IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 11-cv-03393-RBJ

TRISHA J. MUNHOLLAND and
BELLA HOMES, LLC,

Plaintiffs,

v.

WELLS FARGO BANK, NATIONAL ASSOCIATION,
as Trustee for the Certificateholders of Structured Asset
Mortgage Investments II Inc. Bear Stearns Mortgage Funding
Trust 2007-AR5 Mortgage Pass-Through Certificates, Series
2007-AR5,
JPMORGAN CHASE BANK, N.A.,
EMC MORTGAGE CORPORATION, and
MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.

Defendants.

DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' COMPLAINT PURSUANT TO FED. R. CIV. P. 12(b)(6)

Defendants, Wells Fargo Bank, National Association, as Trustee for the Certificateholders of Structured Asset Mortgage Investments II Inc. Bear Stearns Mortgage Funding Trust 2007-AR5 Mortgage Pass-Through Certificates, Series 2007-AR5 ("Wells Fargo"), JPMorgan Chase Bank, N.A. ("Chase"), EMC Mortgage LLC (formerly known as EMC Mortgage Corporation) ("EMC"), and Mortgage Electronic Registration Systems, Inc. ("MERS") (collectively, the "Defendants"), by and through their undersigned counsel, hereby submit the following Motion to Dismiss Plaintiffs' Trisha J. Munholland ("Munholland") and Bella Homes, LLC ("Bella Homes") (collectively, the "Plaintiffs") Complaint [Docket No. 2] pursuant to Fed. R. Civ. P. 12(b)(6) and, in support thereof, state as follows:

I. INTRODUCTION

This action arises out of a judicially authorized and approved foreclosure sale of property Plaintiff Munholland pledged as collateral for a mortgage loan that she failed to pay. Specifically, as set forth below and in the Complaint, Munholland obtained a mortgage loan in the principal sum of $488,000 (the "Loan") from Aegis Wholesale Corporation ("Aegis") on April 4, 2007. As a security for the Loan, Munholland executed a promissory note in favor of Aegis and a deed of trust encumbering her property located at 5328 Danvers Court, Castle Rock, Colorado 80104 (the "Property") for the benefit of Aegis and its successors and assigns. The note and deed of trust were subsequently assigned to Well Fargo and the Loan was serviced by EMC. On February 16, 2011, after Munholland defaulted under the note and deed of trust, Wells Fargo commenced foreclosure proceedings with the Public Trustee for Douglas County, Colorado (the "Public Trustee") in the District Court for Douglas County, Colorado (the "State Court"), Case No. 2011cv952 (the "Foreclosure Proceedings"), wherein Wells Fargo obtained an order authorizing the Public Trustee to sell the Property. On June 8, 2011, and pursuant to the State Court's sale order, the Property was sold to Wells Fargo at public auction. On June 23, 2011, after the State Court issued an order approving the sale, the Public Trustee issued its confirmation deed to Wells Fargo thereby vesting title to the Property in Wells Fargo and extinguishing all liens and encumbrances junior to Wells Fargo's deed of trust pursuant to C.R.S. § 38-38-501.

Despite Munholland's undisputed default under the deed of trust and the fact that the Public Trustee's confirmation deed extinguished all liens and encumbrances on the Property as a matter of law on June 23, 2011 (including Bella's alleged junior interest in the Property),

Plaintiffs commenced this action on November 7, 2011 seeking to quiet title of the Property in their name and asserting various other claims against Defendants under Colorado law and the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692, *et seq.* (the "FDCPA"). However, as set forth below, each of these claims fail as a matter of law and should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6).

More specifically, Plaintiffs' First Claim for Relief (Declaratory Judgment), Second Claim for Relief (Quiet Title) and Seventh Claim for Relief (Temporary and Permanent Injunctive Relief) should be dismissed because Wells Fargo properly foreclosed on its deed of trust under Colorado law and because Plaintiffs lack standing to assert any valid interest in the Property. Additionally, Plaintiffs' Third Claim for Relief (Violation of the FDCPA) should be dismissed because it is barred by the one-year statue of limitations and because Defendants are not "debt collectors" under the FDCPA. Further, Plaintiffs' Fourth Claim for Relief (Breach of Contract), Fifth Claim for Relief (Fraud), and Sixth Claim for Relief (Promissory Estoppel) are all barred by Colorado's Credit Agreement Statute of Frauds as Plaintiffs' note and deed of trust are "credit agreements" under C.R.S. § 38-10-124. Accordingly, because the Complaint is devoid of any claims entitling Plaintiffs to the relief they are seeking, the Complaint should be dismissed pursuant to Rule 12(b)(6).

II. RELEVANT FACTUAL BACKGROUND

A. MUNHOLLAND'S MORTGAGE LOAN AND DEED OF TRUST

1. On April 4, 2007, Munholland obtained the mortgage Loan from Aegis. *See* Complaint, ¶ 12.

2. As a security for the Loan, Munholland executed an Adjustable Rate Note, dated April 4, 2007, in the principal sum of $488,000.00 in favor of Aegis (the "Note"). *See* Complaint, ¶¶ 12, 35, 36, 79; *see also* the Note, which is attached hereto as **Exhibit A**.

3. Pursuant to the terms of the Note, Munholland "promise[d] to pay [Aegis] U.S. $488,000 . . . plus interest" and to make "payments every month until I have paid all of the principal and interest and any other charges described below that I may owe under this Note." *See* **Exhibit A**, §§ 1, 3. Additionally, under the terms of the Note, Munholland expressly agreed and acknowledged that Aegis may transfer the Note and that Munholland would remain obligated to the transferee, or "holder," of the Note. *Id.*, § 1. Specifically, Munholland acknowledged, "I understand that Lender [Aegis] may transfer this Note. Lender or anyone who takes this Note by transfer and who is entitled to receive payments under this Note is called the "Note Holder." *Id*.

4. As additional security for the Loan and Note, Munholland executed a Deed of Trust, dated April 4, 2007 (the "Deed of Trust"), encumbering the Property for the benefit of Aegis *and its successors and assigns*. *See* Complaint, ¶ 12; *see also* the Deed of Trust, which is attached to the hereto as **Exhibit B**.

