

Bankruptcy Litigation Model

VOLUME 3

ADVERSARY PROCEEDINGS

For Ipad

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Volume 3 – Adversary Proceedings

Table of Contents

Tabs		Page
Lien Strip	Letter to Debtors	8
	Complaint to Determine Value	9
	Motion for Entry of Default	12
	Pre Trial Scheduling	17
	Interrogatories	19
	Request to Produce	23
	Consent Order Claim – Secured	25
	Consent Order Claim – Unsecured	27
	Stipulation of Dismissal	29
TILA	Complaint TILA 131(f) and (g)	31
	TILA ROGS & RTP	37
	TILA SASA Complaint	43
	Complaint v GMAC	55
FDCPA UDAP & FTCPA	ACA Position paper on Bankruptcy	63
	FDCPA Complaint	64
	FDCPA AP Complaint	69
	UDAP Complaint	78
	FDCPA & UDAP Complaint	83
	FDCPA & UPDA AP Complaint	87
	Complaint FTCPA	91
	The Federal Telephone Consumer Protection Act	96
	Settlement Agreement	101
Improper Fees & RESPA	Complaint Improper Fees-all core claims	104
	Complaint -105 506(a) 2016(a) FDCPA UDAP	113
	Complaint –Fees & RESPA	120
	Complaint –Breach	126
	Complaint – Failure to Respond QWR	133
	Complaint – Failure to Respond QWR Dodd	137
	Complaint – Improper Fees –Stay Disch Viol	144

Improper Fees & RESPA (cont'd)	Complaint – Improper Fees Discharge Violation Perm Injunction	150
	Galloway v EMC 2010	157
	Complaint – Improper fee Lack of Standing	162
	Mtn Approve Settlement - AP	173
	RTP Improper Fees Case	178
	ROGS RTO –revised long versions	188
	Request to Admit	213
	Settlement Agreement 1	222
	Settlement Agreement 2	224
Failure to Perfect Lien	DBRS on Auto Loan	234
	AP Failure to Perfect Title	235
	Complaint to Avoid Lien	248
	Clark A Warrisome Opinion	252
	In re Clark Contracting	255
	Williams vs Honda ROGS & RTP	265
	Williams vs Honda RTA	276
Avoid Mortgage Trust Securitized	In Re Samuel M. Brothers	288
	Brothers Trustees Objection to Claim	289
	“ Proof of Claim	294
	“1 st Assignment	310
	“ 2 nd Assignment	312
	“ Amended and Restated note	315
	“ BAC Amended Claim w/ 3 rd Assignment	317
	“ BAC Objection to TTE Objection	330
	“Order on Objection	333
	Brothers v BAC Complaint to remove	335
	PSA CWMBS & Countrywide & BONY	346
	Complaint to Determine Secured Status	496
	Exhibit 5 – Ruling on Cross – Motions for Summary Judgment	504
	RTA Lost Noted & ABCD Transfers	512
	Subpoena Duces Tecum for Dep	520
	NC Statute Registering False Docs	522
Stay Violation	Demand for Payment	524
	Reinstatement Demand Mortgage	528
	Vehicle Disabling Device	534

Stay Violation (Contd)	Garner Memo Opinion of Disabling Devices	538
	Late on a Car Loan Meet the Disabler	547
	Employee Discrimination and Stay Violation	551
	Stay Violation and for Accounting	555
	Interrogatories and RTP	560
Preference Recovery	Settlement Agreement 2	566
	Complaint for Preference Recovery	569
	Settlement Agreement	572
Objection to Proof of Claim		
	Improper Charges	575
	Improper Charges Vehicle Deficiency	581
	Judge re Language in Servicer POC	586
	Objection POC SOL	590
	Objection POC Rule 3001c	594
	New Rule 3001	599
	Objection POC not Timely	601
	Objection POC Fraudulent Claim	606
	Objection POC Duplicate Claim	610
Avoid Debt Transfer	RTP Objection POC	615
	Complaint to Avoid Debt Transfer	622
	“ Avoid Debt transfer Mortgage	627
	Debt Elimination Company	635
Tort of Harassment	Violation of Debt Relief Agency	641
	Complaint for Tort of Harassment	648
Payoff Statute		
	NCGS 45-36.7	654
	Complaint Payoff	656
	Complaint Payoff, RESPA, Stay & Discharge	660
Trustee In State Foreclosure		
	Complaint Trustee in State Foreclosure Laws v PTS	670
Lien Release and Cancellation of Deed of Trust		
	NCGS 45-36.9	692
	Complaint Failure to Release Lien on Title	693
	Complaint Failure Cancel 2 nd Deed	700
	Request for Admissions	708
	Interrogatories & RTP	713
	Settlement Agreement Lien Release	720

Discharged Debts	BK Court Fee Schedule	723
	McClure v Bank of America	729
	Complaint Attempt to Collect	744
	Complaint CRA Dispute and Re Reporting	751
	Complaint – Originator and Collection Law Firm	760
	ROGS & RTP Improper Credit Reporting	767
	ROGS & RTP Debt Buyer Dischargeability	774
	Settlement Agreement Discharge Violation	784
Gramm Leach Bliley Act	Complaint Privacy Violations POC	789
	Complaint Privacy Violations Pacer	798
	NCGS Article 2A Identity Theft	806
	Micare v Forster & Garbus 132 F.Supp 2d 77	819
	In re Dixon 2010 WL 501547	823
HAMP	HAMP & ECOA UDAP	831
	ROGS & RTP HAMP Enforcement	843
Fee Sharing	MS LPS Prommis Complaint	854
Electronic Discovery	ROGS & RTP Gen Mtg Servicing Electronic	872
	RTA Improper Mortgage Charges Post Dischg	892
	RTA Improper Mortgage Charges Pre Dischg	905
	Interrogatories & RTP of Electronic Discovery	915
	Additional Discover re Electronic Evidence	921
Mortgage Servicer Discovery	Request for Production Servicer uses MSP	925
	RTP Payment Processing Basic Servicing Platform	935
	RTA Standing, Real Party Interest, Secured Status	961
	RTP Mega List –Dick Shepherd	968
	QWR Basic Note & Assignment Info	981
	QWR Basic Note & Assignment Info From CLIENT	983
	TIL 131(f) Letter	985
	ROGS & RTP to LPS	986
Mortgage Servicer Discovery –	ROGS re Alphabet Problem of assignments	998

Alphabet Problem & Fake Documents (cont'd)	
	Second RTP Re Alphabet Problem of assignments 1006
	RTA for False Docs 1015
	RTA Alphabet Problem of Assignments 1027
	Interrogs & RTP Documents BOA Notary 1040
MERS Discovery	MERS ROGS & RTP 1046
Privilege Log	How to Draft a Privilege Log 1065

A – LIEN STRIP

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DATE

John Q. Public
Mary E. Public
100 Main Street
Anywhere, NC 28999

In the Matter of:
Your Chapter 13 Case
Court No:
SSN:
File Date
Our No:

Adversary proceeding: Public v American General

Dear John and Mary:

I am enclosing a copy of complaint we have filed against American General to strip the second mortgage. This copy is for your records. American General will have 30 days from the date we serve these papers on them to file a response. If such a response is filed, we will notify you. If no response is filed, then we will file a motion with the Court to enter a judgment in your favor.

This letter will also confirm that you should deposit your second mortgage payments in our trust account until this case is resolved. This will be a safeguard in the event we are not successful in canceling this second mortgage loan. Due to the amount of the loan, I expect American General to contest this case.

With best regards, I remain

Very truly yours,



O. Max Gardner, III
OMGIII/cjh
Enclosure: Adversary Complaint

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME:

**Chapter 13 No.
Our File No.**

ADDRESS:

SSN:

Debtors.

Adv. Proc. No. 08- _____

Plaintiffs,

versus

AMERICAN GENERAL FINANCIAL SERVICES, INC.,

Defendant.

**Complaint of the Debtors Pursuant to 11 U.S.C. Section 506(a)
and Bankruptcy Rule 3012 to Determine the Value of
Security and Creditor's Allowed Secured Claim**

Introduction

This is an action brought by the Plaintiffs pursuant to 11 U.S.C. Section 506(a) and Rule 3012 of the Federal Rules of Bankruptcy Procedure to determine the value of the interest of the Defendant in the residential real estate of the debtors and determine the amount of the allowed secured claim of the Defendant.

Jurisdiction

1. The Plaintiffs allege that this is a core proceeding as that term is defined by Section 157(b)(2) of Title 28 of the United States Code in that it concerns claims and matters arising out of the administration of this bankruptcy case and rights duly established under Title 11 of the United States Code and other applicable federal law.

2. The Plaintiffs further allege that this Court has both personal and subject matter jurisdiction to hear this case pursuant to Section 1334 of Title 28 of the United States Code, Section 157(b)(2) of Title 28 of the United States Code, and pursuant to the Order entered by the Judges of the United States District Court for the Western District of North Carolina on July 30, 1984 (the Referral Order), which Order was entered in accordance with the Bankruptcy Amendments and Federal Judgeship Act of 1984.

The Base Case and Parties

3. The underlying Chapter 13 bankruptcy case was commenced by the filing of a voluntary petition with the Clerk of this Court on _____.

4. An Order for Relief under the provisions of Chapter 13 of Title 11 of the United States Code was duly entered by this Court upon the filing of the petition. This order served to invoke the provisions of Section 362(a) of Title 11 of the United States Code.

5. The 341(a) meeting of creditors was held on _____, in Shelby, North Carolina. The plan was subsequently confirmed by order of this Court dated _____.

6. The Defendant filed no objection to confirmation of the plan in this case.

7. The Defendant is, upon information and belief, an entity engaged in the business of consumer credit lending in the State of North Carolina, and which maintains a principal place of business in some state other than the State of North Carolina.

Factual Allegations

8. In the schedules filed with the petition in this case and on the master mailing matrix filed with the Clerk of this Court, a debt was listed in favor of American General Financial Services, Inc. (hereinafter "American General") for the second deed of trust on the residential real estate of the debtors. The debtors believed and therefore alleged in their petition and schedules that there was no equity in their residential real estate to which the second mortgage could secure at the time that the loans were made and, therefore, provided for the claim to be paid as an unsecured claim under the terms of the confirmed plan.

9. The Plaintiffs allege that at the time they filed their bankruptcy petition and at the present time the value of their interest in the said residential real estate was and is approximately \$127,170.00.

10. The Plaintiffs' interest in the real estate is subject to a first lien arising out of a mortgage in favor of Bank of America in the amount of \$148,466.94.

11. The Plaintiffs' interest in their residential real estate is subject to a second lien arising out of a mortgage in favor of American General in the amount of \$10,135.58.

12. The lien securing the second mortgage of American General is junior to the first mortgage listed above as owing to Bank of America.

13. The Plaintiffs allege that there was no equity in their home at the time the second mortgage loan was written and therefore the Defendant has no secured interest for the loan secured by the second deed of trust on the subject real estate.

14. Pursuant to 11 U.S.C. Section 506(a), the Defendant has no allowable secured claim regarding the claim for the second mortgage loan on the subject real estate.

15. Any timely filed claim of the Defendants for the second mortgage loan is allowable only as an unsecured claim and to the extent that no such claim was filed the Defendant has no claim against this estate.

WHEREFORE, the Plaintiffs respectfully pray of the Court as follows:

A. That this Court determine that the Defendant has no secured interest for the loan secured by the second deed of trust on the residential real estate of the Debtors;

B. That this Court order the Defendant to cancel the second mortgage lien on the residential real estate of the debtors pursuant to 11 U.S.C. Section 506(d), immediately upon the entry of the Discharge Order and deliver the same to the attorney for the debtors within

20 days from the date of the entry of the said order at no charge or fee for the aforesaid cancellation and delivery;

C. That this Court direct the Trustee that any timely filed proof of claim of the Defendant for the second mortgage lien be treated as an unsecured claim under the plan;

D. That the attorney for the Plaintiffs be awarded reasonable legal fees;

E. That the Plaintiffs have such other and further relief as to the Court may seem just and proper.

Dated this the _____ day of _____.



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**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME:

**Chapter 13 No.
Our File No.**

ADDRESS:

SSN:

Debtors.

Adv. Proc. No. 08- _____

Plaintiffs,

versus

AMERICAN GENERAL FINANCIAL SERVICES, INC.,

Defendant.

