



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

BEAR STEARNS MORTGAGE
FUNDING TRUST 2007-AR2, by Wells Fargo
Bank, N.A., as Trustee,

Plaintiff,

v.

EMC MORTGAGE CORPORATION,

Defendant.

C.A. No. _____

VERIFIED COMPLAINT FOR DECLARATORY AND EQUITABLE RELIEF

Plaintiff Bear Stearns Mortgage Funding Trust 2007-AR2 (the "Trust"), by Wells Fargo Bank, N.A. (hereinafter the "Trustee"), solely in its capacity as Trustee, by its undersigned attorneys, for its Complaint against the Defendant EMC Mortgage Corporation, hereby alleges as follows:

NATURE OF THE ACTION

1. This is an action for declaratory judgment and equitable relief requiring defendant EMC Mortgage Corporation ("EMC") to provide the Trustee with certain documents and information that EMC is obligated to provide to the Trustee by contract. The Trustee has repeatedly requested that EMC provide access to the subject documents, and after several protestations, EMC sent a letter dated November 19, 2010, agreeing to comply with its clear contractual obligation to produce the documents. Since that time, however, EMC has played proverbial "rope a dope" and otherwise continued to drag its feet, and has produced nothing. As EMC well knows, access to the documents is essential for the Trustee to perform its duties as Trustee under the terms of the PSA (as defined below). Specifically, serious questions have been

raised by investors in the Trust about whether EMC breached representations and warranties regarding the quality of option-ARM mortgage loans purchased by the Trust. The Trustee is entitled to the underlying mortgage documents in the possession of EMC, in order to discharge its responsibilities to timely assess the merits of these claims. Accordingly, the Trustee brings this action to compel performance by EMC, on an expedited basis.

THE PARTIES

2. Plaintiff Bear Stearns Mortgage Funding Trust 2007-AR2 is a common law trust created and existing under the laws of the State of New York pursuant to the terms of the PSA (as defined below).

3. Wells Fargo Bank, N.A., acting solely in its capacity as Trustee on behalf of the Trust in this action, is a national banking association organized under the laws of the United States with a main office, as designated in its articles of association, at 101 N. Phillips Avenue, Sioux Falls, South Dakota, 57104.

4. Defendant EMC is a Delaware corporation with a principal place of business at 2780 Lake Vista Drive, Lewisville, Texas 75067-3884. EMC is a wholly owned subsidiary of Bear Stearns Company LLC (“Bear Stearns”), a Delaware limited liability company with a principal place of business in New York.

FACTUAL ALLEGATIONS

The Pooling and Servicing Agreement

5. The Trustee and EMC are parties to a Pooling and Servicing Agreement (the “PSA”) dated February 1, 2007. The PSA is attached hereto as Exhibit 1. All capitalized terms not otherwise defined herein shall have the meaning ascribed in the PSA.

6. The Trustee is a party to the PSA not in its individual capacity, but solely as Trustee of the Trust.

7. EMC is a party to the PSA in two capacities, as Servicer and as Sponsor.
8. The purpose of the Trust, as set forth in Section 2.08 of the PSA, is to acquire and hold mortgage loans and other assets, to make payments on securities known as mortgage pass-through certificates (the “Certificates”) issued to investors in the Trust (the “Certificateholders”), and to engage in those activities that are necessary, suitable or convenient to accomplish the foregoing.
9. Each month, the Servicer collects principal and interest payments on a pool of mortgage loans (the “Mortgage Loans”) for the benefit of the Trust. The Trustee then makes payments on behalf of the Trust to the Certificateholders, corresponding to each Certificateholder’s fractional undivided share of the Trust.
10. The Mortgage Loans, which are identified in the Mortgage Loan Schedule of the PSA, originally consisted of 2,049 individual loans, each with a term of 30 years, made for the purpose of purchasing residential property or refinancing existing mortgages.
11. In its role as Sponsor, EMC originated the Mortgage Loans and, before execution of the PSA, deposited them with an affiliated intermediary, Structured Asset Mortgage Investments II Inc. (the “Depositor”), a Delaware corporation.
12. When transferring the Mortgage Loans to the Depositor, EMC, as Sponsor, made certain representations and warranties regarding the quality of the Mortgage Loans in the Mortgage Loan Purchase Agreement (the “MLPA”), which is appended to the PSA.
13. On the closing date of the PSA, the Depositor sold the Mortgage Loans to the Trust, including all interest due and principal received with respect to the Mortgage Loans, in exchange for Certificates.

