary proceeding allowing ARE to effectively expand the scope of the Florida Action to pursue its third party claims against Balboa. The Debtor believes that whether ARE should be permitted to join Balboa as a third party defendant in the Florida Action is properly a question for the Florida District Court.

Dated: July 10, 2013
New York, New York

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