**MOTION FOR ENTRY OF DEFAULT
AND
FOR JUDGMENT BY DEFAULT**

COME NOW the above-named debtors, by and through their attorney of record, and respectfully move the Court pursuant to Rules 9013 and 7055 of the Federal Rules of Bankruptcy Procedure and Rule 55(a) of the Federal Rules of Civil Procedure for entry of default against the Defendant and for judgment by default and in support hereof allege and say that:

1. The underlying Chapter 13 bankruptcy case was commenced by the filing of a petition with the Clerk of this Court on _____.
2. The Plaintiffs are debtors under Chapter 13 of Title 11 in the above-captioned case.
3. The Defendant is an entity engaged in the business of consumer credit lending in the State of North Carolina, and which maintains its principal place of business in some state other than the State of North Carolina.
4. The Plaintiffs filed the subject adversary complaint against the Defendant to determine the value of the Defendant's security in the Plaintiffs' residential real estate and further to determine the Defendant's allowed secured claim, if any.
5. The said adversary complaint and summons were served on the Defendant via certified mail as follows:

Corporation Service Company
Registered Agent for
American General Financial Services, Inc.
327 Hillsborough St.
Raleigh, NC 27603
Service Date: _____

6. The Defendant has failed to answer or to otherwise file any responsive pleading as to the complaint or to seek any extension of time from this Court with respect thereto.

7. The Defendant is not in the military service of the United States.

WHEREFORE, the Plaintiffs pray of this Court for the following:

A. That this Court enter a default against the Defendant;

B. That this Court establish damages for the entry of final judgment by default;
and

C. For an additional non base attorney fee of \$450.00 to be paid by the Trustee from funds paid by the debtors into the plan; and

D. For such other and further relief as to the Court may seem just and proper.

This the _____ day of _____



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**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME:

**Chapter 13 No.
Our File No.**

ADDRESS:

SSN:

Debtors.

Adv. Proc. No. 08- _____

Plaintiffs,

versus

AMERICAN GENERAL FINANCIAL SERVICES, INC.,

Defendant.

ENTRY OF DEFAULT

WHEREAS, it has been made to appear to the undersigned Clerk of the United States Bankruptcy Court for the Western District of North Carolina, Shelby Division, that the Defendant has failed to plead or otherwise defend and is not incompetent nor an infant;

NOW, THEREFORE, Default is hereby entered against the Defendant as provided for by Rule 55 of the Federal Rules of Civil Procedure and Bankruptcy Rule 7055.

This Order has been signed
electronically. The judge's
signature and court's seal
appear at the top of the Order

United States Bankruptcy Court

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME:

**Chapter 13 No.
Our File No.**

ADDRESS:

SSN:

Debtors.

Adv. Proc. No. 08- _____

Plaintiffs,

versus

AMERICAN GENERAL FINANCIAL SERVICES, INC.,

Defendant.

ORDER FOR DEFAULT JUDGMENT

THIS CAUSE coming on to be heard, and being heard, before the undersigned Judge presiding over the United States Bankruptcy Court for the Western District of North Carolina, Shelby Division, pursuant to a motion for entry of default and for judgment by default filed by the Plaintiffs; and

IT APPEARING to the undersigned that this court has jurisdiction over the parties and over the subject matter of this matter; and

IT FURTHER APPEARING to the undersigned that the Defendant was duly served with the summons and complaint in this proceeding and has failed to file any responsive pleading thereto with this Court or the Clerk of this Court; and

IT FURTHER APPEARING to the undersigned that all parties in interest received notice of the time, date and place of this hearing and that no such parties have filed any timely objections or otherwise

appeared in opposition to the said motion and that the time for filing any such objection has expired; and

IT FURTHER APPEARING to the undersigned that the relief requested by the debtors in their motion is consistent with the applicable provisions of Title 11 of the United States Code and that the debtors have established good and sufficient cause to grant said relief; and

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. That entry of default is hereby made as to the Defendant;
2. That the value of the interest of the Defendant in the residential real estate in this case is hereby valued at zero;
3. That the allowed secured claim of the Defendant hereby has no value and the claim of the Defendant is hereby allowed only as an unsecured claim against the debtors' estate;
4. That upon entry of the discharge order in this case, the Defendant is hereby ordered to cancel and mark paid its second deed of trust and must provide the debtors with proof thereof; and
5. That upon entry of the discharge order in this case, the Defendant is hereby ordered to mark as paid in full all loan documents related to the second deed of trust and to deliver such documents to the Debtors.
6. That the attorney for the debtors should be awarded an additional non base attorney fee of \$450.00 to be paid under the Chapter 13 plan of the debtors in this case.

This Order has been signed electronically. The judge's signature and court's seal appear at the top of the Order

United States Bankruptcy Court

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME:

**CHAPTER 13 NO.
OUR FILE NO.**

ADDRESS:

SSN:

Debtor(s)

ADVERSARY PROCEEDING:

Plaintiff,

Vs.

Defendant

**PRE-TRIAL SCHEDULING AND DISCOVERY
CONSENT ORDER**

THIS MATTER coming on to be heard before the undersigned Bankruptcy Court Judge for the Western District of North Carolina, Shelby Division, pursuant to an Initial Pre-Trial Order, after reviewing the pleadings and record and being advised that this Order is entered into with the consent of all parties, it is ordered, adjudged and decreed as follows:

1. That the parties will be required to make disclosures, pursuant to Rule 26(a) of the Federal Rules of Civil Procedure by _____; and
2. That the discovery deadline is extended by consent to _____; and
3. Each party shall be entitled to no more than 50 Requests to Produce; 50 Interrogatories and 100 Requests for Admission, including sub-requests.
4. All documents intended to be used as Exhibits will be exchanged by _____; and

5. The parties shall be entitled to four depositions each, for a total of no more than eight depositions for all parties, with each deposition limited to a time period not in excess of four hours;

6. On or before _____ the Plaintiffs shall provide to Defendants' counsel no less than four (4) available dates for deposing both Plaintiffs between the dates of _____ and _____.

7. On or before _____ the Defendants shall provide to Plaintiffs' counsel no less than four (4) available dates for deposing all Defendants between the dates of _____ and _____.

8. Disclosure of retained experts and reports from said experts under Fed. R. Civ. P. 26(a)(2) shall be due from Plaintiffs by _____, and from Defendants by _____.

9. That all parties are properly served and before the Court, however, the parties shall have until _____ to amend or add parties; and

10. That the bar date for the filing of all dispositive motions is extended to _____, with a final pre trial hearing to be held on _____. No dispositive motions shall be filed more than thirty days before the bar date.

11. If no dispositive motions are filed, a Final Pre-Trial Order shall be submitted to the Court by _____.

12. All Exhibits for Trial shall be marked and the original and two full copies shall be provided to this Court at least ten days before the trial date.

13. This case will be scheduled for Trial at the Final Pre-Trial Conference.

14. This proposed Scheduling Order will permit the parties sufficient time to complete discovery and to explore the possibility of settlement prior to trial.

This Order has been signed electronically. The judge's signature and court's seal appear at the top of the Order

United States Bankruptcy Court

WE CONSENT:

O. MAX GARDNER III
Attorney for the Plaintiffs

Attorney for Defendant

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME:

**Chapter 13 No.
Our File No.**

ADDRESS:

SSN:

Debtors.

Adv. Proc. No. 08- _____

Plaintiffs,

versus

AMERICAN GENERAL FINANCIAL SERVICES, INC.,

Defendant.

**FIRST INTERROGATORIES OF PLAINTIFFS TO DEFENDANT
(for subordinate Mortgage lien avoidance)**

COME NOW the Plaintiffs, by and through their attorney of record, and hereby request that the Defendant answer under oath, in accordance with Rule 7033 of the Federal Rules of Bankruptcy Procedure and Rule 33 of the Federal Rules of Civil Procedure, the following interrogatories.

INSTRUCTIONS AND DEFINITIONS

A. Answers to the Interrogatories must be furnished within forty-five (45) days of the service of the Summons and Complaint or within thirty (30) days of the service of these Interrogatories, whichever is later.

B. Each Interrogatory should be answered upon your entire knowledge from all sources and all information in your possession or otherwise available to you, including information from your officers, employees, agents, representatives, or consultants and information which is known by each of them. An incomplete or evasive answer is a failure to answer.

C. If any answer is qualified, state specifically the terms of each qualification and the reasons for it. If an Interrogatory cannot be answered in full, state the part which can be answered and answer the same in full to the extent possible; state further and specifically the reason(s) why the remainder cannot be answered.

D. Each Interrogatory is considered continuing, and if Defendant obtains information which renders its answers or one of them, incomplete or inaccurate, Defendant is obligated to serve amended answers on the undersigned.

E. The terms "document" or "documents" in these Interrogatories shall refer to all writing and recorded materials, of any kind, that are or have been in the possession, control or custody of the Defendant or of which the Defendant has knowledge, whether originals or copies. Such writings or recordings include, but are not limited to, contracts, documents, notes, rough drafts, inter-office memoranda, memoranda for the files, letters, facsimiles, research materials, correspondence, logs, diaries, forms, bank statements, tax returns, card files, books of account, journals, ledgers, invoices, diagrams, drawings, computer print-outs or tapes, reports, statistical computations, studies, graphs, charts, minutes, manuals, pamphlets, or books of all nature and kind whether handwritten, typed, printed, mimeographed, photocopied or otherwise reproduced, all tape recordings (whether for computer, audio, or visual replay) or other written, printed, and recorded matter or tangible things on which words, phrases, symbols or information are recorded.

F. A request to identify a document is a request to state as applicable:

1. The date of the document;
2. The type of document;
3. The names and present addresses of the person or persons who prepared the document and of the signers and addressers of the document;
4. The name of the employer or principal whom the signers, addressers and preparers were representing;
5. The present location of the document;
6. The name and current business and home addresses of the present custodians of the original document, and any copies of it;
7. A summary of the contents of the document; and
8. If the original document was destroyed, the date and reason for or circumstances under which it was destroyed.

G. If any Interrogatory may be answered fully by a document, the document may be attached in lieu of an answer if the document is marked to refer to the Interrogatory to which it responds.

INTERROGATORIES

1. State the name(s), business address(es) and job title(s) or capacity(ies) of the officer(s), employee(s) or agent(s) answering or providing any information used to answer each Interrogatory.

ANSWER:

2. State the correct legal name of your organization, any other names which your organization(s) uses to identify itself, whether such names are registered with any official, the date and place of such registration, and state the form of your organization, the date and place the organization was organized and registered and/or licensed to do business.

ANSWER:

3. Is Defendant affiliated with any other organization (e.g., common ownership, overlapping offices or managers or common facilities or employees)? If so, describe the affiliation and identify the participants.

ANSWER:

4. Identify and describe each document known to Defendant which is related to the account of the Plaintiff and identify the party or parties who have custody of the said file records.

ANSWER:

5. Identify and describe any documents Defendant used to describe, record or establish the valuation of the plaintiffs' property which is the subject of this matter, when Plaintiff applied for a mortgage with the Defendant on the property at issue.

ANSWER:

6. Indicate if the Defendant retained an appraiser to appraise the subject real estate in conjunction with documenting any allowable secured claim, and if so, identify the person or firm retained.

ANSWER:

7. Indicate if the subject account of the Plaintiff has ever been sold or transferred, and if so, identify when it was sold, why it was sold and to whom it was sold.

ANSWER:

8. Identify any witnesses to or participants in, and the substance of each contact with any person, made in connection with the valuation of the subject property.

ANSWER:

9. Identify any document furnishing information with regard to your response to the immediately preceding Interrogatory.

ANSWER:

10. Identify by name, position, address and phone number all witnesses Defendant proposes to call to trial.

ANSWER:

11. List all exhibits Defendant proposes to introduce at trial.

ANSWER:

12. Identify each person whom the Defendant expects to call as an expert witness at trial, state the subject matter on which the expert is expected to testify and the substance of the facts and opinions to which the expert is expected to testify, and a summary of the grounds for each opinion.

ANSWER:

13. State each and every contention that you will present at the hearing in this matter as to why Defendant may have an allowable secured claim regarding its claim for the mortgage loan on the subject real estate.

ANSWER:

Dated this the _____ day of _____ 2008.

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**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME: Chapter 13 No.
Our File No.

ADDRESS:

SSN:

Debtors.

