

**Hearing Date and Time: September 24, 2013 at 10:00 a.m. (Prevailing Eastern Time)**

**Response Date and Time: September 16, 2013 at 4:00 p.m. (Prevailing Eastern Time)**

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*Counsel for the Debtors and  
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**UNITED STATES BANKRUPTCY COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK**

-----X	:	
Todd A. Williams,	:	
	:	Adv. Proc. 13-01309 (MG)
Plaintiff,	:	
	:	
v.	:	
	:	
GMAC Mortgage, LLC, <i>et al.</i>	:	
	:	
Defendants.	:	
-----X	:	
In re	:	Case No. 12-12020 (MG)
RESIDENTIAL CAPITAL, LLC, <i>et al.</i> ,	:	
	:	Chapter 11
	:	
Debtors	:	Jointly Administered
-----X	:	

**NOTICE OF DEBTOR DEFENDANTS' MOTION TO DISMISS  
PLAINTIFF'S ADVERSARY COMPLAINT**

**PLEASE TAKE NOTICE** that the undersigned have filed the attached *Debtor Defendants' Motion to Dismiss Plaintiff's Adversary Complaint* (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 **September 24, 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 **September 16, 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: Gary S. Lee, Norman S. Rosenbaum, Paul Galante, Erica J. Richards); (b) the Office of the United States Trustee for the Southern District of New York, 201 Varick Street, Suite 1006, New York, NY 10014 (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 you do not timely file and serve a written objection to the relief requested in the Motion, the Bankruptcy Court may deem any opposition waived, treat the motion as conceded, and enter an order granting the relief requested in the Motion without further notice or hearing.

Dated: September 5, 2013  
New York, New York

/s/ Norman S. Rosenbaum

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In re	:	
	:	Case No. 12-12020 (MG)
RESIDENTIAL CAPITAL, LLC, <i>et al.</i> ,	:	
	:	Chapter 11
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Debtors	:	Jointly Administered
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**DEBTOR DEFENDANTS' MOTION TO DISMISS  
PLAINTIFF'S ADVERSARY COMPLAINT**

Defendants GMAC Mortgage, LLC (“GMACM”) and Homecomings Financial, LLC (“Homecomings” and together with GMACM, the “Debtor Defendants”), each a debtor and debtor in possession in the above-captioned chapter 11 case (collectively with all affiliated non-defendant debtors and debtors in possession, (the “Debtors”), hereby submit this motion (the “Motion”) to dismiss the above-referenced adversary proceeding (the “Adversary Proceeding”)<sup>1</sup> commenced by Plaintiff Todd A. Williams (“Plaintiff”). The Court should dismiss the Adversary Proceeding for Plaintiff’s failure to comply with the Court’s Supplemental AP Procedures and for insufficient service of process.

## **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 is a non-core proceeding pursuant to 28 U.S.C. §§ 157(b)(1) and (b)(2). Nonetheless, pursuant to Local Bankruptcy Rule 7012-1, the Debtor 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. BACKGROUND**

### **A. General Bankruptcy Case Background**

2. On May 14, 2012 (the “Petition Date”), each of the Debtors filed a voluntary petition in this Court for relief under Chapter 11 of the United States Bankruptcy Code (the “Bankruptcy Code”).

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<sup>1</sup> As used herein, “AP Docket” refers to documents filed in the Adversary Proceeding under Case Number 13-01309.

3. 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 “Chapter 11 Cases”)<sup>2</sup> are being jointly administered pursuant to Rule 1015(b) of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”). No trustee has been appointed in the Chapter 11 Cases.

4. 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 (the “Creditors’ Committee”).

5. On July 3, 2012, the U.S. Trustee appointed the Honorable Arthur T. Gonzalez, former Chief Judge of this Court, as examiner.

6. On June 20, 2012, the Court directed that an examiner be appointed (the “Examiner”), and on July 3, 2012, the Court approved Arthur J. Gonzalez as the Examiner [Docket Nos. 454, 674]. On May 13, 2013, the Examiner filed his report under seal [Docket Nos. 3677, 3697]. On June 26, 2013, the report was unsealed and made available to the public [Docket No. 4099].