5. Under the terms of the Deed of Trust, Munholland *irrevocably* granted and conveyed all of her rights, title and interests in and to the Property to the "Note Holder" as a security for the repayment of the Note. More specifically, Munholland expressly agreed and acknowledged in the Deed of Trust that:

> The beneficiary of this Security Instrument is MERS (solely as nominee for Lender and Lender's successors and assigns) and the successors and assigns of MERS. This Security Instrument secures to Lender: (i) the repayment of the Loan, and all renewals, extensions and modifications of the Note, and (ii) the

> performance of Borrower's covenants and agreements under this Security Instrument and the Note. For this purpose, Borrower, in consideration of the debt and the trust herein created, *irrevocably grants and conveys to Trustee, in trust, with power of sale*, the following described property . . .

Exhibit B, p. 2 (emphasis added).

6. As with the Note, Munholland further acknowledged that the rights granted to Aegis under the Deed of Trust could be assigned without notice to Munholland. Specifically, the Deed of Trust provides that "[t]he Note or a partial interest in the Note (together with this Security Instrument) can be sold one or more times *without prior notice to Borrower*." **Exhibit B**, § 20 (emphasis added).

7. On April 12, 2007, the Deed of Trust was recorded with the Clerk and Recorder for Douglas County, Colorado (the "Recorder") at reception number 2007029062. *See* Complaint, ¶ 12

8. Aegis indorsed the Note in blank, and the Note was subsequently assigned to Wells Fargo, as Trustee, and serviced by EMC. *See* Complaint, ¶¶ 16, 27, 34, 44-48; *see also* **Exhibit A** (Allonge to Note).

B. MUNHOLLAND'S DEFAULT AND THE FORECLOSURE PROCEEDINGS

9. Munholland defaulted under the Note and Deed of Trust. *See* Complaint, ¶¶ 27, 44; *see also* Wells Fargo's April 6, 2011 Rule 120 Motion for Order Authorizing Sale (the "Rule 120 Motion") which was filed in the Foreclosure Proceedings and attached hereto as **Exhibit C**.

10. On February 14, 2011, and as a result of Munholland's default under the Note and Deed of Trust, Wells Fargo filed a Notice of Election and Demand for Sale (the "NEDS") with the Public Trustee. *See* Complaint, ¶ 16; *see also* the NEDS, which is attached hereto as **Exhibit D**.

11. The NEDS was recorded with the Recorder on February 16, 2011 at reception number 2011011298. *See* Complaint, ¶ 16; *see also* **Exhibit D**.

12. On April 6, 2011, Wells Fargo commenced the Foreclosure Proceedings by filing its Rule 120 Motion with the State Court. *See* Complaint, ¶¶ 30, 93; *see also* **Exhibit C**.

13. In connection with its Rule 120 Motion, Plaintiff received Wells Fargo's Notice of Hearing May 4, 2011 in the Foreclosure Proceedings (the "Notice of Hearing"), which advised Munholland that a hearing on Wells Fargo's Rule 120 Motion had been set for May 4, 2011 and that:

> any interested party who disputes the existence of such default under the terms of said Deed of Trust and Negotiable Instrument secured thereby, or who otherwise disputes the existence of circumstances authorizing the exercise of the power of sale contained in said Deed of Trust, or who desires to raise such other grounds for the objection to the issuance of an order Authorizing Sale . . . must file a response to [the Sale Motion].

See Complaint, ¶ 30; *see also* Notice of Hearing, which was filed in the Foreclosure Proceedings on April 6, 2011 and is attached hereto as **Exhibit E**.

14. The Notice of Hearing was mailed to Munholland on April 4, 2011 and posted on the front door of Munholland's home on the Property on April 11, 2011. *See* Complaint, ¶ 30; *see also* the Certificate of Mailing and Posting of Notice which was filed in the Foreclosure Proceedings on April 6, 2011 and is attached hereto as **Exhibit F**; *see also* the Return of Service which was filed in the Foreclosure Proceedings on April 20, 2011 and is attached hereto as **Exhibit G**.

15. Despite having received the Notice of Hearing, Munholland never disputed the existence of a default under the Note in the Foreclosure Proceedings, did not file a response to the Rule 120 Motion and did not appear in the Foreclosure Proceedings or otherwise oppose the

Rule 120 Motion. *See, e.g.,* Docket of Foreclosure Proceedings, a copy of which is attached hereto as **Exhibit H**.

16. On May 9, 2011, the State Court in the Foreclosure Proceedings issued an Order Authorizing Sale of the Property (the "Sale Authorization Order"). *See* the Sale Authorization Order filed in the Foreclosure Proceedings on May 9, 2011 and which is attached hereto as **Exhibit I**.

17. On June 8, 2011, and pursuant to the Sale Authorization Order, the Property was sold at public auction to Wells Fargo. *See* Complaint, ¶ 19; *see also* the Return of Sale filed in the Foreclosure Proceedings on June 22, 2011 and which is attached hereto as **Exhibit J**.

18. On June 22, 2011, the State Court in the Foreclosure Proceedings issued its Order Approving the Sale (the "Sale Approval Order"). *See* the Sale Approval Order filed in the Foreclosure Proceedings on June 22, 2011 and which is attached hereto as **Exhibit K**.

19. On June 23, 2011, the Public Trustee issued a Public Trustee's Confirmation Deed (the "Confirmation Deed"), vesting the title of the Property in Wells Fargo and extinguishing all liens and encumbrances junior to Wells Fargo's Deed of Trust on the Property pursuant to C.R.S. §§ 38-38-501, 502. *See* Complaint, ¶ 20; *see also* the Confirmation Deed, which was filed with the Recorder on June 23, 2011 at reception number 2011038105 and which is attached hereto as **Exhibit L**.

C. BELLA HOMES'S ACQUISITION OF PROPERTY AFTER COMMENCEMENT AND NOTICE OF FORECLOSURE PROCEEDINGS

20. On or about April 22, 2011, after the NEDS was filed with the Recorder and after Munholland received the Notice of Hearing, Munholland executed a Warranty Deed allegedly conveying the Property to Bella Homes "for and in consideration of the sum of TEN AND

00/100'S ($10.00) DOLLARS . . . ," and which was filed with the Recorder on September 8, 2011 at reception number 2011054089 (the "Warranty Deed"). *See* Complaint, ¶ 17; *see also* Warranty Deed, which is attached hereto as **Exhibit M**.