Adv. Proc. No. 08- _____

Plaintiffs,

versus

AMERICAN GENERAL FINANCIAL SERVICES, INC.,

Defendant.

Defendant.

**PLAINTIFFS' REQUEST TO PRODUCE DOCUMENTS
(for subordinate Mortgage lien avoidance)**

COME NOW the above-named Plaintiffs, by and through their attorney of record, and herewith request pursuant to Rule 7034 of the Federal Rules of Bankruptcy Procedure and Rule 34 of the Federal Rules of Civil Procedure that Defendant produce a copy of each of the following documents to be sent to the office of Plaintiffs' attorney within thirty (30) days of this request.

"Document" means and includes any printed, typewritten or handwritten matter of whatever character including specifically, but not exclusively and without limiting the generality of the foregoing, letters, desk or other calendars, memoranda, telegrams, cables, reports, charts, business records, personal records, accountants' statements, bank statements, handwritten notes, minutes of meetings, notes of meetings or conversations, catalogs, written agreements, checks, receipts, invoices, bills, and any carbon or other copies of such materials.

1. All contracts between Plaintiffs and Defendant including notes, judgment notes, security agreements, mortgages, deeds of trust and insurance agreements.
2. All credit applications or credit reports pertaining to Plaintiffs' account.
3. All disclosure statements given to Plaintiffs or other notices of the Plaintiffs' rights.
4. All ledger cards or ledger sheets or other documents reflecting payments, charges, and costs incurred on Plaintiffs' account as well as any document related to any settlement with the Plaintiff in any transaction.
5. All correspondence concerning Plaintiffs' account including but not limited to internal and external emails, memos, letters to the file, reports, summaries, evaluations, and any other documents.

6. All telephone log sheets or other internal memoranda or notes concerning Plaintiffs' account.
7. All procedural manuals, operating manuals, memoranda, or other documents or internal rules or regulations related in any way to the guidelines for making third mortgage loans to debtors such as the Plaintiffs herein.
8. All agreements, correspondence, or other documents concerning credit life, accident or property insurance on the Plaintiffs' account including any master or overall contracts, agreements, or other documents relating to the overall cost, commission on, or other details of any group insurance policy applicable to Plaintiffs.
9. All documents related to any type of appraisal of the subject property either before, at the time of, or after the loan.
10. All documents related to any broker's opinion of value for the subject property whether or not such opinion was based on a formal appraisal.
11. All property inspection or property preservation reports related to the condition or value of the property.
12. All internal documents related to the amount of money Defendant could or might loan on the property related to the principal amount of the first and second mortgages.
13. All records of credit scores or credit ratings assigned to the Plaintiffs before making the second mortgage loan.
14. Please provide a list of all employees who were involved with the decision to furnish the second mortgage loan.
15. All of the above-enumerated documents with respect to any previous transactions between Plaintiffs and Defendant.

Dated this the _____ day of _____, 2008.

O. Max Gardner III
Law Offices of O. Max Gardner III, P.C.
Attorney for the Plaintiffs
P.O. Box 1000
Shelby, NC 28151-1000
N.C. State Bar No. 6164
(704) 487-0616 / FAX (704) 487-0619
maxgardner@maxgardner.com

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME:

**Chapter 13 No.
Our File No.**

ADDRESS:

SSN:

Debtors.

Adv. Proc. No. 08- _____

Plaintiffs,

versus

AMERICAN GENERAL FINANCIAL SERVICES, INC.,

Defendant.

**CONSENT ORDER ON DEBTOR'S COMPLAINT TO DETERMINE VALIDITY, PRIORITY OR
EXTENT OF A LIEN OR OTHER INTEREST IN PROPERTY DECLARING LIEN UNSECURED**

THIS CAUSE coming on to be heard before the undersigned Bankruptcy Court Judge for the Western District of North Carolina, Shelby Division, upon the filing of a Complaint to determine the validity, priority or extent of the Defendant's lien by the debtors, and the Court, after reviewing the pleadings and record and being advised that this order is entered into with the consent of all parties, makes the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. This underlying bankruptcy case was commenced by the filing of a petition with the Clerk of this Court on _____.
2. On or about _____, the debtors filed a Complaint seeking to determine the validity, priority or extent of the lien of American General Financial Services, Inc.
3. The Defendant was properly served with the Summons and Complaint in this matter and filed an Answer on or about _____.

4. All parties consent to the entry of this Consent Order, and all parties to this proceeding were served with Notice, are properly before this Court, and this Court has proper jurisdiction over this proceeding.

BASED UPON THE FOREGOING FINDINGS OF FACT AND CONCLUSIONS OF LAW, AND BY AND WITH THE CONSENT OF THE PARTIES, IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. The parties agree that the Defendant has no secured second mortgage and that there is no security for the debt to Defendant;

2. The balance of the claim will be treated as a general unsecured claim under the plan;

3. All claims of Defendant on this loan will be discharged upon the entry of a Final Decree in the base Chapter 13 case; and

4. That within thirty (30) days of the entry of the discharge order in this case, the Defendant is hereby ordered to cancel and mark paid its second deed of trust and must provide the debtors with proof thereof; and

5. That within thirty (30) days of the entry of the discharge order in this case, the Defendant is hereby ordered to mark as paid in full all loan documents related to the second deed of trust and to deliver such documents to the Debtors.

6.. All parties are responsible for their own legal fees and expenses incurred with respect to this matter. The attorney for the debtors shall be awarded his non base fee of \$450.00 for representing the debtors with respect to this matter, which shall be added to the debtors' Chapter 13 plan.

This Order has been signed electronically. The judge's signature and court's seal appear at the top of the Order

United States Bankruptcy Court

WE CONSENT:

O. MAX GARDNER III
Attorney for the debtors

Attorney for Defendant

NO OBJECTION:

Steven G. Tate
Chapter 13 Trustee

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME: Chapter 13 No. _____
Our File No. _____

ADDRESS:

SSN:

Debtors.

Adv. Proc. No. 08- _____

Plaintiffs,

versus

AMERICAN GENERAL FINANCIAL SERVICES, INC.,

Defendant.

**CONSENT ORDER ON DEBTOR'S COMPLAINT TO DETERMINE
VALIDITY, PRIORITY OR EXTENT OF A LIEN OR OTHER INTEREST IN PROPERTY
PROVIDING FOR CURE OF SECURED CLAIM**

THIS CAUSE coming on to be heard before the undersigned Bankruptcy Court Judge for the Western District of North Carolina, Shelby Division, upon the filing of a Complaint to determine the validity, priority or extent of the Defendant's lien by the debtors, and the Court, after reviewing the pleadings and record and being advised that this order is entered into with the consent of all parties, makes the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. This underlying bankruptcy case was commenced by the filing of a petition with the Clerk of this Court on _____.
2. On or about _____, the debtors filed a Complaint seeking to determine the validity,

priority or extent of the lien of Defendant.

3. The Defendant was properly served with the Summons and Complaint in this matter and filed a Response on or about _____.

4. The parties have reached a settlement of the issues between them with respect to this matter.

5. All parties consent to the entry of this Consent Order, all parties to this proceeding were served with Notice, are properly before this Court, and this Court has proper jurisdiction over this proceeding.

BASED UPON THE FOREGOING FINDINGS OF FACT AND CONCLUSIONS OF LAW, AND BY AND WITH THE CONSENT OF THE PARTIES, IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. The parties agree that the secured value of the claim of Defendant is to be fixed at \$_____;

2. The balance of the claim will be treated as a general unsecured claim under the plan;

3. The debtors agree to repay the secured claim without interest over a period of 100 months beginning in _____ with fixed monthly payments of \$200.00;

4. All claims of Defendant on this loan other than the agreed amount will be discharged upon the entry of a Final Decree in the base Chapter 13 case; and

5. All parties are responsible for their own legal fees and expenses incurred with respect to this matter.

This Order has been signed electronically. The judge's signature and court's seal appear at the top of the Order

United States Bankruptcy Court

WE CONSENT:

O. MAX GARDNER III
Attorney for the debtors

Attorney for Defendant

NO OBJECTION:

Steven G. Tate
Chapter 13 Trustee

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME:

**Chapter 13 No.
Our File No.**

ADDRESS:

SSN:

Debtors.

Adv. Proc. No. 08- _____

Plaintiffs,

versus

AMERICAN GENERAL FINANCIAL SERVICES, INC.,

Defendant.

**STIPULATION OF DISMISSAL WITH PREJUDICE
OF ADVERSARY PROCEEDING**

COME NOW the parties to this Adversary Proceeding filed by the Debtors, by and through counsel, pursuant to Rule 41 of the Federal Rules of Civil Procedure and Rules 7041 and 9014 of the Federal Rules of Bankruptcy Procedure, and stipulate to the dismissal of the said complaint filed by the Debtors against the Defendants with prejudice.

Date: _____

O. Max Gardner III
Attorney for the Debtors

Date: _____

Attorney for Defendant

B - TILA

IN THE MATTER OF:)	
)	
)	CASE NO.
)	OUR FILE NO.
)	
Debtor.)	
_____)	
)	
)	ADV. PROC. NO.
)	
Plaintiff,)	
)	
vs.)	
)	
SUNTRUST MORTGAGE, INC.,)	
ABC Servicing, Inc., and)	
XYZ Trust)	
)	
Defendant.)	

Introduction

Jurisdiction and Venue

¹ Recent amendments to these sections of TILA may not yet be reflected in some codification services. Section 404 of the Helping Families Save Their Homes Act, Pub. L. 111-22, 123 Stat. 1632, enacted and effective May 20, 2009, amended TILA § 131(f) [15 U.S.C. § 1641(f)] to provide private remedies for failure to respond to borrowers' requests for information under that section, and added a new section 131(g) [15 U.S.C. § 1641(g)] relating to notices of sale, assignment, or other transfer of mortgage loans. The Housing and Economic Recovery Act of 2008, Pub. L. 110-289, sec. 2502(b), 122 Stat. 2857, amended 15 U.S.C. § 1640a to change the amount of statutory damages for violations of the type alleged in this Complaint to a range of not less than \$400 nor greater than \$4,000.00.

3. Jurisdiction is further conferred on this Court by 15 U.S.C. § 1640(e) and 28 U.S.C. §§ 1331, 1337.

4. This Court has both personal and subject matter jurisdiction to hear this case pursuant to Section 1334 of Title 28 of the United States Code, Section 157(b)(2) of Title 28 of the United States Code, and pursuant to the Order entered by the Judges of the United States District Court for the Western District of North Carolina on July 30, 1984 (the Referral Order), which Order was entered in accordance with the Bankruptcy Amendments and Federal Judgeship Act of 1984.

5. This Court has supplemental jurisdiction to hear all state law claims, if any, pursuant to Section 1367 of Title 28 of the United States Code.

6. The Plaintiff is informed and believes that this matter is primarily a core proceeding and therefore the Bankruptcy Court has jurisdiction to enter a final order. However, in the event this case is determined to be a non-core proceeding then and in that event the Plaintiff consents to the entry of a final order by the Bankruptcy Judge.

Venue

7. Venue lies in this District pursuant to Section 1391(b) of Title 28 of the United States Code.

Parties

8. The Plaintiff in this case was and is a debtor under Chapter 13 of Title 11 of the United States Code in case number <CASE>, which case was filed on <DATE> and is presently pending before this Court.

9. The Defendant, Suntrust Mortgage, Inc. ("Suntrust" or "Defendant") is a corporation that originates, purchases, sells, and services residential mortgage loans. Defendant is headquartered in Richmond, Virginia and is a wholly-owned subsidiary of Suntrust Banks, Inc., a bank holding company. Suntrust originated the mortgage loans that are the subject of this case.

*. The Defendant, _____ is a corporation that services residential mortgage loans. Upon information and belief _____ is the servicer of the mortgage loans which are the subject of this complaint. Defendant _____ is a corporation organized and existing under the laws of the State of _____, which a headquarters located at _____.

*. The Defendant, _____ is the Trust which upon information and belief actually owns and holds the subject notes.

Facts

10. On December 13, 2007 Defendant made two mortgage loans to Plaintiff for the purpose of acquiring a dwelling at <ADDRESS>, Shelby, North Carolina 28150 (the "Property"), referred to in this Complaint as the "First Mortgage Loan" and the "Second Mortgage Loan."

11. In connection with the First Mortgage Loan the Plaintiff executed a promissory

note (the "First Mortgage Note") in the original principal amount of \$417,000 payable to the Suntrust.