14. On February 28, 2007, the Depositor caused the issuance by the Trust and sale of Certificates to the Certificateholders. *See* Structured Asset Mortgage Investments II Inc., Form 8-K filed February 28, 2007, attached hereto as Exhibit 2.

15. Upon execution of the PSA, the Depositor's right, title and interest in the MLPA was assigned to the Trustee on behalf of the Trust and for the benefit of the Certificateholders, pursuant to Section 2.03(a) of the PSA.

16. Pursuant to Section 2.01(b) of the PSA, in connection with the transfer and assignment of the Mortgage Loans to the Trust, EMC, in its role as Sponsor, was also required to deposit with the Trustee or its agent, the following documents with respect to each Mortgage Loan, which collectively constitute the Mortgage File:

- a. The original Mortgage Note;
- b. The original Mortgage;
- c. Any and all assignments of the Mortgage Note or the Mortgage;
- d. The original or a copy of the policy or certificate of primary mortgage guaranty insurance;
- e. The original policy of title insurance or mortgagee's certificate of insurance or commitment of binder for title insurance;
- f. Originals of all modification agreements, if applicable.

17. In accordance with Section 2.01(b) of the PSA, the documents comprising the Mortgage File are the property of the Trust.

EMC's Obligation to Maintain and Provide Access to the Mortgage Documents

18. In its capacity as Servicer, EMC is obligated to maintain documents and records on behalf of the Trust. Section 3.08 of the PSA sets forth the Servicer's obligation to maintain and provide access to documents relating to the Mortgage Loans:

Section 3.08. Documents, Records and Funds in Possession of Servicer to be Held for Trustee.

(a) The Servicer shall transmit to the Trustee or Custodian such documents and instruments coming into the possession of the Servicer from time to time as are required by the terms hereof, to be delivered to the Trustee or Custodian. ... The Servicer shall provide access to information and documentation regarding the Mortgage Loans to the Trustee, its agents and accountants at any time upon reasonable request and during normal business hours ...

(b) All Mortgage Files and funds collected or held by, or under the control of, the Servicer, in respect of any Mortgage Loans, whether from the collection of principal and interest payments or from Liquidation Proceeds or Insurance Proceeds, shall be held by the Servicer for and on behalf of the Trustee and the Certificateholders and shall be and remain the sole and exclusive property of the Trust; provided, however, that the Servicer shall be entitled to setoff against, and deduct from, any such funds any amounts that are properly due and payable to the Servicer under this Agreement. (Emphasis added).

19. Thus, the Servicer must provide any “information and documentation” regarding the Mortgage Loans to the Trustee upon reasonable request, and to the extent the Servicer is in possession of the Mortgage Files, such files are the property of the Trust and must be delivered to the Trustee upon request.

20. Section 3.21 of the PSA further provides that EMC, as Servicer, must maintain and provide the Trustee with access to a complete set of books and records for the Mortgage Loans:

(a) The Servicer shall be responsible for maintaining, and shall maintain, a complete set of books and records for the Mortgage Loans which shall be appropriately identified in the Servicer’s computer system to clearly reflect the ownership of the Mortgage Loans by the Trust. In particular, the Servicer shall maintain its possession, available for inspection by the Trustee and shall deliver to the Trustee upon demand, evidence of compliance with all federal, state and local laws, rules and regulations. ...

(b) The Servicer shall maintain with respect to each Mortgage Loan and shall make available for inspection by the Trustee the related servicing file during the time such Mortgage Loan is subject to this Agreement and thereafter in accordance with applicable law. (Emphasis added).

21. Section 3.21 of the PSA thus requires the Servicer to make available to the Trustee all of the books and records for the Mortgage Loans, including the servicing file, and in particular, evidence of compliance with all federal, state and local laws, rules and regulations. In connection with its transfer of the Mortgage Loans to the Depositor, EMC represented and warranted in the MLPA that the Mortgage Loans complied with numerous federal, state and local laws and regulations relating to predatory lending, truth-in-lending, “high risk homes,” and high interest rates, points and/or fees.

The Trustee’s Repeated Requests For Access to Documents and Information

22. The Trustee has repeatedly requested that EMC provide information and documentation regarding the Mortgage Loans, including but not limited to the Mortgage Files, so as to be able to timely address investor concerns about the quality of the underlying mortgage investments, and whether EMC breached its representations and warranties. The Trustee’s efforts to obtain access to these documents were rebuffed by EMC over a lengthy period of time, despite several requests – until EMC appeared to change course and agreed to provide the requested documents, by letter dated November 19, 2010. However, EMC has failed to follow up on the promises in its letter, and to date has provided nothing.