21. In connection with Munholland's conveyance of the Property to Bella Homes, Bella Homes granted Munholland a three-year option to repurchase the Property for 90% of its appraised value (the "Option Agreement"). *See* Complaint, ¶ 18; *see also* the Option Agreement, which is attached hereto as **Exhibit N**.

22. On November 7, 2011, Plaintiffs commenced this action in the State Court. On December 28, 2011, Defendants removed this action to this Court.

III. ARGUMENT

A. PLAINTIFFS' COMPLAINT SHOULD BE DISMISSED PURSUANT TO FED. R. CIV. P. 12(b)(6)

Under Fed. R. Civ. P. 12(b)(6), a complaint must be dismissed when the allegations asserted in the complaint fail "to state a claim upon which relief may be granted." Under this Rule, courts should dismiss claims that fail to allege "enough facts to state a claim for relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). This "requirement of plausibility serves not only to weed out claims that do not (in the absence of additional allegations) have a reasonable prospect of success, but also to inform the defendants of the actual grounds of the claim against them." *Robbins v. Oklahoma*, 519 F.3d 1242, 1248 (10th Cir. 2008). To satisfy the requisite notice, a complaint must make "'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Twombly*, 550 U.S. at 555 (*quoting Conley v. Gi*bson, 355 U.S. 41, 47 (1957)). But the United States

Supreme Court has explained that "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*." *Id*. At 555. (emphasis added). Accordingly, "the mere metaphysical possibility that ***some*** plaintiff could prove ***some*** set of facts in support of the pleaded claims is insufficient; the complaint must give the court reason to believe that ***this*** plaintiff has a reasonable likelihood of mustering factual support for ***these*** claims." *Ridge at Red Hawk, L.L.C. v. Schneider*, 493 F.3d 1174, 1177 (10th Cir. 2007) (emphasis in original). In this regard, and in evaluating a Rule 12(b)(6) motion, courts only consider the well-pled facts in the complaint, as opposed to conclusory allegations, as true. *Sutton v. Utah State School for Deaf & Blind*, 173 F.3d 1226, 1236 (10th Cir. 1999).

Further, in ruling on a Rule 12(b)(6) motion, the court may refer to documents that are referenced in the complaint or central to plaintiffs' claims without converting the motion to one for summary judgment. *Alvarado v. KOB-TV, L.L.C.*, 493 F.3d 1210, 1215 (10th Cir. 2007). When referring to documents referenced in a complaint for purposes of a Rule 12(b) motion, it is well established that the document itself prevails over the allegations in the Complaint. *Jacobsen v. Deseret Book Co.*, 287 F.3d 936, 941-942 (10th Cir. 2002); *Thompson v. Illinois Dept. of Professional Regulation*, 300 F.3d 750, 754 (7th Cir. 2002).

Additionally, in ruling on a 12(b) motion, a trial court may take judicial notice of its own records and files as well as court records in a related proceeding without converting the motion to one for summary judgment. *See, e.g., St. Louis Baptist Temple, Inc. v. F.D.I.C.*, 605 F.2d 1169, 1172 (10th Cir. 1979) ("a court may, Sua sponte, take judicial notice of its own records and preceding records if called to the court's attention by the parties . . . Further, it has been held

that federal courts, in appropriate circumstances, may take notice of proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to the matters at issue."); *Pace v. Swerdlow*, 519 F.3d 1067, 1072-73 (10th Cir. 2008) (taking judicial notice of state court documents in considering motion to dismiss under Fed. R. Civ. P. 12(b)(6)). Moreover, and pursuant to F.R.E. 201, a trial court may *sua sponte* take judicial notice of adjudicative facts that are not subject to reasonable dispute in that they are 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." *See* F.R.E. 201(a), (b), and (c).

Here, Plaintiffs' Complaint references, relies upon, and discusses the Note, the Deed of Trust, the NEDS, the Foreclosure Proceedings, the Confirmation Deed, the Warranty Deed, and the Option Agreement. *See* Complaint, ¶¶ 12, 16, 17-20, 22-24, 28, 29, 34, 36, 43, 70, 79, 84-87, 91-94, 124, 129. Additionally, the Rule 120 Motion, the Note, the Deed of Trust, the Notice of Hearing, the Certificate of Mailing and Posting of Notice, the Return of Service, the Sale Authorization Order, the Return of Sale, and the Sale Approval Order were all filed in the Foreclosure Proceedings and are subject to this Court's judicial notice. *See* **Exhibit H**. Accordingly, the Court can refer to the attached documents without converting the Defendants' Motion to one for summary judgment. Moreover, because the attached exhibits together with the "well-pled" allegations in the Complaint fail to support any of Plaintiffs' Claims for Relief as a matter of law, the Complaint should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6).

B. PLAINTIFFS' FIRST, SECOND AND SEVENTH CLAIMS FOR REIEF FAIL AS A MATTER OF LAW

1. Plaintiffs' First, Second and Seventh Claims for Relief Fail as a Matter of Law Because Wells Fargo Properly Foreclosed on the Property Under Colorado Law

Plaintiffs' First Claim for Relief (Declaratory Judgment), Second Claim for Relief (Quiet Title), and Seventh Claim for Relief (Temporary and Permanent Injunctive Relief) are all premised on the erroneous *argument* that Wells Fargo was not the "real party" in interest to foreclose on the Property. Specifically, Plaintiffs allege that Wells Fargo was not the "real party in interest" entitled to foreclose on the Property because, among other things, it never provided "evidence and or proof of legal ownership of the Deed of Trust sufficient to commence a foreclosure action." *See* Complaint, ¶¶ 25, 29, 31, 42, 43, 79, 89-94. Plaintiffs' *argument* is simply without any factual or legal merit as the undisputed facts demonstrate that Wells Fargo was the "real party in interest" to foreclose under Colorado's foreclosure statutes and the Colorado Uniform Commercial Code (the "U.C.C."). As such, Plaintiffs' First, Second, and Seventh Claims for Relief should be dismissed pursuant to Rule 12(b)(6).