12. The First Mortgage Note was secured by a Deed of Trust on the Property dated <DATE> and recorded in the Cleveland County, North Carolina Office of the Register of Deeds in Deed Book <PAGE>, page <PAGE> (the "First Deed of Trust"), which named Jackie Miller as Trustee, the Defendant Suntrust as Lender, and Mortgage Electronic Registration Systems, Inc., a Delaware corporation ("MERS") as beneficiary of the Deed of Trust and as "nominee" for Defendant.

13. In connection with the Second Mortgage Loan the Plaintiff executed a promissory note (the "Second Mortgage Note") in the original principal amount of \$115,000 payable to Suntrust.

14. The Second Mortgage Note was secured by the a subordinate-lien Deed of Trust on the Property dated <DATE> and recorded in the said Office of the Register of Deeds in Deed Book <PAGE>, page <PAGE> (the "Second Deed of Trust"). Like the First Deed of Trust, the Second Deed of Trust named Jackie Miller as Trustee, the Defendant as Lender, and MERS as beneficiary of the Deed of Trust and as "nominee" for Defendant.

15. The First Mortgage Loan was made for the maximum amount acceptable for purchase by Fannie Mae. Upon information and belief, the reason Defendant offered home purchase financing divided into two loans was to allow Defendant to sell the First Mortgage Loan to Fannie Mae and to sell, or have available for sale, the Second Mortgage Loan such other investor as Defendant may choose, a practice that is typical in the mortgage industry.

16. Both the First Mortgage Loan and Second Mortgage Loan are consumer credit transactions within the meaning of, and subject to, TILA.

17. Both the First Mortgage Loan and the Second Mortgage Loan are "federally related mortgage loans" as defined in 12 U.S.C. § 2602(1).

COUNT 1

Failure to provide the identity of the owner or master servicer of the First Mortgage Note as required by TILA § 131(f) [15 U.S.C. § 1641(f)] and failure to respond to a "qualified written request" regarding the First Mortgage Loan § 6(e)(1)(B) of the Real Estate Settlement Procedures Act ("RESPA") [12 U.S.C. § 2605(e)(1)]

18. The allegations of paragraphs 1 through 17 of this Complaint are hereby re-alleged and incorporated by reference.

19. The debtor filed this case for relief under Title 11 of the United States Code on January 4, 2009.

20. At various times between January 20, 2009 and August 14, 2009 the attorney for the provided numerous notices to Suntrust that the Plaintiff was involved in an active Chapter 13 bankruptcy proceeding and as a result needed information about the current owner and holder of both of her mortgage notes.

21. On or about July 30, 2009 Plaintiff mailed a letter to Defendant-Suntrust requesting the name of the owner of the First Mortgage Note and clearly alerting Defendant to the fact that his request was being made pursuant to TILA § 131(f). An unsigned copy of

Plaintiff's request, the original of which Plaintiff signed and mailed, is attached hereto as Exhibit A along with Postal Form 3811, the certified receipt form, attached as Exhibit B.

22. The law firm for Suntrust that filed a Notice of Appearance in this case and that filed Proofs of Claim on both mortgage notes received a letter from Plaintiff's counsel dated August 7, 2009 that among other topics clearly informed Defendant's counsel that Plaintiff had sent his July 30, 2009 letter to Defendant and that Plaintiff's letter invoked Plaintiff's rights under TILA § 131(f) and that Plaintiff had not received any response to his letter.

23. Plaintiff's July 30, 2009 letter to Defendant is a "qualified written request" as defined in § 6(e)(1)(B) of the Real Estate Settlement Procedures Act ("RESPA") [12 U.S.C. § 2605(e)(1)(B)]. Thus Plaintiff's July 30, 2009 letter had the dual effect of invoking Plaintiff's rights under TILA § 131(f) as well Plaintiff's rights under RESPA § 6(e)(1).

24. The Defendant did not respond within 20 days to Plaintiff's request for the name of the owner and holder of the First Mortgage Note as required by § 6(e)(1) of RESPA [12 U.S.C. § 2605(e)(1), and as recently as September 9, 2009 has never provided Plaintiff with a response, thus violating both 12 U.S.C. § 2605(e)(1) (RESPA) and 15 U.S.C. § 1641(f) (TILA) with respect to the First Mortgage Loan.

COUNT 2

Failure to provide the identity of the owner or master servicer of the Second Mortgage Note as required by TILA §131(f) [15 U.S.C. §1641(f)] and failure to respond to a "qualified written request" regarding the Second Mortgage Loan § 6(e)(1)(B) of the Real Estate Settlement Procedures Act ("RESPA") [12 U.S.C. § 2605(e)(1)]

25. The allegations of paragraphs 1 through 24 of this Complaint are hereby re-alleged and incorporated by reference.

26. On August 7, 2009 Plaintiff instructed his attorney to mail a letter² to Defendant requesting the name of the owner and holder of the Second Mortgage Note and clearly alerting Defendant to the fact that his request was being made pursuant to TILA § 131(f). A copy of the request that Plaintiff directed to be made on his behalf, together with the certified mail receipt signed on behalf of Defendant upon receipt of that request is attached hereto as Exhibit C.

27. The August 7, 2009 letter to Defendant is a "qualified written request" as defined in § 6(e)(1)(B) of RESPA [12 U.S.C. §2605(e)(1)(B)]. Thus the said August 7, 2009 letter had the dual effect of invoking Plaintiff's rights under TILA § 131(f) as well Plaintiff's rights under RESPA § 6(e)(1).

28. The Defendant did not respond within 20 days to Plaintiff's request for the name of the owner of the Second Mortgage Note as required by § 6(e)(1) of RESPA [12 U.S.C. § 2605(e)(1), and as recently as September 9, 2009 has never provided Plaintiff with a response, thus violating both 12 U.S.C. § 2605(e)(1) (RESPA) and 15 U.S.C. § 1641(f) (TILA) with respect to the Second Mortgage Loan.

² This letter and the letter of the same date referred to in paragraph 22 of this Complaint are two separate letters.

COUNT 3

**Failure to notify Plaintiff of the Assignment of the First
Deed of Trust as required by TILA § 131(g) [15 U.S.C. § 1641(g)]**

29. The allegations of paragraphs 1 through 28 of this Complaint are hereby re-alleged and incorporated by reference.

30. The First Mortgage Loan was a consumer credit transaction secured by the Plaintiff's principal dwelling within the meaning of TILA.

31. Upon information and belief, on July 15, 2009 Mortgage Electronic Registration Systems, Inc. ("MERS") assigned all of its right, title, and interest in the First Deed of Trust to the Defendant-Suntrust. A copy of an Assignment believed to constitute at least part of the documentation of that transaction is attached hereto as Exhibit C.

32. Defendant did not send Plaintiff any notice of the July 15, 2009 assignment of the First Deed of Trust from MERS to Defendant, thus violating TILA § 131(g) [15 U.S.C. § 1641(g)].

COUNT 4

**Failure to notify Plaintiff of the Sale or Transfer of the First Mortgage
Note as required by TILA § 131(g) [15 U.S.C. § 1641(g)]**

33. The allegations of paragraphs 1 through 32 of this Complaint are hereby re-alleged and incorporated by reference.

34. Plaintiff believes, and evidence expected to be available through further investigation and discovery is likely to show, that at some time after the origination of the First Mortgage Loan, the First Mortgage Note was sold by Defendant to Fannie Mae.

35. Upon information and belief, at some time before July 11, 2009 Fannie Mae sold or otherwise transferred the First Mortgage Note to Defendant-Suntrust. A copy of a letter to Plaintiff's attorney from Defendant's bankruptcy law firm dated July 10, 2009, identifying the Defendant as the holder of the First Mortgage Note is attached hereto as Exhibit E. A "Notice Required by the Fair Debt Collection Practices Act" believed to have accompanied that July 10, 2009 letter, identifying the Defendant as "the creditor to whom the debt is owed" as of July 10, 2009 is attached hereto as Exhibit F.

36. Defendant did not send Plaintiff any notice of the sale or transfer of the First Mortgage Note from Fannie Mae to Defendant, thus violating TILA § 131(g) [15 U.S.C. § 1641(g)].

WHEREFORE, the Plaintiff having set forth his claims for relief against the Defendant respectfully prays of the Court as follows:

A. For an Order of this Court awarding Plaintiff the relief provided by TILA as to each of the four separate violations of TILA set forth above, including statutory damages in the amount of \$4,000.00 for each violation, actual damages if any be proven, reasonable attorney's fees, and costs expended in this proceeding.

B. That the Plaintiff have such other and further relief as the Court may deem just and proper.

This _____ day of _____, 2009.

O. Max Gardner III
Gardner & Gardner PLLC
Attorney for the Debtor/Plaintiff
NC State Bar #6164
P.O. Box 1000, Shelby, NC 28151-1000
(704) 487-0616 / FAX (704) 487-0619
e-mail maxgardner@maxgardner.com

IN THE UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION

IN THE MATTER OF:)	
)	
)	
	)	CHAPTER 13 CASE NO.
	)	OUR FILE NO.:
)	
Debtor.)	
)	
<hr style="border: 0.5px solid black;"/>		
)	
)	
)	
Debtor/Plaintiff,)	
	)	ADV. PROC. NO.;
STEVEN G. TATE, ESQ.,)	
Chapter 13 Trustee, Interested Party,)	
)	
vs.)	
)	
DEUTSCHE BANK NATIONAL TRUST)	
COMPANY,)	
)	
Defendant.)	
)	

**PLAINTIFF'S INTERROGATORIES AND REQUESTS FOR PRODUCTION OF
DOCUMENTS, FIRST SET, TO DEFENDANT DEUTSCHE BANK NATIONAL TRUST**

(FOR A TILA CASE)

Plaintiff requests pursuant to Rules 33 and 34 of the Federal Rules of Civil Procedure that Defendant answer the within interrogatories and produce a copy of each of the following documents, to be sent to the office of Plaintiff's attorney **within thirty (30) days** of this request.

I. INSTRUCTIONS

A. In answering these interrogatories, furnish all information in the possession of Defendant, its officers, agents and employees and its attorneys and investigators for its attorneys.

B. If Defendant cannot answer the following interrogatories in full after exercising due diligence to secure the information to do so, state the answer to the extent possible specifying your inability to answer the remainder, and state whatever information or knowledge Defendant has concerning the unanswered portion.

C. Each interrogatory is considered continuing, and if Defendant obtains information which renders its answers or one of them, incomplete or inaccurate, Defendant is obligated to serve amended answers on the undersigned.

D. Insofar as may be applicable, and except as otherwise indicated, the term "document" or "documents" shall refer to any and all writings and recorded materials, of any kind whatsoever, that is or has been in the possession, control or custody of Defendant or of which Defendant has knowledge, whether originals or copies, including but not limited to contracts, documents, notes, rough drafts, interoffice memoranda, memoranda for the files, letters, research materials, correspondence, logs, diaries, forms, bank statements, tax returns, card files, books of account, journals, ledgers, invoices, blueprints, diagrams, drawings, computer print-outs or tapes, reports, surveys, statistical computations, studies, pictures, maps, graphs, charts, minutes, manuals, pamphlets, or books of any nature or kind whatsoever; and all other materials handwritten, printed, typed, mimeographed, photocopied or otherwise reproduced; and slides or motion pictures, television tapes; all tape recordings (whether for computer, audio or visual replay) or other written, printed or recorded matter or tangible things on which words, phrases, symbols or information are affixed.

E. A request to "Identify" a document is a request to state (Insofar as may be applicable):

1. The date of such document.
2. The type of document or written communication it is.
3. The names and present addresses of the person or persons who prepared such document and of the signers, addressors and addressees of such document.
4. The name of any principal whom or which the signers, addressors and preparers of such document were thereby representing.
5. The present location of such document.
6. The name and present address of the person now having custody of the document.
7. Whether you possess or control the original or a copy thereof and if so, the location and name of the custodian of such original or copy.
8. A brief description of the contents of such document.

F. A request to "describe" any oral statement or communication is a request to state:

1. The name and present address of each individual making such statement or communication.

2. The name of any principal or employer whom or which such individual was thereby representing and the position in which such individual was then employed or engaged by such principal or employee.
3. The name and present address of the individual or individuals to whom the oral statement or communication was made, and the name of any principal or employer whom such person or persons were representing at the time of and in connection with such oral statement or communication, as well as the employment position in which they were then employed or engaged.
4. The names and present addresses of any other individuals present when such oral statement or communication was made or who heard or acknowledged hearing the same.
5. The place where such oral statement or communication was made.
6. A brief description of the contents of such oral statement or communication.