7. On July 3, 2013, the Debtors filed the *Joint Chapter 11 Plan Proposed by Residential Capital, LLC, et al. and the Official Committee of Unsecured Creditors* [Docket No. 4153] (the “Plan”) and the *Disclosure Statement for the Joint Chapter 11 Plan Proposed by Residential Capital, LLC, et al. and the Official Committee of Unsecured Creditors* [Docket No. 4157] (the “Disclosure Statement”). On August 16, 2013, the Debtors filed a revised Disclosure Statement, which includes a revised copy of the Plan [Docket No. 4733]. On August 23, 2013,

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<sup>2</sup> As used herein, “Docket” refers to documents filed in the jointly administered Chapter 11 Cases under Case Number 12-12020.

the Court entered an order approving, *inter alia*, the Disclosure Statement, as amended [Docket No. 4809].

**B. Events Giving Rise to the Adversary Proceeding**

8. On March 20, 2013, Plaintiff filed a complaint initiating this Adversary Proceeding (the “Complaint”) [AP Docket No. 1], and a summons and notice of pretrial conference (the “Summons”) was issued with respect to the Adversary Proceeding on March 22, 2013 [AP Docket No. 2].<sup>3</sup> Plaintiff, however, has failed to make any effort to prosecute his case.

9. On March 22, 2013, the Court entered the Mandatory Supplemental AP Procedures for AP Actions (“Supplemental AP Procedures”), [Docket No. 3293], as amended on April 22, 2013. [Docket No. 3490].

10. A review of the AP Docket as of the date hereof reflects that Plaintiff has not filed an affidavit of service of the Complaint and Summons. Also as of the date hereof, the Debtor Defendants have no record of being served, either directly or through their counsel or registered agent. Notwithstanding such deficiencies in service, the Debtor Defendants became aware of the Adversary Proceeding as a result of their day-to-day monitoring of the docket for the Chapter 11 Cases.

11. On March 27, 2013, the Debtor Defendants’ counsel, Morrison & Foerster LLP, served a *Notice of Applicability of The Order Approving Mandatory Supplemental AP Procedures for AP Actions* (“Notice of AP Procedures”) [AP Docket No. 3]. The Supplemental AP Procedures require, among other things, that Plaintiff provide the Debtors with his contact information, participate in an initial conference with the Debtors and Special Borrowers’

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<sup>3</sup> Williams filed a proof of claim (Claim No. 765), which was disallowed and expunged on September 4, 2013 for providing insufficient documentation in support thereof. [Dkt. No. 4942].

Counsel (as defined in the Supplemental AP Procedures), and meet and confer in good faith.

Supplemental AP Procedures, ¶¶ 1, 4.

12. After being served with the Notice of AP Procedures, Plaintiff failed to comply with its terms. First, Plaintiff failed to provide the Debtor Defendants with updated contact information as required by paragraph 2 of the Supplemental AP Procedures.

(Declaration of Paul Galante ¶ 2 (“Galante Decl.”)).

13. Plaintiff also failed to cooperate with the Debtor Defendant’s efforts to schedule the initial conference, as required by paragraph 4 of the Supplemental AP Procedures. (Declaration of Paul Galante ¶¶ 3-4). The Debtor Defendants’ counsel attempted to contact Plaintiff by letter sent via overnight mail directed to the address listed by Plaintiff in the Complaint on May 8, 2013. (Galante Decl., ¶ 3). On May 16, 2013, the Debtor Defendants informed Plaintiff by letter sent via overnight mail that they intended to file a motion to dismiss this Adversary Proceeding due to Plaintiff’s failure to comply with the Supplemental AP Procedures. (Galante Decl., ¶ 4). Plaintiff never responded to the Debtor Defendants’ letters. (Galante Decl., ¶¶ 3-4).

14. On May 28, 2013, the Debtor Defendants filed a Progress Report with this Court as required by the Supplemental AP Procedures, stating that they planned to move to dismiss Plaintiff’s Complaint because he had failed to comply with the Supplemental AP Procedures. [AP Docket 5]. Plaintiff never contacted the Debtor Defendants’ counsel or Special Borrowers’ Counsel after the Debtor Defendants filed the Progress Report (Galante Decl. ¶ 5), nor did Plaintiff file his own progress report with the Court.