More specifically, under Colorado's foreclosure statutes, the "[h]older of an evidence of debt [such as a note] may elect to foreclose." C.R.S. § 38-38-101. Similarly, under the U.C.C., the "holder" of an instrument, such as a note, is entitled to enforce the instrument. *See* C.R.S. § 4-3-301. A person is a "holder" of an instrument if the person "is *in possession* of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession." C.R.S. § 4-1-201(b)(20)(A) (emphasis added). Under C.R.S. § 4-3-201(b), "[i]f an instrument is payable to bearer, it may be negotiated by transfer of possession alone." Specifically, "[w]hen indorsed in blank, an instrument becomes payable to bearer and may be

negotiated by transfer of possession alone until specially indorsed." C.R.S. § 4-3-205(b). The U.C.C. defines "negotiation" as "a transfer of possession, whether voluntarily or involuntarily, of an instrument [such as a note] by a person other than the issuer to a person who thereby becomes its holder." C.R.S. § 4-3-201(a). Thus, in the context of foreclosures, "it is the '*owner of an evidence of debt which is secured by a deed of trust containing a power of sale'* that is entitled to initiate a foreclosure proceeding by supplying the required notices and evidence of the debt to the 'public trustee of the county wherein such property is located.'" *In re Roberts*, 367 B.R. 677, 684 (Bankr. D. Colo. 2007) (citing C.R.S. § 38-38-101) (emphasis added); *see also Columbus Investments v. Lewis*, 48 P.3d 1222, 1226 (Colo. 2002) ("The transfer or assignment of a negotiable promissory note carries with it, as an incident, the deed of trust or mortgage upon real estate or chattels that secure its payment."). Stated differently, the entity that physically holds the original note is entitled to foreclose on the collateral for that note including, without limitation, the right to foreclose on property pledged as collateral for the note in a deed of trust.

That is precisely the case here. Aegis, the original noteholder, indorsed the Note in blank. *See* **Exhibit A** (Allonge to Note). With the blank indorsement, the Note became "payable to bearer," and could "be negotiated by transfer of possession alone." *See* C.R.S. § 4-3-205(b). Wells Fargo had possession of the Note and was the current holder when it commenced the Foreclosure Proceedings, and Plaintiffs never contested Wells Fargo's status as a "real party in interest," including whether it was the current holder of the Note, in the Foreclosure Proceedings. *See* **Exhibit C**, p. 2; **Exhibit H**. Accordingly, Wells Fargo was the "holder of the evidence of debt" and well within its rights to "elect to foreclose" under C.R.S. § 38-38-101.

Further, the Deed of Trust contains a power of sale authorizing Wells Fargo, the holder of the Note, to commence *foreclosure* proceedings. In particular, the Deed of Trust provides that, in the event of a default under the Note, "*Lender* at its option may require immediate payment in full of all sums secured by this Security Instrument without further demand and may invoke the power of sale and any other remedies permitted by Applicable Law." *See* Deed of Trust, ¶ 22 (emphasis added). Although the Deed of Trust defines "Lender" as "AEGIS WHOLESALE CORPORATION," *id.*, p. 1, Munholland specifically agreed that the Deed of Trust inures to the benefit of the Lender's successors and assigns. *See id.*, ¶ 13 ("The covenants and agreements of this Security Instrument shall bind (except as provided in Section 20 [if note is sold and serviced by loan servicer other than note purchaser, mortgage loan servicing obligations are not automatically assumed by note purchaser]) and benefit the successors and assigns of Lender."). Munholland also specifically agreed that "[t]he Note or a partial interest in the Note (together with this Security Instrument) can be sold one or more times *without prior notice to Borrower*." *See id.*, ¶ 20 (emphasis added). Accordingly, as Wells Fargo succeeded to Aegis's rights under the Note by assignment, Wells Fargo was entitled to invoke the Deed of Trust's power of sale and commence the Foreclosure Proceedings upon Munholland's default under the Note.

Munholland defaulted under the Note – a fact Plaintiffs do not dispute. *See* Complaint, ¶ 27. Indeed, despite having received the Notice of Hearing, Munholland never disputed the existence of a default under the Note, appeared in the Foreclosure Proceedings, or otherwise opposed the Rule 120 Motion. *See* **Exhibits E, F**, **G**, **H**. Munholland does not even dispute her default under the Note in the Complaint. *See* Complaint, ¶ 27. Wells Fargo thus had the legal and contractual right to foreclose on the Property under the Deed of Trust and Colorado law.

In sum, and because it is undisputed that Munholland defaulted under the Note and Deed of Trust and because the Note and Deed of Trust provide that the "Note Holder" can foreclose on the Property, Wells Fargo was entitled to foreclose on the Property in the Foreclosure Proceedings as a matter of law. Indeed, that is precisely what the State Court ruled when it issued the Sale Authorization Order and the Sale Approval Order[1] in the Foreclosure Proceedings. Accordingly, Plaintiffs' First, Second, and Seventh Claims for Relief fail under Rule 12(b)(6).

2. Plaintiffs' First, Second And Seventh Claims For Relief Fail As A Matter of Law Because The Confirmation Deed Extinguished Any Interests They Have In The Property As A Matter Of Law

Plaintiffs' First, Second and Seventh Claims for Relief also fail as a matter of law because the Confirmation Deed extinguished any interest they may have had in the Property as a matter of law pursuant to C.R.S. § 38-38-501.

In particular, C.R.S. § 38-38-501 provides, in pertinent part, that

> Upon the expiration of all redemption periods allowed to all lienors entitled to redeem under part 3 of this article or, if there are no redemption periods, upon the close of the officer's business day eight business days after the sale, title to the property sold *shall vest in the holder of the certificate of purchase* or in the holder of the last certificate of redemption in the case of redemption. Subject to the right to cure and the right to redeem provisions of section 38-38-506 and subject to the provisions of section 38-41-212(2), *such title shall be free and clear of all liens and encumbrances junior to the lien foreclosed*.

(emphasis added). The phrase "free and clear" in this section means "that title to property 'is not incumbered by any liens.'" *First Interstate Bank v. Tanktech, Inc*., 864 P.2d 116, 119 (Colo.

[1] In fact, any attempt of Plaintiffs to dispute these Orders now (including whether Wells Fargo had standing to foreclose in the Foreclosure Proceedings) would likely be barred by the *Rooker-Feldman* doctrine. *See, e.g., Brode v. Chase Home Finance, LLC*, Case No. 10-cv-00692-WYD-MJW, 2010 WL 2691693, *6 (D. Colo. Jul. 6, 2010) (acknowledging that the *Rooker-Feldman* doctrine barred plaintiff-homeowner's claims predicated upon allegations that the lender lacked standing to foreclose plaintiff's property).