G. A request to "cite" portions or provisions of any document is a request to state, insofar as applicable with reference to such portion or provision, the title, date, division, page, sheet, charge order number, and such other information as may be necessary to accurately locate the portion or provision referenced.

H. The term "person" shall include a natural person, partnership, corporation, association, or other group however organized.

I. Whenever a request is made to "identify" a natural person, it shall mean to supply all of the following information:

1. His/her full name.
2. His/her employer and position at the time.
3. The name of any person or entity (natural or artificial) whom she/he is claimed to have represented in connection with the matter to which the interrogatory relates.
4. His/her last known address, telephone number, and employer.
5. His/her present employer.

J. A request to "explain fully" any answer, denial or claim is a request (insofar as may be applicable) to:

1. State fully and specifically each fact and/or contention in support of your answer, denial or claim; and
2. For each such fact or contention, to identify each person who has knowledge relative to that fact or contention, each document that tends to support that fact or contention; and each document that tends to dispute that fact or contention.

K. Unless otherwise specified, the term "instant transaction" means the transaction(s) described in the complaint, including any contacts with any party to this lawsuit by Defendant or any assignor of Defendant up to and including the date of your answers to these interrogatories.

L. A request in any of the enclosed interrogatories to "identify" any document is a request to attach said document to answers to these interrogatories. If documents are attached to answers to these interrogatories, they must be marked to identify which interrogatory they refer to. In identifying documents you are also requested to produce, you need to supply only so much of the requested information as is not readily apparent from the face of the document.

II. INTERROGATORIES

1. Please identify the person answering each of the instant interrogatories.
2. Prior to the date of filing of this lawsuit, did Defendant perform or hire any third party to perform any due diligence review of the Truth in Lending disclosures for this loan by comparison among the disclosure statements, any itemization of the amount financed, the note, or any other disclosure of disbursement in accordance with 15 U.S.C. §1641(e)(1). If so, identify the person(s) who performed the foregoing review and state whether there is a writing memorializing the review's method, analysis, and/or results.
3. Regarding the \$500.00 charge that is designated "Stephen G. Smith: Attorney fees" on the HUD-1 settlement statement attached hereto as Ex. "A":
 - a) State whether the fees were included in the finance charge.
 - b) If your answer is in the negative, explain why it was or should be, in your opinion, excluded from finance charge calculation.
 - c) Describe all services performed for the charge.
4. Regarding the \$1,500.00 that is designated "Attorney's fee to Stephen G. Smith" on the HUD-1 settlement statement attached hereto as Ex. "A":
 - a) State whether the fee was included in the finance charge.
 - b) If your answer is in the negative, explain why it was or should be, in your opinion, excluded from finance charge calculation.
 - c) Describe all services performed for the charge.

5. Regarding the \$2,000.00 charge that is designated "Karen Iverson: Services rendered" on the HUD-1 settlement statement attached hereto as Ex. "A":
 - a) State whether the fees were included in the finance charge.
 - b) If your answer is in the negative, explain why it was or should be, in your opinion, excluded from finance charge calculation.
 - c) Describe all services performed for the charge.
6. State your calculation of the finance charge for this transaction including each item from the HUD1 settlement statement attached hereto as Ex. "A" and, specifically, state any basis for why you do or do not believe the foregoing attorney fees are "bona fide and reasonable" pursuant to Reg. Z, 226.4(c)(7).
7. State the total amount of dollars in cash that Plaintiff has paid to Defendant in the instant transaction. Identify each payment individually and state the date of payment.
8. Identify each person Defendant may call as a witness in this case.
9. Identify each document which Defendant may introduce into evidence in this case.

III. REQUEST FOR PRODUCTION OF DOCUMENTS

A. INSTRUCTIONS

1. If your response is that the documents are not in your possession or custody, please describe in detail the unsuccessful efforts you made to locate the documents.
2. If your response is that the documents are not in your control, please identify who has control and the location of the documents.

3. If a request for production seeks a specific document or an itemized category which is not in your possession, control or custody, provide any documents you have that contain all or part of the information contained in the requested document or category.

4. If there are documents not currently in Defendant's possession, but which Defendant can obtain from previous holders of the mortgage, such additional documents are included in this request.

B. REQUEST FOR PRODUCTION

1. All documents referenced in your answers to interrogatories above.
2. To the extent not included in your prior response, any HOEPA worksheets contained in the loan file for plaintiff's loan.
3. A complete payment history for the loan.
4. Any and all documents that you intend to introduce at trial in this case.

This the _____ day of _____, 2009.

O. Max Gardner III
Gardner & Gardner, PLLC
Attorney for Debtor/Plaintiff
N.C. State Bar No. 6164
P.O. Box 1000
Shelby, NC 28151-1000
(704) 487-0616
FAX (704) 487-0619
maxgardner@maxgardner.com

**IN THE UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:)	
)	
)	
John Q. Public and	)	CASE NO.
Mary Public,	)	OUR FILE NO.
)	
Debtors.)	
<hr style="width:40%; margin-left:0"/>)	
)	
Juan Q. Público and	)	ADV. PROC. NO.
Maria Público,)	
)	
Plaintiffs,)	
)	
vs.)	
)	
FIRST RESIDENTIAL MORTGAGE SERVICES)	
CORP.; WELLS FARGO BANK, NATIONAL)	
ASSOCIATION, AS TRUSTEE FOR)	
CERTIFICATE HOLDERS OF BEAR STEARNS)	
ASSET BACKED SECURITIES I LLC, ASSET)	
BACKED CERTIFICATES, SERIES 2007-AC2;)	
AND EMC MORTGAGE CORPORATION,)	
)	
Defendants.)	

(This is a case that involved non-English speaking borrowers)

**FIRST AMENDED COMPLAINT
I. PRELIMINARY STATEMENT**

1. This Complaint is filed under the Truth in Lending Act, 15 U.S.C. § 1601 (hereinafter called "TILA"), to enforce the Plaintiffs' right to rescind a consumer credit transaction, to void the Defendants' security interest in the Plaintiffs' home, and to recover statutory damages, reasonable attorney's fees and costs by reason of the Defendant's violations of TILA and Regulation Z, 12 C.F.R. § 226 (hereinafter called "Regulation Z"). This action is also filed for actual and statutory damages from Defendant EMC pursuant to 12 U.S.C. §§ 2605(e)(1)(A) and 2605(e)(1)(B)(2) and §§ 3500.21(e)(1) and 3500.21(e)(3) of Regulation X. This action also is filed for damages against First Residential for its unfair and deceptive conduct in violation of the North Carolina Consumer Economic Protection Act ("CEPA"). This action also is filed against all defendants to recover damages resulting from defendants' fraud, misrepresentation, and civil conspiracy.

II. JURISDICTION

2. On January 5, 2010, Plaintiffs filed a voluntary petition under chapter 13 of the Bankruptcy Code (Title 11, United States Code). Therefore, the Court has jurisdiction over this proceeding pursuant to 28 U.S.C. §§ 1334 and 157, as amended, and the Order of

Reference made by the district court for this district (which Order was entered in accordance with the Bankruptcy Amendments and Federal Judgeship Act of 1984). Jurisdiction is further conferred on the Court by 15 U.S.C. § 1640(e) and 28 U.S.C. §§ 1331, 1337. The Court has authority to issue a declaratory judgment by virtue of 28 U.S.C. § 2201. The Court has both personal and subject matter jurisdiction to hear this case pursuant to 28 U.S.C. Sections 1334 and 157(b)(2). The Court has jurisdiction to hear the claims for relief under the Real Estate Settlement Procedures Act pursuant to 12 U.S.C. § 2614. The Court has supplemental jurisdiction to hear all state law claims pursuant to 28 U.S.C. Section 1367.

3. This matter is a core proceeding and therefore the Bankruptcy Court has jurisdiction to enter a final order. However, in the event this case is determined to be a non-core proceeding then and in that event the Plaintiffs consent to the entry of a final order by the Bankruptcy Judge.

III. PARTIES

4. The Plaintiffs are the Debtors, Juan Q. Público ("Juan") and Maria Público ("Maria") (individually or collectively, "Plaintiffs"). The Plaintiffs own and reside at the real property known as 360 North Hampton, Shelby, North Carolina (the "Property").

5. Defendant First Residential Mortgage Services Corporation (hereinafter "First Residential") is a New Jersey corporation engaged in the business of mortgage banking and loan correspondence with a principal place of business located at 570 Sylvan Ave., Englewood Cliffs, NJ 07632-3101. First Residential's North Carolina Resident Agent is Blumberg Excelsior Corporate Services, Inc., 176 Mine Lake Court, #100, Raleigh, North Carolina 27615. First Residential is identified as the originating lender on Plaintiffs' Deed of Trust encumbering the Property that was recorded January 2, 2007, at Deed Book 1370, Page 846, in the office of the Cleveland County Register of Deeds (the "Deed of Trust").

6. Defendant assignee Wells Fargo Bank, National Association, as Trustee for Certificate holders of Bear Stearns Asset Backed Securities I LLC, Asset Backed Certificates, Series 2007-AC2 (hereinafter "Wells Fargo" or the "Trust"), is identified in that certain Deed of Appointment of Substitute Trustee, recorded on the Property October 28, 2009, at Deed Book 1625, Page 326, in the office of the Cleveland County Register of Deeds, as the owner and holder of the Note secured by the Deed of Trust.

7. Defendant EMC Mortgage Corporation (hereinafter "EMC") is a Delaware corporation engaged in the business of mortgage lending, securitization, and servicing, with a principal place of business located at 800 State Highway 121 Bypass, Lewisville, TX 75067-3884. EMC's North Carolina Resident Agent is the CT Corporation System, 150 Fayetteville Street, Box 1011, Raleigh, NC 27601. EMC is identified as the Seller, Master Servicer, and the Company in the Pooling and Servicing Agreement¹ (PSA) which governs the subject Trust, dated as of February 1, 2007 and filed with the Securities and Exchange Commission (SEC).

8. At all times relevant hereto, First Residential, in the ordinary course of its business, regularly extended or offered to extend consumer credit for which a finance charge is or may be imposed or which, by written agreement, is payable in more than four installments.

¹ A true and correct copy of the PSA can be found on the SEC's web site at:
http://www.sec.gov/Archives/edgar/data/1388968/000088237707000985/d642573_ex4-1.htm

IV. FACTS

9. On or about November 20, 2006, Plaintiffs entered into a consumer credit transaction (hereinafter the "transaction") with First Residential in which the extended consumer credit was subject to a finance charge and which was initially payable to First Residential.

10. Attached as PLAINTIFFS' [EXHIBIT A](#) is a true and accurate copy of the credit agreement evidencing the transaction (the "Note").

11. As part of this consumer credit transaction, First Residential retained a security interest in the Property.

12. The security interest was not created to finance the acquisition or initial construction of Plaintiffs' home.

13. Attached as [PLAINTIFFS' EXHIBIT B](#) is a true and accurate copy of the mortgage evidencing First Residential's security interest (the "Deed of Trust").

14. The settlement agent for the transaction was Settlement Services, Inc. ("Settlement Services"). Attached as [PLAINTIFFS' EXHIBIT C](#) is a true and accurate copy of the HUD-1 Settlement Statement ("HUD-1 ") prepared by Settlement Services and delivered to Plaintiffs on November 20, 2006 when the transaction closed. Settlement Services' representative stated at the outset of the closing that he was running late and pressed for time, and rushed Plaintiffs through the process of signing the settlement papers.

15. Attached as [PLAINTIFFS' EXHIBIT D](#) is a true and accurate copy of Settlement Services' Deposit/Check Disbursement Statement for the transaction ("Disbursements").

16. The HUD-1 inaccurately states that closing took place at Settlement Services' office at 8604 Cliff Cameron Drive, Suite 110, Charlotte, NC 28269. Closing actually took place after 5:00 p.m. at the office of First Residential's loan officer ("LO") located at 111 W. Central Avenue, #203, Mount Holly, North Carolina (the "Closing").

17. Plaintiffs were introduced to LO by the real estate agent that helped them buy the Property in October 2005, and LO recommended Settlement Services' closing services to Plaintiffs.