23. The Trustee began requesting documents from EMC in January 2010, but was met with a series of refusals and unfounded objections from EMC.

24. On April 22, 2010, the Trustee again sent a letter to EMC, requesting documentation regarding the Mortgage Loans and providing details on the specific categories of documents sought. *See Exhibit 3.* EMC responded on May 20, 2010, refusing to produce the documents on the grounds that the Trustee’s request was “unreasonable” in scope. *See Exhibit 4.*

25. On August 31, 2010, the Trustee sent a letter to EMC, notifying EMC that the Trustee had received a letter from the law firm of Grais & Ellsworth LLP (“Grais”), which

represented an investor in the Trust owning 42% of the outstanding face amount of the Certificates in the Trust, dated August 3, 2010 (the “Grais Letter”). *See Exhibit 5.* The Grais Letter gave notice to the Trustee that Grais had investigated the condition of 1,317 of the 2,049 Mortgage Loans held by the Trust, and determined that EMC appeared to have violated its representations and warranties in the MLPA with respect to 938 of those loans.

26. On September 20, 2010, counsel for the Trustee sent a letter to EMC’s counsel requesting that EMC provide copies of loan origination documents (the “Requested Documents”) relating to 902 mortgage loans as specified in Appendix A of the letter. *See Exhibit 6.* The scope of the request was nearly identical to the Trustee’s prior request of April 22, 2010 (*see Exhibit 3*). The Requested Documents consist of the following:

1. Complete loan origination files, including:
 - a. The origination credit report,
 - b. All supporting credit report upgrades and updates,
 - c. The origination appraisal/valuation result,
 - d. Any post closing valuations,
 - e. The title commitment and policy,
 - f. Any income/asset documentation,
 - g. The AUS findings,
 - h. The loan approval,
 - i. The initial loan application,
 - j. The final loan application,
 - k. The 1008 form,
 - l. Mortgage Note,
 - m. Any purchase contract (if applicable),

- n. Mortgage insurance certificate (if applicable),
 - o. Any final settlement statement HUD-1,
 - p. The closing documents, and
 - q. All related servicing collection comments;
- 2. Applicable loan underwriting guidelines of the related originators;
 - 3. Complete loan servicing files, records, histories and notes;
 - 4. All servicing guidelines and procedures;
 - 5. All amendments and supplements (or confirmation if there have been no such amendments or supplements) to the MLPA.

27. On October 13, 2010, counsel for the Trustee sent another letter to EMC's counsel following up on phone calls between counsel, again demanding that EMC provide the Requested Documents. *See Exhibit 7.*

28. On November 4, 2010, counsel for EMC responded to the letters from the Trustee's counsel dated September 20 and October 13, 2010. The letter stated that while EMC continued to object to the scope of the Trustee's requests, it would agree to provide documents relating to EMC's role as Servicer, but did not believe that it was required to provide documents relating to loan origination because, in its view, such documents are "beyond the scope" of Sections 3.08 and 3.21 of the PSA. *See Exhibit 8.*

29. On November 9, 2010, counsel for the Trustee responded to EMC's letter dated November 4, 2010, stating that EMC's position was untenable and that the Trustee was entitled to the Requested Documents under the terms of the PSA, as previously stated in letters dated September 20 and October 13, 2010. *See Exhibit 9.*

30. On November 19, 2010, EMC responded to the Trustee's letter dated November 9, 2010, and stated that it agreed to provide the Trustee with access to the Requested Documents in response to the Trustee's request. *See Exhibit 10.*

31. On November 29, 2010, counsel for the Trustee emailed EMC's counsel regarding arrangements for EMC to provide the Requested Documents identified in the Trustee's letter dated September 20, 2010, per EMC's agreement in its letter of November 19, 2010. *See Exhibit 11.*

32. Having received no reply, the Trustee's counsel sent a subsequent email to EMC's counsel on December 1, 2010, requesting a response to his prior email. *See id.*

33. On December 1, 2010, EMC's counsel responded to the Trustee by forwarding internal EMC correspondence regarding the SAMI 2007 AR-5 mortgage trust, an entirely separate and unrelated transaction from the Trust, with a different trustee (Citibank). EMC's counsel's email stated only: "I'm attaching the correspondence between the in-house folks. That's the last I've heard." *See id.*