1993) (quoting *Sant v. Stephens*, 753 P.2d 752, 759 (Colo. 1988)). Thus, "upon foreclosure of a senior security interest, any subordinate leases, liens or encumbrances are extinguished once the redemption period has expired." *Id.* Indeed, Colorado courts have consistently held that the "the plain intent" of this provision "is to extinguish all subordinate liens upon foreclosure" so that a subsequent purchaser or transferee may "rely on the state of record title." *Id.*

Here, it is undisputed that title to the Property vested in Wells Fargo when it received the Confirmation Deed on June 23, 2011. *See* C.R.S. § 38-38-501. As such, any interest Muholland and Bella Homes had in the Property was extinguished as a matter of law. In fact, Bella Homes did not file its purported interest in the Property with the Recorder until after the foreclosure sale occurred. *See* Complaint, ¶ 17 ("Said document was recorded with the Douglas County Clerk and Recorder on September 8, 2011"). Under these circumstances, Bella has absolutely no standing to assert any interest in the Property whatsoever and the filing of its Warranty Deed after the foreclosure sale with the Recorder is, at best, a "groundless of otherwise invalid" lien under C.R.S. § 38-35-109(3).

Moreover, any purported interest Bella Homes had in the Property was subject to the Deed of Trust and the NEDS. It is axiomatic that a recorded instrument, such as the Deed of Trust, puts all parties on notice of its existence. *See* C.R.S. 38-35-106(1) ("Any written instrument required or permitted to be acknowledged affecting title to real property . . . after being recorded in the office of the county clerk and recorder of the county where the real property is situate, shall be notice to all persons or classes of persons claiming an interest in said property."); *Arnove v. First Fed. Sav. & Loan Assoc. of Tarpon Springs, Florida*, 713 P.2d 1329, 1331 (Colo. App. 1985) ("a person is deemed to have constructive notice of any instrument

encumbering the title to real property once the document has been recorded in the office of the county clerk and recorder of the county where such real property is situated."). Thus, "[w]hen a seller transfers real property that is encumbered by a deed of trust, the buyer may either take the property subject to the encumbrance or assume the obligations secured by the encumbrance itself." *Bayou Land Company v. Talley*, 924 P.2d 136, 152 (Colo. 1996). To that end, "[i]f the buyer acquires the land subject to the encumbrance, the land continues to secure the obligation . . . ." *Id.* Thus, when a buyer purchases property that is subject to a recorded deed of trust, the buyer takes the property subject to that deed of trust, and the mortgagee may still look to the property to satisfy the borrower's obligation to it.

Here, as Plaintiffs acknowledge in the Complaint, the Deed of Trust was recorded with the Recorder on April 12, 2007 at reception number 2007029062. *See* Complaint, ¶ 12. Further, on February 16, 2011, Wells Fargo filed the NEDS with the Recorder at reception number 2011011298. *Id.*, at ¶ 16. Two months later, and after Wells Fargo commenced the Foreclosure Proceedings and after serving the Notice of Hearing on Muholland, Bella Homes allegedly "acquired" the Property. *Id.*, at ¶ 17. However, because the Deed of Trust and NEDS were publicly on file with the Recorder before Bella allegedly acquired the Property, any interest Bella had in Property was subject to the Deed of Trust and the NEDS. *See Province v. Johnson*, 894 P.2d 66 (Colo. App. 1995). Further, when Wells Fargo foreclosed its senior interest in the Property with the Public Trustee and obtained its Confirmation Deed, Bella Homes's alleged junior interest in the Property was extinguished pursuant to C.R.S. § 38-38-501 as a matter of law. Under these circumstances, Plaintiffs have no standing to assert any claim for an interest in the Property. Therefore, Plaintiffs' First, Second and Seventh Claims for Relief, which are all

premised upon their alleged interest in the Property, fail as a matter of law and should be dismissed.

3. Plaintiffs' First, Second and Seventh Claims For Relief Fail as a Matter of Law Because Munholland Defaulted Under Her Loan

Plaintiffs "Declaratory Judgment," "Quiet Title," and "Temporary and Permanent Injunction" Claims amount to claims for "wrongful foreclosure," and as such, fail because Munholland defaulted under her Loan and lacks standing to assert them as a matter of law. As recently held by the Colorado Court of Appeals, a party asserting claims that its secured lender wrongfully foreclosed on its collateral must plead and prove that it was not in default under its loan when the foreclosure proceeding commenced. *See Ball v. OneWest Bank, FSB*, No. 11CA0169, slip op. at 14-15 n.5 (Colo. App. Jan. 19, 2012) (attached hereto as **Exhibit O**); *Fields v. Millsap & Singer, P.C.*, 295 S.W.3d 567, 571 (Mo. Ct. App. 2009) ("[a] plaintiff seeking damages in a wrongful foreclosure action must plead and prove that when the foreclosure proceeding was begun, there was no event of default on its part that would give rise to a right to foreclose." (internal quotations omitted)); *Smith v. Community Lending, Inc.*, 773 F.Supp.2d 941, 944-45 (D. Nev. 2011) ("no damages claim for wrongful foreclosure lies where there is in fact a default.").

Here, Plaintiffs' First, Second, and Seventh Claims for Relief amount to claims for "wrongful foreclosure." Munholland's default under the Note is, and always has been, undisputed, and nowhere in the Complaint do Plaintiffs contest Munholland's default. *See* Complaint, ¶ 27; *see also* **Exhibit C**. As such, Plaintiffs are unable to maintain their "Declaratory Judgment," "Quiet Title," and "Temporary and Permanent Injunction" claims. These claims should accordingly be dismissed under Rule 12(b)(6).

4. Plaintiff Bella Homes's Purported Acquisition of the Property Should be Deemed Void Because Bella Homes Engaged in Unconscionable Conduct Under the Colorado Foreclosure Protection Act

Bella Homes's "Declaratory Judgment," "Quiet Title," and "Temporary and Permanent Injunction" Claims fail as a matter of law because Bella Homes engaged in unconscionable conduct under the Colorado Foreclosure Protection Act, and its purported acquisition of the Property from Munholland should be deemed void.