### III. ARGUMENT

#### A. The Adversary Proceeding Should Be Dismissed for Plaintiff's Failure to Comply with the Supplemental AP Procedures

15. The Supplemental AP Procedures require that Plaintiff provide the Debtors with his contact information, participate in an initial conference with the Debtors and Special Borrowers' Counsel, and meet and confer in good faith. Supplemental AP Procedures, ¶¶ 1, 4. The Supplemental AP Procedures also require that Plaintiff collaborate with the Debtors to submit a Joint Progress Report to the Court that documents the extent of progress and status of the case. Id.

16. Paragraph 4 of the Supplemental AP Procedures provides that the Debtors may move before the Bankruptcy Court "for an order dismissing the AP Action for failure to prosecute and comply with the Supplemental AP Procedures." Supplemental AP Procedures, ¶ 4.

17. As set forth above, Plaintiff has made no effort to prosecute this Adversary Proceeding. The Debtor Defendants provided Plaintiff with a copy of the Supplemental AP Procedures, notified Plaintiff repeatedly that compliance with the Supplemental AP Procedures is mandatory, and advised Plaintiff that they would seek to dismiss the Adversary Proceeding if Plaintiff's failure to comply continued. At no point has Plaintiff attempted to contact the Debtor Defendants or Special Borrowers' Counsel, or otherwise comply with the mandatory provisions of the Supplemental AP Procedures. In light of Plaintiff's repeated failure to comply with the

Court-ordered Supplemental AP Procedures, the Debtor Defendants hereby move to dismiss this Adversary Proceeding pursuant to paragraph 4 of the Supplemental AP Procedures.<sup>4</sup>

**B. The Adversary Proceeding Should Be Dismissed for Insufficient Service of Process**

18. 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 insufficient service of process, and that a motion asserting any of these defenses may be made before pleading. The Adversary Proceeding should be dismissed pursuant to Bankruptcy Rule 7012(b) and FRCP 12(b)(5) because Plaintiff failed to provide sufficient service of process.

19. Bankruptcy Rule 7004 incorporates by reference FRCP 4(c)(1), 4(h) and 4(l). FRCP 4(c)(1) in turn provides that the plaintiff is responsible for having the summons and complaint served within the time allowed, and FRCP 4(h) requires that a corporation must be served in the manner prescribed by FRCP 4(e)(1) for serving an individual, or by delivering a copy of the summons and complaint to an authorized agent and by mailing a copy of each to the defendant. In addition, under Bankruptcy Rule 7004(b)(3), service may also be effectuated by mailing a copy of the summons and complaint to “an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process . . . .” Fed. R. Bankr. P. 7004(b)(3). Bankruptcy Rule 7004(b)(9) also authorizes service upon a debtor by mailing a copy of the summons and complaint to the address shown in the bankruptcy petition. Fed. R. Bankr. P. 7004(b)(9). Bankruptcy Rule 7004(e) further requires that service of the summons and complaint be delivered or deposited in the mail within 14 days after the summons

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<sup>4</sup> As provided under paragraph 4 of the Supplemental AP Procedures, GMACM reserves its right to file additional motions to dismiss at a later date.

is issued, and FRCP 4(l) requires that proof of service must be made to the court by the server's affidavit. Rule 9078-1 of the Local Bankruptcy Rules provides that, unless the Court orders otherwise, "any party serving a pleading or other document shall file proof of service by the earlier of (i) three days following the date of service, and (ii) the hearing date." Local Bankr. R. 9078-1.

20. Upon information and belief, the Debtor Defendants have not been served with the Complaint and Summons by any means prescribed by Bankruptcy Rule 7004. Nor has a certificate of service been filed as of the date hereof with respect to the Complaint or Summons. Accordingly, the Debtor Defendants request that the Adversary Proceeding be dismissed for insufficient service of process pursuant to Bankruptcy Rule 7012(b) and FRCP 12(b)(5).

#### **IV. CONCLUSION**

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

Dated: September 5, 2013  
New York, New York

/s/ Norman S. Rosenbaum

Gary S. Lee

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