34. The Trustee's counsel responded by email dated December 2, 2010, again demanding that EMC provide the Requested Documents, and requesting a firm commitment from EMC before Tuesday, December 7, 2010, to agree to an electronic procedure to make the Requested Documents available to the Trustee. *See id.*

35. Later on December 2, 2010, EMC's counsel responded that although EMC was "amenable to doing as you have asked," he would not respond to a "ridiculous attempt at bullying." Of course there has been no "bullying," but rather a frustrating series of communications over many months, in which EMC dodged and weaved and never complied with its contractual obligations to produce the Requested Documents. *See id.*

36. On December 9, 2010, Ropes & Gray LLP, acting as Special Litigation Counsel to the Trustee, sent a letter to EMC's counsel demanding that EMC provide the Requested

Documents by December 20, 2010, or litigation would be initiated to obtain the Requested Documents. *See Exhibit 12.*

37. EMC's counsel responded to Ropes & Gray's letter by email on December 9, 2010, stating that it constituted "more bullying" and referring again to an unrelated mortgage trust in which Citibank is the trustee. *See Exhibit 13.*

38. Ropes & Gray replied on December 10, 2010, informing EMC that "if we do not hear from you or EMC to discuss and arrange for the Requested Documents to be provided on a date certain, the Trustee will proceed as stated in its letter." *Id.*

39. Consistent with its pattern of empty promises and then further delay, on December 21, 2010, a day subsequent to the deadline, EMC's outside counsel emailed the Trustee's counsel, stating: "I am advised that EMC expects to have additional information for you about details and timing later today." *See Exhibit 14.* Nothing was forthcoming later that day.

40. However, in response to communications initiated by EMC to the Trustee, on December 23, 2010, the Trustee and EMC reached an agreement under which EMC would produce the Requested Documents (explicitly including the complete loan origination files and applicable loan underwriting guidelines) with respect to 400 of the Mortgage Loans, on an expedited basis, "without condition." Under the terms of the agreement, EMC was obligated to produce the documents with respect to 100 of the underlying Mortgage Loans by January 5, 2011, and the documents with respect to the 300 additional loans by January 14, 2011. This agreement was memorialized in email correspondence from Elizabeth Walker of Wells Fargo to Frances Dixon of EMC dated Dec. 23, 2010. *See Exhibit 15.* Ms. Walker's email stated that the Requested Documents were equally prioritized, but "must especially include the '[a]pplicable

loan underwriting guidelines.’” *Id.* The Trustee explicitly did not waive its right to the Requested Documents for all 902 loans identified in the letter to EMC dated September 20, 2010 (Exhibit 6), and informed EMC that a lawsuit would promptly be filed if EMC failed to provide the requested documents by the above-referenced deadlines. *See Exhibit 15.* Counsel for the Trustee subsequently forwarded the email agreement to counsel for EMC. *Id.*

41. On December 24, 2010, EMC requested, and the Trustee granted, a brief extension to the agreed upon deadlines, making the Requested Documents for the first 100 loans due on January 10, 2011 (extended from January 5th) , and the Requested Documents for the next 300 loans due on January 21, 2011 (extended from January 14th).

42. Rather than produce the Requested Documents “without condition” on January 10, 2011, as it had agreed to do, EMC forwarded an unreasonably prohibitive confidentiality agreement to the Trustee after business hours on the evening of January 7. The onerous restrictions of EMC’s proposed confidentiality agreement would have prevented the Trustee from using the information contained in the Requested Documents obtained from EMC for any purpose other than evaluating “service compliance,” and thus would have prohibited the Trustee from using the information to establish in a court of law any breaches by EMC of its representations and warranties. Moreover, the PSA does not permit EMC to condition its providing the Requested Documents to the Trustee upon any confidentiality restrictions, let alone the exceedingly onerous ones sought by EMC – the PSA expressly states that the Requested Documents sought by the Trustee is the property of the Trust, not EMC.

43. Despite the absence of any legal requirement that it do so, the Trustee responded to EMC on January 11, 2011, by forwarding an executed version of a revised confidentiality agreement under which the Trustee agreed to take reasonable steps to protect any confidential

information contained in the Requested Documents obtained from EMC, and which expressly contemplated that if necessary, the Trustee would seek to file confidential information under seal in any resulting court proceeding. Having allowed another deadline to pass, the Trustee demanded that EMC produce the Requested Documents by Wednesday, January 12, 2011.