Recognizing that "too many home owners in financial distress, especially the poor, elderly, and financially unsophisticated, are vulnerable to a variety of deceptive or unconscionable business practices designed to dispossess them or otherwise strip the equity from their homes," the State of Colorado enacted the Colorado Foreclosure Protection Act, C.R.S. § 6-1-1101, *et seq.* (the "CFPA"), *See* C.R.S. § 6-1-1102. The CFPA accordingly places limits on what an "equity purchaser," like Bella Homes, can do. Subject to certain exceptions, inapplicable here, an "equity purchaser" is "a person, other than a person who acquires a property for the purpose of using such property as his or her personal residence, who acquires title to a residence in foreclosure . . . ." C.R.S. § 6-1-1103(2). In this context, a "residence in foreclosure" is defined as "a residence or dwelling . . . that is occupied as the home owner's principal place of residence, is encumbered by a residential mortgage loan, and against which a foreclosure action has been commenced or as to which an equity purchaser otherwise has actual or constructive knowledge that the loan is at least thirty days delinquent or in default." C.R.S. § 6-1-1104(8)(b).

Here, Bella Homes fits squarely within the CFPA as an "equity purchaser." On or about April 22, 2011, Bella Homes purported to acquire title to the Property through the Warranty

Deed. *See* **Exhibit M**. When it did so, the Property was a "residence in foreclosure," as Wells Fargo had already commenced the Foreclosure Proceedings by filing the Rule 120 Motion on April 6, 2011. *See* **Exhibits C, H**. Moreover, Bella Homes would have had at least constructive notice of Munholland's default under the Loan, as the NEDS were publicly recorded with the Recorder on February 16, 2011 – more than thirty days prior to Bella Homes's acquisition of the Property. *See* Complaint, ¶ 16. In other words, Bella Homes purported to acquire title to the Property when it was a "residence in foreclosure," and Bella Homes is thus an "equity purchaser" under the CFPA.

Despite qualifying as an "equity purchaser" under the CFPA, Bella Homes violated the CFPA by engaging in "unconscionable" conduct. Under the CFPA, when purchasing a home from a home owner and granting an option to the home owner to repurchase the property at a later date, the "equity purchaser" must meet certain specified conditions. Specifically, the price the home owner must pay to exercise the option to repurchase the residence in foreclosure cannot be "unconscionable." C.R.S. § 6-1-1115(e). More specifically, "a repurchase price exceeding twenty-five percent of the price at which the equity purchaser acquired the residence in foreclosure creates a rebuttable presumption that the reconveyance contract is unconscionable." *Id.*

Here, Bella Homes's transaction with Munholland was unconscionable on its face. The Warranty Deed recites that Bella Homes acquired the property "for and in consideration of the sum of TEN AND 00/100'S ($10.00) Dollars and other good and valuable consideration . . . ." *See* **Exhibit M**. Meanwhile, the Option to reconvey the Property to Munholland provides, "[a]t the time the Buyer [Munholland] exercises their right to purchase the property, Seller [Bella

Homes] will sell the property at 90% of its appraised value." In other words, if 90% of the appraised value of the property is any amount in excess of $2.50 – "twenty-five percent of the price at which the equity purchaser acquired the residence in foreclosure" – Bella Homes's transaction with Munholland is "unconscionable" on its face. Inasmuch as Bella Homes violated the CFPA, the Court should refuse to enforce Munholland's transaction with Bella Homes. *See* C.R.S. § 1119(2)(a) ("If a court, as a matter of law, finds an equity purchaser contract or any clause of such contract to have been unconscionable at the time it was made, the court may refuse to enforce the contract . . . "). To the extent Munholland's purported conveyance of the Property to Bella Homes is invalidated, Bella Homes lacks standing to bring this action.

C. PLAINTIFFS' FDCPA CLAIM FAILS AS A MATTER OF LAW

Plaintiffs' Third Claim for Relief (Violation of the Federal and Colorado Fair Debt Collection Practices Act) fails because the Claim for Relief is time-barred, neither Chase nor EMC is a "Debt Collector,"[2] and the Complaint fails to allege enough facts to state a claim for relief under the FDCPA "that is plausible on its face."

As an initial matter, claims under the FDCPA are subject to a one-year statue of limitations. *See* 15 U.S.C. § 1692k(d) ("[a]n action to enforce any liability created by [the FDCPA] may be brought . . . within one year from the date on which the violation occurs."); *see also Clymer v. Discover Bank*, Case No. 10-cv-01526, 2011 WL 3319542, at *3 (C.D. Cal. July

[2] Although the Complaint references the Colorado Fair Debt Collection Practices Act, C.R.S. § 12-14-101, *et seq.*, Plaintiffs do not plead any violation of that Act. *See* Complaint, ¶¶ 95-97. Instead, Plaintiffs limit their allegations to violations of the Federal Fair Debt Collection Practices Act, 15 U.S.C. § 1692, *et seq*. (the "FDCPA"). *See id.* Accordingly, Plaintiffs have failed to state a claim under the Colorado Fair Debt Collection Practices Act. Further, although the heading for Plaintiffs' Third Claim for Relief generally states that it is against all Defendants, the allegations only pertain to Chase and EMC. *See* Complaint, ¶¶ 95-97. For the reasons discussed herein, Plaintiffs fail to state claims against Chase and EMC under the FDCPA. Inasmuch as Plaintiffs fail to allege a single fact as to any other Defendant in relation to the FDCPA, Plaintiffs' claims under the FDCPA must similarly fail as to the other Defendants.

29, 2011) (dismissing FDCPA claims premised on letters sent more than one-year before plaintiff initiated action). Here, Plaintiffs' *sole factual allegation* under its FDCPA claim – that Chase and EMC somehow violated the FDCPA by "falsely promising to consider Plaintiff Munholland in good faith for loan modifications on the condition that they [sic] submit TPP payments or forbearance payments" – occurred approximately three years ago. *See* Complaint, ¶¶ 44-47, 67(a), 97, 117, 120. Plaintiffs' FDCPA claims are thus time-barred as the alleged act in violation of the FDCPA occurred more than one year before Plaintiffs filed their Complaint. *See* 15 U.S.C. § 1692k(d).