18. Plaintiffs do not speak or read English. LO served as Plaintiffs' interpreter throughout the transaction. Plaintiffs communicated with First Residential only through LO.

19. Juan emigrated to the United States from Bolivia and is a permanent resident alien of the United States. Juan works as a debris truck driver for Roofing Services Inc. of Lawndale, North Carolina, a roofing contractor, since at least 2005. Maria works as a cook and housekeeper for St. Mary's Catholic Church in Shelby, North Carolina, where she has been employed for the past four years. Plaintiffs are not well educated and are unsophisticated in business and financial matters.

20. All of the transaction documents signed by Plaintiffs at closing are in English. The subject loan is in Juan's name only, but the Deed of Trust was signed by both Plaintiffs at since the Property is owned by Plaintiffs as husband and wife, tenants by the entirety.

21. The subject loan, which was originated to be securitized, is known as a "stated income, stated asset" ("SISA") loan, and was underwritten based on Juan's credit score, the loan to value ratio, and the belief that residential real estate in this country can only go up in value.

22. LO never asked Juan how much income he received. She only asked Juan for his social security number and his authorization to check his credit report, and she told Juan that was the only information she needed to qualify him for a loan.

23. LO prepared the Uniform Residential Loan Application ("Application") that Juan signed at closing, a true and correct copy of which is attached as [PLAINTIFFS' EXHIBIT E.](#)

24. The Application lists Juan's gross monthly income as \$9,500 from fence construction self employment, and Maria's income as zero. LO supplied the income information on the Application, which she got by searching www.salary.com for the average income of a person engaged in fence construction, rather than reporting Plaintiffs' actual income. LO did not tell Plaintiffs that she falsified their income and occupation on the Application. Juan did not know when he signed the Application that it incorrectly stated his income and his occupation.

25. LO was acting within the scope of her employment, and in the manner she had been taught at First Residential, when she stated Plaintiffs' income on the Application.

26. First Residential never asked Juan for his tax returns, pay stubs, or any other evidence of his actual income.

27. The transaction resulted in little or no benefit to Plaintiffs, but cost them \$7,443 in closing charges (in the form of equity skimming) that would not have been incurred had the transaction not been consummated, and decreased their debt service by only \$61 per month. The interest rate on the first trust that was refinanced was a five-year ARM at a starting rate of 7.375%, a minimum rate of 2.375% and a maximum rate of 12.375% based on 6-month LIBOR index plus 2.25%, with the first change date on November 1, 2010. Had Plaintiffs not refinanced, their interest expense likely would drop significantly in November since LIBOR is currently at 0.39%.

28. First Residential assigned the obligation in question to Wells Fargo.

**V. FIRST CAUSE OF ACTION
VIOLATION OF TRUTH IN LENDING ACT
(as to Defendants First Residential and Wells Fargo)**

29. Plaintiffs repeat and re-allege each and every preceding paragraph as if fully set forth herein.

30. First Residential is a creditor within the meaning of § 1602(f) of the Truth in Lending Act (15 U.S.C. §§ 1601 *et seq.*, hereinafter "TILA" or the "Act") and Regulation Z, 12 C. F.R. § 226.2(a)(17), and as such was required to provide notices of the right to rescind the transaction and to deliver material disclosures including, but not limited to, the amount financed, finance charge and annual percentage rate to Plaintiffs consistent with the Truth In Lending Act.

31. Plaintiffs are consumers within the meaning of § 1602(h) of the Act and Regulation Z, § 226.2(a)(11).

32. This consumer credit transaction was subject to the PLAINTIFFS' right of rescission as described by 15 U.S.C. § 1635 and Regulation Z § 226.23 (12 C. F.R. § 226.23).

33. In the course of this consumer credit transaction, First Residential violated 15 U.S.C. § 1635(a) and Regulation Z § 226.23(b) by failing to deliver to the Plaintiff two copies of a notice of the right to rescind that clearly and conspicuously disclosed the date the rescission period expired. Instead, the notice incorrectly states the transaction date as October 26, 2006, rather than the actual transaction date of November 20, 2006.

34. Attached as [PLAINTIFFS' EXHIBIT F](#) is a true and accurate copy of the Notice of Right to Cancel the transaction delivered at Closing to Plaintiffs.

35. The disclosure statement issued in conjunction with this consumer credit transaction, and attached as [PLAINTIFFS' EXHIBIT G](#), violated the requirements of TILA and Regulation Z in the following and other respects:

a. By failing to include in the finance charge certain charges imposed by First Residential and payable by Plaintiffs incident to the extension of credit as required by 15 U.S.C. § 1605 and Regulation Z, § 226.4, thus improperly under-disclosing the finance charge in violation of 15 U.S.C. § 1638(a)(3) and Regulation Z, § 226.18(d). Such amounts include, but are not limited to the following charges that are not "bona fide and reasonable," and therefore not properly excluded finance charges:

HUD-1 LINE	AMOUNT CHARGED	DESCRIPTION	BONA FIDE	NOT BONA FIDE
303	\$ 9,015.33	Cash out	\$ 8,905.50	\$ 109.83
1102	\$ 195.00	Abstract	\$ 179.00	\$ 6.00
1108	\$ 1,002.00	Title Insurance	\$ 532.50	\$ 469.50
1201	\$ 60.00	Releases	\$ 0.00	\$ 60.00

i. Actual Disbursements. Settlement Services' Disbursements (Pls' Ex. D) prove that the actual amount disbursed to Juan from the transaction loan proceeds was \$8,905.50, or \$109.83 less than stated on the HUD-1 (Pls' Ex. C), which difference consists of an extra day of interest in the amount of \$76.30 (Line 901) and \$33.53 in hidden bogus charges. Attached as [PLAINTIFFS' EXHIBIT H](#) is a true and correct copy of Settlement Services' unsigned HUD-1 printed 11/22/2006 showing the \$76.30 in additional interest charged Juan, and First Residential's unsigned revised notice of right to cancel containing the correct transaction date, neither of which was ever presented to Plaintiffs. Settlement Services' Disbursements also prove that the \$60 charged for government release recording charges (Line 1201) is bogus, and that the actual amount paid for the title abstract (Line 1102) was \$179 rather than the \$195 stated on the HUD-1. Plaintiffs were not aware of these bogus charges, nor would a reasonable person have been, until sometime after January 29, 2010, when Settlement Services produced its transaction file.

ii. Title Insurance. Nearly half (\$469.50) of the title insurance charges (Line 110 8) in this transaction are bogus. Plaintiffs were charged \$1,002 for the most expensive lender's title insurance policy possible (the CTIC policy at the original rate),

rather than \$532.50 for the least expensive lender's title insurance policy possible (standard policy with re-issue rate), in violation of North Carolina General Statute 58-27-5 which states:

(a) No person or entity selling real property, or performing services as a real estate agent, attorney or lender, which services are incident to or a part of any real estate settlement or sale, shall pay or receive, directly or indirectly, any kickback, rebate, commission or other payment in connection with the issuance of title insurance for any real property which is a part of such sale or settlement; nor shall any title insurance company, agency or agent make any such payment.

Attached as [PLAINTIFFS' EXHIBIT I](#) is a true and accurate copy of North Carolina General Statute 58-27-5. Attached as [PLAINTIFFS' EXHIBIT J](#) is a true and accurate copy of Chicago Title Insurance Company's Title Insurance Rates for the State of North Carolina applicable on November 20, 2006, the date of the subject transaction.

a. Standard vs. Enhanced Coverage Rate. First Residential's closing instructions required only the less expensive ALTA Title policy, not an expanded or enhanced policy such as the CTIC policy. Attached as [PLAINTIFFS' EXHIBIT K](#) is a true and accurate copy of First Residential's closing instructions for the transaction.

b. Original vs. Re-Issue Rate. Plaintiffs purchased an original owners' title insurance policy, insuring their interest in the Property in the amount of \$410,000, when they bought the Property on October 17, 2005, thereby qualifying for First American's title insurance re-issue rates in the subject transaction. Attached as [PLAINTIFFS' EXHIBIT L](#) is Plaintiffs' CTIC Title Insurance Policy A79-Z005712 dated October 17, 2005. Settlement Services knew Plaintiffs were qualified for CTIC's lender's title insurance re-issue rate since Plaintiffs were refinancing two conventional Fannie Mae/Freddie Mac uniform purchase-money deeds of trust on the property dated October 17, 2005, each of which contains the notation at the top of the recorded deed of trust that title was insured by Chicago Title Insurance Company. Plaintiffs also obviously qualified for CTIC's lender's title insurance re-issue rates since Plaintiffs' recorded deed to the property states that title was insured by CTIC. Attached as [PLAINTIFFS' EXHIBIT M](#) is a true and accurate copy of the Plaintiffs' recorded deed, Settlement Services' land records search results dated 11/06/2006, and the first page and Schedule A of Plaintiffs' two prior recorded deeds of trust on the property that were refinanced in the subject transaction, all produced by Settlement Services as part of its closing file for the transaction. Plaintiffs were not aware, nor would a reasonable person have been aware, of these bogus title insurance charges until sometime after July 9, 2009, when they engaged the services of attorney Ira Shady.

b. By improperly including certain charges, in the amount financed, which are finance charges, including but not limited to those itemized in Paragraph 35(a) herein, First Residential improperly disclosed the amount financed in violation of 15 U.S.C. § 1638(a)(2) and Regulation Z, § 226.18(b); and

c. By calculating the annual percentage rate (APR) based upon improperly calculated and disclosed finance charges and amount financed, 15 U.S.C. § 1606, Regulation Z, § 226.22, First Residential understated the disclosed annual percentage rate in violation of 15 U.S.C. § 1638(a)(4) and Regulation Z, § 226.18(c).

36. The disclosures improperly made by First Residential, as itemized in paragraph 35, are material disclosures as defined in the Truth in Lending Act, 15 U.S.C. § 1602(u), Regulation Z, § 226.23 n. 48.

37. The finance charge and APR were under-disclosed by more than \$35, the tolerance levels set forth in 15 U.S.C. §§ 1605(f) and 1635(i).

38. By reason of those material violations of 15 U. S.C. § 1638, Plaintiffs have a right of rescission for three years from the date of consummation of the loan pursuant to 15 U.S.C. § 1635(f).

39. On November 19, 2009, Plaintiffs rescinded the transaction by sending a notice of rescission to Defendants, by fax where indicated, and by regular U.S. Mail, or certified U.S. Mail as indicated, return receipt requested, postage prepaid, as follows:

Certified - Return Receipt Requested

William F. Aldinger III, President
Wells Fargo Bank, National Association, as
Trustee for Certificate holders of Bear Stearns Asset Backed Securities I LLC,
Asset Backed Certificates, Series 2007-AC2
299 South Main Street
Salt Lake City, UT 84111-1901

Wells Fargo Bank, National Association
c/o EMC Mortgage Corporation,
Agent 909 Hidden Ridge #200
Irving, TX 75038

Wells Fargo Bank, National Association
c/o EMC Mortgage Corporation
2780 Lake Vista Drive
Lewisville, TX 75067-3884

First Residential Mortgage Services Corp. 570 Sylvan Avenue
Englewood Cliffs. NJ 07632
by US Mail and **Fax: 201-758-2800**

William F. Aldinger III, President
Wells Fargo Bank, National Association, as Trustee for Certificate holders of Bear Stearns
Asset Backed Securities I LLC,
Asset Backed Certificates, Series 2007-AC2
Attn: BK Department,
1 Home Campus
P.O. Box 10335
Des Moines, IA 50328

Wells Fargo Bank, National Association, as Trustee for Certificate holders of Bear Stearns
Asset Backed Securities I LLC, Asset Backed Certificates, Series 2007-AC2
c/o Jacob Geesing, Esquire
Bierman, Geesing & Ward, LLC
4520 East West Highway, Suite 200 Bethesda, MD 20814
by US Mail and **Fax: 301-961-6545**

40. Attached as [PLAINTIFFS' EXHIBIT N](#) is a true and accurate copy of Plaintiffs' notice of rescission with the Broadcast Report evidencing fax transmission of the notice on November 19, 2009 ("Rescission Notice"). Attached as [PLAINTIFFS' EXHIBIT O](#) is a true and accurate copy of U.S. Postal Service Certified Mail Receipt postmarked 11/19/2009 for Article Number 7005 1820 0007 9088 0063. Attached as [PLAINTIFFS' EXHIBIT P](#) is a true and accurate copy of U.S. Postal Service Domestic Return Receipt evidencing delivery to Wells Fargo of Article Number 7005 1820 0007 9088 0063. Article Number 7005 1820 0007 9088 0063 was an envelope which contained Plaintiffs' Rescission Notice.