44. EMC failed to produce the Requested Documents on January 12, 2011, culminating more than a year of good-faith negotiations and misplaced patience by the Trustee in a futile attempt to avoid litigation. By January 12, it had become obvious to the Trustee that EMC would continue its “rope a dope” strategy ad nauseam, without ever intending to live up to the plain contractual obligations of the PSA, to produce the Requested Documents. EMC is contractually obligated to provide the Trustee with copies of the Requested Documents. The Trustee’s requests are limited to those Mortgage Loans belonging to the Trust for which there is a high probability that EMC has breached its representations and warranties in the MLPA, according to the analysis described in the Grais Letter (Exhibit 5).

45. EMC is contractually obligated to provide the Trustee with copies of the Requested Documents. The Trustee’s requests are limited to those Mortgage Loans belonging to the Trust for which there is a high probability that EMC has breached its representations and warranties in the MLPA, according to the analysis described in the Grais Letter (Exhibit 5).

46. The Trustee is in urgent need of the Requested Documents. A thorough review of the Requested Documents in order to assess whether EMC’s representations and warranties have been breached will take, at a minimum, a protracted period of time. Indeed, it appears to be EMC’s calculated strategy to avoid producing the Requested Documents as long as possible, so as to avoid their underlying responsibilities under the PSA.

FIRST CAUSE OF ACTION
(Declaratory Judgment)

47. Plaintiff repeats, reiterates and realleges each and every allegation contained in the foregoing paragraphs 1 through 46 of this Complaint as if each were fully set forth herein.

48. The Trustee and EMC are parties to a valid contract, the PSA.

49. The Trustee has performed or stands ready to perform its obligations under the PSA.

50. Pursuant to Sections 3.08 and 3.21 of the PSA, EMC is obligated to provide documents and information regarding the Mortgage Files to the Trustee upon request.

51. The Trustee, on behalf of the Trust, has requested documents and information from EMC to which it is entitled under the terms of the PSA.

52. EMC has failed to provide the Requested Documents.

53. As a result, an actual case or controversy exists between the parties that is ripe for judicial determination.

54. Pursuant to 10 Del. C. § 6501 *et seq.*, the Trustee requests a declaration that it is entitled to originals or reproductions of the Requested Documents, as set forth in the letter from the Trustee's counsel dated September 20, 2010, attached hereto as Exhibit 6.

SECOND CAUSE OF ACTION
(Breach of Contract – Specific Performance)

55. Plaintiff repeats, reiterates and realleges each and every allegation contained in the foregoing paragraphs 1 through 54 of this Complaint as if each were fully set forth herein.

56. The Trustee and EMC are parties to a valid contract, the PSA.

57. The Trustee has performed or stands ready to perform its obligations under the PSA.

58. Defendant EMC is contractually obligated to provide the Requested Documents to the Trustee in accordance with the terms of the PSA.

59. By failing to provide the Requested Documents in accordance with its obligations under the PSA, EMC is in material breach of the PSA.

60. Without the Requested Documents, the Trustee cannot adequately perform its duties on behalf of the Trust, and cannot enforce the rights of the Certificateholders and/or the Trust.

61. If EMC does not provide the Requested Documents, the Trustee, the Trust and the Certificateholders will suffer irreparable harm for which there will be no adequate remedy at law.

62. The Trustee is, therefore, entitled to an order of specific performance requiring EMC to provide originals or reproductions of the Requested Documents, as set forth in the letter from the Trustee's counsel dated September 20, 2010, attached hereto as Exhibit 6.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that the Court enter judgment in their favor and against Defendant as follows:

(1) Declare that EMC is obligated to provide the Trustee with originals or reproductions of the Requested Documents as set forth in the September 20, 2010 letter from Trustee's counsel to EMC's counsel, in accordance with the terms of the PSA;

(2) Enter an order of specific performance requiring EMC to provide immediately originals or reproductions of the Requested Documents as set forth in the September 20, 2010 letter from Trustee's counsel to EMC's counsel, in accordance with the terms of the PSA;

(3) Issue a mandatory injunction requiring EMC to provide immediately originals or reproductions of the Requested Documents as set forth in the September 20, 2010 letter from Trustee's counsel to EMC's counsel, in accordance with the terms of the PSA;

(4) Award the Trustee its attorneys' fees and costs in accordance with the indemnification provisions specified in Section 7.03 of the PSA; and

(5) Such further relief as this Court deems just and proper.

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