Even if Plaintiffs' FDCPA claims were not time-barred, however, the FDCPA is inapplicable because Chase and EMC are not "Debt Collectors." The FDCPA applies only to the actions of "Debt Collectors." *See* 15 U.S.C. § 1692; *Llewellyn v. Allstate Home Loans, Inc.* 795 F.Supp.2d 1210, 1231 (D. Colo. 2011) ("The FDCPA only applies to 'debt collectors.'"). Subject to certain exclusions, the FDCPA defines a "Debt Collector" as "any person who uses any instrumentality of interstate commerce or the mails in any business, the principal purpose of which is the collection of any debts, who regularly collects or attempts to collect, directly or indirectly, *debts owed or due or asserted to be owed or due another*." 15 U.S.C. § 1692a(6) (emphasis added). As a result, creditors, mortgage servicing companies, or assignees of the debt are not "Debt Collectors" under the FDCPA if they acquired the loan before it was in default. *See Llewellyn*, 795 F.Supp.2d at 1231 (" . . . a creditor mortgage servicing company, or assignee of the debt is not a 'debt collector' under the FDCPA if the entity acquired the loan before it was in default.") (citing *Perry v. Stewart Title Co.*, 756 F.2d 1197, 1208 (5th Cir. 1985) ("[A] debt collector [under section 1692a(6)] does not include the consumer's creditors, a mortgage

servicing company, or an assignee of a debt, as long as the debt was not in default at the time it was assigned.")). In other words, a party that takes a note by transfer prior to the borrower's default and its servicer are not "Debt Collectors" and accordingly not subject to the FDCPA.

Here, EMC acted as the servicer of the Loan, and EMC acted in this function as Chase's affiliate. *See* Complaint, ¶¶ 6, 21, 46-48. Specifically, Plaintiffs acknowledged that they were in default three years prior to the Complaint and that EMC already serviced the Loan when they were in default. *See* Complaint, ¶¶ 21, 44-48, 64. Moreover, the Complaint fails to allege that Chase and EMC acted in any capacity other than as a mortgage servicing company. Accordingly, the FDCPA is inapplicable because Chase and EMC do not qualify as "Debt Collectors."

Plaintiffs' FDCPA claim also fails because it does not allege "enough facts to state a claim for relief that is plausible on its face" and merely alleges "conclusory allegations," devoid of any factual basis. *See* Complaint, ¶¶ 96-97; *see also Twombly*, 550 U.S. at 570. Indeed, Plaintiffs' *sole factual allegation* under its FDCPA claim – that Chase and EMC somehow violated the FDCPA by "falsely promising to consider Plaintiff Munholland in good faith for loan modifications on the condition that they [sic] submit TPP payments or forbearance payments" – does not fall under the enumerated conduct of 15 U.S.C. § 1692e that would constitute a violation of the FDCPA. *See* Complaint, ¶ 97. The Complaint alleges no other conduct that would constitute an FDCPA violation. *See id.*, ¶¶ 96-97. Under these circumstances, the Court should dismiss Plaintiffs' Third Claim for Relief.

D. PLAINTIFFS' "BREACH OF CONTRACT," "PROMISSORY ESTOPPEL," AND "FRAUD" CLAIMS FAIL UNDER THE CREDIT AGREEMENT STATUTE OF FRAUDS AS A MATTER OF LAW

Plaintiffs' Fourth Claim for Relief (Breach of Contract), Sixth Claim for Relief (Promissory Estoppel), and Fifth Claim for Relief (Fraud) are barred as a matter of law by Colorado's Credit Agreement Statute of Frauds, C.R.S. § 38-10-124.

1. Plaintiffs' Breach of Contract Claim Fails Under the Credit Agreement Statute of Frauds as a Matter of Law

A party claiming "Breach of Contract" must prove (1) the existence of a contract, (2), performance by the plaintiff or some justification for nonperformance, (3) failure to perform the contract by the defendant, and (4) resulting damages to the plaintiff. *See Western Distributing Co. v. Diodosio*, 841 P.2d 1053, 1058 (Colo. 1992). Although not all contracts must be in writing, the Colorado Statute of Frauds specifically provides that "no debtor or creditor may file or maintain an action or a claim relating to a credit agreement involving a principal amount in excess of twenty-five thousand dollars unless the credit agreement is in writing and is signed by the party against whom enforcement is sought." C.R.S. § 38-10-124(2). A "credit agreement" is defined as:

> (I) A contract, *promise, undertaking, offer, or commitment to lend, borrow, repay, or forbear repayment of money*, to otherwise extend or receive credit, or to make any other financial accommodation;
>
> (II) Any *amendment of, cancellation of, waiver of, or substitution for* any or all of the terms or provisions of any of the credit agreements defined in subparagraphs (I) and (III) . . . ; and
>
> (III) Any *representations and warranties made* or omissions *in connection with the negotiation, execution, administration, or performance of, or collection of sums due* under, any of the credit agreements defined in subparagraphs (I) and (II) . . .

Id., at § 38-10-1238(a) (emphasis added). Courts interpret the definition of "credit agreement" broadly. *See Schoen v. Morris*, 15 P.3d 1094, 1097 (Colo. 2000) ("Colorado cases applying the statute have adopted a broad definition of the term "credit agreements."). The Credit Agreement Statute of Frauds thus "applies to effectuate a bar to any action or claim *relating to* a credit agreement and expressly precludes exceptions by implication or construction." *Norwest Bank Lakewood v. GCC P'ship.*, 886 P.2d 299, 302 (Colo. App. 1994) (emphasis in original). Specifically, "[t]he plain language of the statute renders it applicable to a purported agreement, *negotiation, representation, or promise* that assertedly *amends, cancels, or waives* any terms or provisions of a previous credit agreement . . . [and] renders representations, warranties, or omissions in connection with credit agreements *inoperative unless they are reduced to a writing*." *Id.* (emphasis added). In that regard, any representation or promise in connection with a modification of a written credit agreement must also be in writing to be enforceable. *See id.* (precluding actions based on alleged oral promises or representations made during negotiations to modify the terms of promissory note).