41. Defendants First Residential and Wells Fargo received copies of the Plaintiffs' notice of rescission on or about November 19, 2006.

42. More than 20 calendar days have passed since the Defendants received copies of the Plaintiffs' notice of rescission.

43. The Defendants have failed to take any action necessary or appropriate to reflect the termination of any security interest created under the transaction, including the security interest described in Paragraph 8, as required by 15 U.S.C. § 1635(b) and Regulation Z § 226.23(d)(2). Defendant Wells Fargo refused to honor the rescission by its agent's (EMC Mortgage Corp.) December 29, 2009 letter to Plaintiffs' counsel, Ira Shady, a true and correct copy of which is attached as [PLAINTIFFS' EXHIBIT Q](#).

44. The Defendants have failed to return to Plaintiffs any money or property given by the Plaintiffs to anyone, including the Defendants, as required by 15 U.S.C. § 1635(b) and Regulation Z § 226.23(d)(2).

45. As a result of the aforesaid violations of the Act and Regulation Z, pursuant to 15 U.S.C. §§ 1635(a), 1640(a), and 1641(c), Defendants are liable to Plaintiffs for:

- a. Rescission of this transaction.
- b. Termination of any security interest in Plaintiffs' property created under the transaction.
- c. Return of any money or property given by the Plaintiffs to anyone, including the Defendants, in connection with this transaction.
- d. Statutory damages of \$2,000 for the disclosure violations.
- e. Statutory damages of \$2,000 for Defendants' failure to respond properly to Plaintiffs' rescission notice.
- f. Forfeiture of return of loan proceeds.
- g. Actual damages in an amount to be determined at trial.
- h. Reasonable attorney's fees.

VI. SECOND CAUSE OF ACTION VIOLATION OF REAL ESTATE SETTLEMENT PROCEDURES ACT (as to Defendant EMC)

46. The preceding allegations of this complaint are re-alleged and incorporated herein by this reference.

47. Defendant EMC is the servicer of a "federally related mortgage loan" as that term is defined in 12 U.S.C. § 2602(1). On November 19, 2009, Plaintiffs, through their attorney, sent Defendants Wells Fargo and EMC a "qualified written request" (QWR) as that term is defined under RESPA, 12 U.S.C. § 2605(e)(1)(B), and asked Defendants Wells Fargo and EMC to provide them with information necessary to calculate the rescission tender amount under TILA, as follows:

Please provide me with an itemization of the loan disbursements, the loan charges, the current principal balance, and all payments received from my client, so that we may determine the exact amount needed for tender.

[PLAINTIFFS' EXHIBIT N.](#)

48. Defendant EMC sent Plaintiffs a response dated December 11, 2009 acknowledging receipt of Plaintiffs' QWR. Thereafter, EMC sent Plaintiffs a letter dated December 29, 2009, rejecting Plaintiffs' rescission demand and failed to provide the information requested in Plaintiffs' QWR. EMC has failed to provide the information requested in Plaintiffs' QWR.

49. Defendant EMC violated RESPA, 12 U.S.C. § 2605(e)(2)(C) by failing to provide the Plaintiff with the information and documentation requested, or an explanation why the information sought was unavailable, no later than 60 days after receipt of the Plaintiff's qualified written request.

50. The Defendant has failed to comply with Section 2605 of Title 12 of the United States Code.

51. Defendant EMC has engaged in a pattern or practice of non-compliance with the requirements of the mortgage servicer provisions of RESPA as set forth in 12 U.S.C. § 2605.

52. Pursuant to 12 U.S.C. § 2605(f) and § 3500.21(f) of Reg. X, the Plaintiffs may recover of the Defendant EMC actual damages, costs and reasonable attorney fees for each failure of the Defendant to comply with any part of 12 U.S.C. § 2605.

**VII. THIRD CAUSE OF ACTION
VIOLATION OF NORTH CAROLINA CONSUMER ECONOMIC PROTECTION ACT
(as to all Defendants)**

53. The preceding allegations of this complaint are re-alleged and incorporated herein by this reference.

54. Defendants conduct was unfair and deceptive and violated the North Carolina Consumer Economic Protection Act ("CEPA"), by intentionally misstating Plaintiffs' income and occupation on their mortgage Application ([PLAINTIFFS' EXHIBIT E](#)). As a proximate result of the Defendants' violations of the CEPA, Plaintiffs have suffered damages, including emotional distress and mental anguish, and incurred legal fees.

**VIII. FOURTH CAUSE OF ACTION
FRAUD
(as to all Defendants)**

55. The preceding allegations of this complaint are re-alleged and incorporated herein by this reference.

56. Defendants misrepresented material information regarding the mortgage transaction, including but not limited to inflating Juan's income to qualify him for a loan that he could not afford, and telling him that all they needed to qualify him for a loan was his credit score and social security number.

57. Defendants knew that the representations were false, or acted with reckless disregard to the truth.

58. Defendants made these material misrepresentations to Plaintiffs with the intent that Plaintiff rely upon them.

59. Plaintiffs acted in reliance upon the material misrepresentations.

60. As a direct and proximate result of the material misrepresentations, Plaintiffs suffered damages including but not limited to increased finance charges, excessive loan expenses and interest rates, loss of other credit opportunities, damage to their credit rating, and other costs.

**IX. FIFTH CAUSE OF ACTION
MISREPRESENTATION
(as to all Defendants)**

61. The preceding allegations of this complaint are re-alleged and incorporated herein by this reference.

62. Defendants made a representation of one or more material facts, including but not limited to inflating Juan's income to qualify him for a loan that he could not afford, and telling him that all they needed to qualify him for a loan was his credit score and social security number.

63. The representations were false when they were made.

64. Defendants knew the representations were false when they made it or made the representations recklessly without knowing whether the representations were true.

65. The Defendants made the representations with the intent that plaintiffs rely on them and so that Defendants would profit from the transaction.

66. Plaintiffs did rely on the representations.

67. Plaintiffs were damaged as a result of their reasonable reliance on the representations including but not limited to increased finance charges, excessive loan expenses and interest rates, loss of other credit opportunities, damage to their credit rating, and other costs.

**X. SIXTH CAUSE OF ACTION
CIVIL CONSPIRACY
(as to all Defendants)**

68. The preceding allegations of this complaint are re-alleged and incorporated herein by this reference.

69. Defendants acted in concert pursuant to a common design to and plan to induce plaintiffs to enter into this mortgage transaction which had little or no benefit to them, including but not limited to providing the funding for the scheme.

70. Defendants illegally, maliciously and wrongfully conspired with one another with the intent to and with the purpose of inducing Plaintiffs to enter into this mortgage transaction which had little or no benefit to them.

71. The civil conspiracy resulted in damaging the plaintiffs including but not limited to increased finance charges, excessive loan expenses and interest rates, loss of other credit opportunities, damage to their credit rating, and other costs.

WHEREFORE, the Plaintiffs having set forth their claims for relief against the Defendants respectfully pray of the Court as follows:

A. That the Plaintiffs have and recover against the Defendants, jointly and severally, a sum to be determined by the Court in the form of actual damages;

B. That the Plaintiff have and recover against the Defendants, jointly and severally, a sum to be determined by the Court in the form of statutory damages;

C. That the Plaintiff have and recover against the Defendants, jointly and severally, a sum to be determined by the Court in the form of punitive damages;

D. That the Plaintiff have and recover against the Defendants, jointly and severally, all reasonable legal fees and expenses incurred by her attorney;

E. That this Court order Defendants, jointly and severally, to pay additional actual damages in a sum to be determined by the Court for violation of the North Carolina Consumer Economic Protection Act;

F. That the Plaintiffs have such other and further relief as the Court may deem just and proper;

G. That this Court order the Defendant EMC to pay to the Plaintiffs their attorney's fees and costs and additional actual damages a sum to be determined by the Court for each failure to comply with any part of Section 2605 of Title 12 of the United States Code pursuant to Section 2605(f) of Title 12 of the United States Code and Section 3500.21(f) of Reg. X;

H. The security interest in the Property be declared void;

I. Defendants' claim be classified as wholly unsecured;

J. Defendants' claim be reduced by all finance charges, insurance charges and all other charges as required by 12 C.F.R. § 226.23;

K. Plaintiffs be awarded all actual and statutory damages under TILA, §§ 1635 and 1640, for Defendant First Residential's initial disclosure violations and for its, and its assignee's failure to honor Plaintiffs' rescission;

L. The Claim be reduced by all actual and statutory damages that are awarded to Plaintiffs; and

M. The Court order such additional relief as is necessary in the interest of justice.

Respectfully submitted, this _____ day of _____, 2010.

O. Max Gardner III
Gardner & Gardner PLLC
Attorney for the Debtor/Defendant
NC State Bar #6164
P.O. Box 1000, Shelby, NC 28151-1000
(704) 487-0616 / FAX (704) 487-0619
e-mail maxgardner@maxgardner.com

**IN THE UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:)	
)	
)	
John Q. Public and	)	CASE NO.
Mary Public,	)	OUR FILE NO.
)	
Debtors.)	
<hr style="width:40%; margin-left:0"/>)	
)	
John Q. Public and	)	ADV. PROC. NO.
Mary Public,)	
)	
Plaintiffs,)	
)	
vs.)	
)	
GMAC Mortgage, LLC, successor to,)	
GMAC Mortgage Corporation,)	
)	
Defendant.)	
)	
)	

COMPLAINT – CLASS ACTION
ECOA VIOLATION-FAILURE TO PROVIDE LOAN MODIFICATION

INTRODUCTION

1. Plaintiffs bring this action to secure redress for unlawful credit practices engaged in by GMAC Mortgage, LLC, successor to GMAC Mortgage Corporation ("GMAC"). Plaintiffs allege violation of the Equal Credit Opportunity Act, 15 U.S.C. § 1691 et seq. ("ECOA").
2. The ECOA requires that notice of adverse action on a request for credit be timely provided to the applicant.

JURISDICTION AND VENUE

3. This Court has jurisdiction under 15 U.S.C. § 1691e (ECOA) and 28 U.S.C. §§ 1331 and 1337.
4. Venue is appropriate in the Western District of North Carolina pursuant to 28 U.S.C. § 1391, as a substantial part of the events giving rise to these claims occurred in this district, plaintiffs reside in this district, and defendant GMAC Mortgage, LLC, successor to GMAC Mortgage Corporation, transacts business within this district.

PARTIES

5. Plaintiffs John Q. Public and Mary Public ("plaintiffs") are natural persons residing in house they own in Shelby, Cleveland County, North Carolina. Plaintiffs are "consumers" as defined in 15 U.S.C. § 1692a(3).

6. Defendant GMAC Mortgage, LLC, ("defendant") successor to GMAC Mortgage Corporation, is a limited liability company which does business in North Carolina. Its registered agent is Corporation Service Company, 327 Hillsborough Street, Raleigh, NC 27603. It is engaged in the mortgage business.

FACTS

7. On or about June 2, 2008, plaintiffs applied with defendant for a loan modification.

8. Plaintiffs were not granted a loan modification.

9. At no time were plaintiffs informed what had happened to the modification application.

10. No written statement of the reasons for such denial was furnished to plaintiffs.

VIOLATION ALLEGED

11. Plaintiffs' request for a loan modification was an application subject to the ECOA and implementing Federal Reserve Board Regulation B.

12. On information and belief, it was the policy and practice of defendant to not provide a written statement of the reasons for the denial of loan modifications.

13. Such policy and practice violates the ECOA.

14. 15 U.S.C. §1691(d) provides:

Reason for adverse action; procedure applicable; "adverse action" defined.

(1) Within thirty days (or such longer reasonable time as specified in regulations of the Board for any class of credit transaction) after receipt of a completed application for credit, a creditor shall notify the applicant of its action on the application.

(2) Each applicant against whom adverse action is taken shall be entitled to a statement of reasons for such action from the creditor. A creditor satisfies this obligation by—

(A) providing statements of reasons in writing as a matter of course to applicants against whom adverse action is taken; or

(B) giving written notification of adverse action which discloses (i) the applicant's right to a statement of reasons within thirty days after receipt by the creditor of a request made within sixty days after such notification, and (ii) the identity of the person or office from which such statement may be obtained. Such statement may be given orally

if the written notification advises the applicant of his right to have the statement of reasons confirmed in writing on written request.