Here, the Statute of Frauds bars Plaintiffs' claim for "breach of contract" as a matter of law, as any alleged modifications or representations concerning Munholland's Loan qualify as "credit agreements" under the Statute of Frauds. *See* C.R.S. § 38-10-124(a); *Norwest Bank Lakewood*, 886 P.2d at 302. Yet, nowhere in the Complaint do Plaintiffs allege the existence of a *specific* written agreement with Defendants for a modification. Instead, Plaintiffs' make vague reference to "implied" promises, "further representations," and "common, uniform oral representations." *See* Complaint, ¶¶ 104-05. None of these allegations is sufficient to allege the existence of a *contract* with Defendants, much less a written credit agreement, as required by the

Statute of Frauds. Absent any such writing, Plaintiffs' Third Claim for Relief (Breach of Contract) should fail as a matter of law.

2. Plaintiffs' "Promissory Estoppel" Claim Fails Under the Credit Agreement Statute of Frauds as a Matter of Law

Similarly, the Statute of Frauds expressly bars "promissory estoppel" claims in connection with credit agreements. The Statute of Frauds provides: *"A credit agreement may not be implied* under any circumstances, including, without limitation, from the relationship, fiduciary or otherwise, of the creditor and the debtor or from performance or partial performance by or on behalf of the creditor or debtor, *or by promissory estoppel*." C.R.S. § 38-10-124(3) (emphasis added); *see also Lang v. Bank of Durango*, 78 P.3d 1121, 1124 (Colo. App. 2003) ("the statute expressly bars the equitable claims of part performance and promissory estoppel"). Plaintiffs' "promissory estoppel" claim is thus impermissible on its face. Moreover, the Statute of Frauds bars Plaintiffs' "promissory estoppel" claim as Plaintiffs thinly base the "claim" on alleged "representations" and "promises." *See* Complaint, ¶ 117-18. The Statute of Frauds thus expressly precludes Plaintiffs' "promissory estoppel" claim, and their Sixth Claim for Relief should be dismissed as a matter of law.

3. Plaintiffs' "Fraud" Claim Fails Under the Credit Agreement Statute of Frauds as a Matter of Law

Plaintiffs' Complaint also fails with respect to its Fifth Claim for Relief (Fraud) because the "fraud" claim is barred by the Credit Agreement Statute of Frauds and because Plaintiffs have failed to plead this claim with specificity as required by Fed. R. Civ. P. 9(b).

The Credit Agreement Statute of Frauds bars a claim for "fraud" when the claim is based on oral representations relating to a credit agreement. *See Lang*, 78 P.3d at 1122-23. In *Lang*,

the Colorado Court of Appeals dismissed a claim for fraud as barred by the Credit Agreement Statute of Frauds because the claim was based on *oral representations* that a refinancing loan had been approved. *Id*.

Here, Plaintiffs similarly base their claims of "fraud" on "uniform oral representations." *See* Complaint, ¶ 111. Absent any allegation of a writing, Plaintiffs' "fraud" claims should be dismissed under Rule 12(b) as a matter of law for failure to satisfy the Credit Agreement Statute of Frauds.

Further, Fed. R. Civ. P. 9(b) provides, "In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." To satisfy this requirement, "[a]t a minimum, Rule 9(b) requires that a plaintiff set forth the 'who, what, when, where and how' of the alleged fraud . . . and must 'set forth the time, place, and contents of the false representation, the identity of the party making the false statements and the consequences thereof.'" *United States ex rel. Sikkenga v. Regence Blue Cross Blue Shield of Utah*, 472 F.3d 702, 726–27 (10th Cir. 2006) (internal quotations and citations omitted). Moreover, to meet this requirement, Plaintiffs must set forth "well-pleaded" factual allegations as opposed to "labels and conclusions" or "a formulaic recitation of the elements of a cause of action." *Twombly*, 550 U.S. at 555.

The Complaint falls woefully short of Rule 9(b)'s heightened pleading standard. Plaintiffs' "Fraud" claim is comprised of nothing more than naked "labels and conclusions" and "formulaic recitations" of the elements "of a cause of action." Indeed, Plaintiffs wholly fail to assert the "who, what, when, where, and how" requirements to satisfy Rule 9(b). For example, in alleging that Defendants made numerous material misrepresentations to Munholland,

Plaintiffs fail to specify the time, place, or specific content of the alleged misrepresentations, as well as who specifically made the representations to Munholland. *See* Complaint, ¶ 111. Instead, Plaintiffs merely allege representations made by "Chase and EMC," omitting which Defendant made the representation or when the representation was made. *See id.* Moreover, to the extent Plaintiffs allege representations *without limitation*, they fail to meet the pleading requirements of Rule 9(b). *See id.* Further, inasmuch Plaintiffs' assert their Fraud Claim "Against All Defendants," they fail to allege any representation by Defendants other than Chase and EMC, generally. *See* Complaint, ¶¶ 111-12. Thus, Plaintiffs' Fifth Claim for Relief (Fraud) should also be dismissed pursuant to Fed. R. Civ. P. 9(b).

IV. CONCLUSION

For the above-mentioned reasons, Wells Fargo Bank, National Association, as Trustee for the Certificateholders of Structured Asset Mortgage Investments II Inc. Bear Stearns Mortgage Funding Trust 2007-AR5 Mortgage Pass-Through Certificates, Series 2007-AR5, JPMorgan Chase Bank, N.A., EMC Mortgage LLC (formerly known as EMC Mortgage Corporation), and Mortgage Electronic Registration Systems, Inc. respectfully request that the Court enter an Order dismissing Plaintiffs' Complaint *with prejudice* and granting such other and further relief the Court deems just and proper under the circumstances.

Respectfully submitted this 25th day of January, 2012.

By: *s/ Adam L. Hirsch*

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ATTORNEYS FOR DEFENDANTS WELLS FARGO BANK, NATIONAL ASSOCIATION, AS TRUSTEE FOR THE CERTIFICATEHOLDERS OF STRUCTURED ASSET MORTGAGE INVESTMENTS II INC. BEAR STEARNS MORTGAGE FUNDING TRUST 2007-AR5 MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2007-AR5, JPMORGAN CHASE BANK, N.A., EMC MORTGAGE LLC (FORMERLY EMC MORTGAGE CORPORATION), AND MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.

CERTIFICATE OF SERVICE

I hereby certify that on January 25, 2012, I served a copy via U.S. Mail, postage prepaid, of the foregoing filing to the following address:

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