(3) A statement of reasons meets the requirements of this section only if it contains the specific reasons for the adverse action taken.

(4) Where a creditor has been requested by a third party to make a specific extension of credit directly or indirectly to an applicant, the notification and statement of reasons required by this subsection may be made directly by such creditor, or indirectly through the third party, provided in either case that the identity of the creditor is disclosed.

(5) The requirements of paragraph (2), (3), or (4) may be satisfied by verbal statements or notifications in the case of any creditor who did not act on more than one hundred and fifty applications during the calendar year preceding the calendar year in which the adverse action is taken, as determined under regulations of the Board.

(6) For purposes of this subsection, the term "adverse action" means a denial or revocation of credit, a change in the terms of an existing credit arrangement, or a refusal to grant credit in substantially the amount or on substantially the terms requested. Such term does not include a refusal to extend additional credit under an existing credit arrangement where the applicant is delinquent or otherwise in default, or where such additional credit would exceed a previously established credit limit.

15. GMAC has received more than 150 requests per year for loan modifications.

16. 15 U.S.C. § 1691a provides:

Definitions; rules of construction

(a) The definitions and rules of construction set forth in this section are applicable for the purposes of this title [15 USCS §§ 1691 et seq.].

(b) The term "applicant" means any person who applies to a creditor directly for an extension, renewal, or continuation of credit, or applies to a creditor indirectly by use of an existing credit plan for an amount exceeding a previously established credit limit.

(c) The term "Board" refers to the Board of Governors of the Federal Reserve System.

(d) The term "credit" means the right granted by a creditor to a debtor to defer payment of debt or to incur debts and defer its payment or to purchase property or services and defer payment therefor.

(e) The term "creditor" means any person who regularly extends, renews, or continues credit; any person who regularly arranges for the extension, renewal, or continuation of credit; or any assignee of an original creditor who participates in the decision to extend, renew, or continue credit.

(f) The term "person" means a natural person, a corporation, government

or governmental subdivision or agency, trust, estate, partnership, cooperative, or association.

(g) Any reference to any requirement imposed under this title [15 USCS §§ 1691 et seq.] or any provision thereof includes reference to the regulations of the Board under this title [15 USCS §§ 1691 et seq.] or the provision thereof in question.

17. Plaintiffs were applicants as defined in § 1691a.
18. Defendant is a "creditor" as defined in § 1691a.
19. The loan modifications offered by defendant are "credit" as defined in § 1691a.
20. Implementing Federal Reserve Board Regulation B, 12 C.F.R. § 202.9, provides:
Notifications.

(a) Notification of action taken, ECOA notice, and statement of specific reasons

(1) When notification is required. A creditor shall notify an applicant of action taken within:

(i) 30 days after receiving a completed application concerning the creditor's approval of, counteroffer to, or adverse action on the application;

(ii) 30 days after taking adverse action on an incomplete application, unless notice is provided in accordance with paragraph (c) of this section;

(iii) 30 days after taking adverse action on an existing account; or

(iv) 90 days after notifying the applicant of a counteroffer if the applicant does not expressly accept or use the credit offered.

(2) Content of notification when adverse action is taken. A notification given to an applicant when adverse action is taken shall be in writing and shall contain: a statement of the action taken; the name and address of the creditor; a statement of the provisions of section 701(a) of the Act; the name and address of the Federal agency that administers compliance with respect to the creditor; and either:

(i) A statement of specific reasons for the action taken; or

(ii) A disclosure of the applicant's right to a statement of specific reasons within 30 days, if the statement is requested within 60 days of the creditor's notification. The disclosure shall include the name, address, and telephone number of the person or office from which the statement of reasons can be obtained. If the creditor chooses to provide the reasons orally, the creditor shall also disclose the applicant's right to have them confirmed in writing within 30 days of

receiving a written request for confirmation from the applicant.

21. 15 U.S.C. § 1691e provides:

Civil liability

(a) Individual or class action for actual damages. Any creditor who fails to comply with any requirement imposed under this title 115 USCS §§ 1691 et seq.] shall be liable to the aggrieved applicant for any actual damages sustained by such applicant acting either in an individual capacity or as a member of a class.

(b) Recovery of punitive damages in individual and class action for actual damages; exemptions; maximum amount of punitive damages in individual actions; limitation on total recovery in class actions; factors determining amount of award. Any creditor, other than a government or governmental subdivision or agency, who fails to comply with any requirement imposed under this title 115 USCS §§ 1691 et seq.] shall be liable to the aggrieved applicant for punitive damages in an amount not greater than \$ 10,000, in addition to any actual damages provided in subsection (a), except that in the case of a class action the total recovery under this subsection shall not exceed the lesser of \$ 500,000 or 1 per centum of the net worth of the creditor. In determining the amount of such damages in any action, the court shall consider, among other relevant factors, the amount of any actual damages awarded, the frequency and persistence of failures of compliance by the creditor, the resources of the creditor, the number of persons adversely affected, and the extent to which the creditor's failure of compliance was intentional.

(c) Action for equitable and declaratory relief. Upon application by an aggrieved applicant, the appropriate United States district court or any other court of competent jurisdiction may grant such equitable and declaratory relief as is necessary to enforce the requirements imposed under this Title 115 USCS §§ 1691 et seq.].

(d) Recovery of costs and attorney fees. In the case of any successful action under subsection (a), (b), or (c), the costs of the action, together with a reasonable attorney's fee as determined by the court, shall be added to any damages awarded by the court under such subsection.

(e) Good faith compliance with rule, regulation, or interpretation of Board or interpretation or approval by an official or employee of Federal Reserve System duly authorized by Board. No provision of this title 115 USCS §§ 1691 et seq.] imposing liability shall apply to any act done or omitted in good faith in conformity with any official rule, regulation, or interpretation thereof by the Board or in conformity with any interpretation or approval by an official or employee of the Federal Reserve System duly authorized by the Board to issue such interpretations or approvals under such procedures as the Board may prescribe therefor, notwithstanding that after such act or omission has occurred, such rule, regulation, interpretation, or approval is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.

(f) Jurisdiction of courts; time for maintenance of action; exceptions. Any action under this section may be brought in the appropriate United States district court without regard to the amount in controversy, or in any other court of competent jurisdiction. No such action shall be brought later than two years from the date of the occurrence of the violation

22. Defendant's policy and practice of not providing written notice of credit denial violates the ECOA.

CLASS ALLEGATIONS

23. This action is brought on behalf of a class, pursuant to Fed.R.Civ.P. 23(a) and (b)(3).

24. The class consists of (a) all persons who applied for loan modifications from defendant, (b) were denied a loan modification, or did not have the modification granted within 30 days and (c) who did not receive a written statement of the reasons for such denial or lack of approval within 30 days thereafter.

25. On information and belief, the class is so numerous that joinder of all individuals is not practicable.

26. There are questions of law and fact common to the class, which questions predominate over any questions affecting only individual class members. The principal common question for purposes of this claim is whether defendant has a policy and practice of not complying with ECOA.

27. The only individual question would appear to be the identification of the class members.

28. Plaintiffs' claims are typical of those of the class members. All are based on the same factual and legal theories.

29. Plaintiffs will fairly and adequately represent the class members. Plaintiffs have retained counsel experienced in bringing class actions and consumer credit claims.

30. A class action is superior for the fair and efficient adjudication of the class members' claims. Congress specifically contemplated ECOA class actions as a principal means of enforcing the statute.

WHEREFORE, plaintiffs request that the Court enter judgment in favor of plaintiffs and the class members and against defendant GMAC Mortgage, LLC for:

- (1) Statutory damages as provided by 15 U.S.C. § 1691e.
- (2) Appropriate injunctive relief.
- (3) Attorney's fees, litigation expenses and costs of suit.
- (4) Such other or further relief as is appropriate.

Dated this _____ day of _____, 20__.

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C – FDCPA, UDAP & FTCPA

Bankruptcy

A Technical Amendment to Notify All Interested Parties



Both the Fair Debt Collection Practices Act (FDCPA) and the automatic stay provision under the Bankruptcy Code prohibit third-party debt collectors from contacting consumer debtors after the filing of a bankruptcy petition. Under the Bankruptcy Code, debt collectors could be held liable for actual damages, attorney's fees and costs and punitive damages for violating the automatic stay. The civil penalties for violating the FDCPA include actual damages sustained by the consumer debtor, statutory damages up to \$1,000 and the attorney's fees and costs incurred by the consumer debtor in pursuing the action against the debt collector. Under the FDCPA, this liability attaches whether or not the third-party debt collector had knowledge of the bankruptcy filing.

Under present law, there is no requirement that the consumer debtor, creditor or bankruptcy court notify a third-party debt collector when a consumer bankruptcy has been filed. Unless consumer debtors are required to list third-party debt collectors along with their creditors on the bankruptcy petition, there is little chance the thousands of third-party debt collectors who are collecting consumer debts on behalf of their creditor clients will be able to avoid violations of the FDCPA or the automatic stay. For this reason, ACA International requests § 521(1)(A) of the U.S. Bankruptcy Code be amended as follows:

§ 521. Debtor's duties

The debtor shall—

(1) file—

(A) a list of creditors and known third-party debt collectors;^{*} and

(B) unless the court orders otherwise—

(i) a schedule of assets and liabilities;

(ii) a schedule of current income and current expenditures;

(iii) and a statement of the debtor's financial affairs...

^{*}As this term is defined in 15 U.S.C. § 1692a(6)

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME:

**Chapter 13 No.
Our File No.**

ADDRESS:

SSN:

Debtors.

PLAINTIFF,

Adv. Proc. No. 08- _____

versus

DEFENDANTS.

**COMPLAINT SEEKING DAMAGES IN CORE ADVERSARY PROCEEDING
PURSUANT TO THE FAIR DEBT COLLECTION PRACTICES ACT**

(Violations center around a debt collection letter sent to debtors from creditor Chase Manhattan Bank's law firm in Montana and unlawful **pre-petition efforts to collect a debt** in the amount of \$4494.00. Defendants' conduct involves falsely threatening the debtors with legal actions which the Defendants have no intention of taking. Defendants were neither licensed attorneys in the State of North Carolina nor registered debt collectors.)

Introduction

1. This action seeks redress for the unlawful and deceptive practices committed by the Defendants in connection with their pre-petition efforts to collect a debt. Defendants' conduct involves falsely threatening the debtors with legal actions which the Defendants have no intention of taking. Defendants are neither licensed attorneys in the State of North Carolina nor are Defendants registered debt collectors. Plaintiff seeks monetary relief based on Defendants' violations of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et seq.*

2. The violations center around a debt collection letter sent from the Defendant's Law Firm on or around May 26, 2005. The Plaintiff does not dispute that he owes the debt that is the subject of this action and in fact he has chosen to repay a percentage of this debt as part of his Chapter 13 plan. This claim for relief has also been duly listed on Schedule B of the petition filed in this case and has been designated as part of the funding mechanism for the Chapter 13 plan. The letter is a common device used by Debt Collectors in order to make the debtors think they are in imminent danger of being sued by an attorney when in fact the person/company sending the letter has neither the intention nor ability to file suit in the State of North Carolina.

Jurisdiction

3. Jurisdiction is conferred on this Court pursuant to the provisions of Section 1334 of Title 28 of the United States Code in that this proceeding arises in and is related to the above-captioned Chapter 13 case under Title 11 and concerns property of the Debtors in that case.

4. This Court has both personal and subject matter jurisdiction to hear this case

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pursuant to Section 1334 of Title 28 of the United States Code, Section 157(b)(2) of Title 28 of the United States Code, and pursuant to the Order entered by the Judges of the United States District Court for the Western District of North Carolina on July 30, 1984 (the Referral Order), which Order was entered in accordance with the Bankruptcy Amendments and Federal Judgeship Act of 1984.

5. This Court has supplemental jurisdiction to hear all state law claims pursuant to Section 1367 of Title 28 of the United States Code.

6. This Court also has jurisdiction to hear the Fair Debt Collection Practices Act violations pursuant to Section 1692 of Title 15 of the United States Code; thus, federal subject matter jurisdiction is properly founded upon Section 1331 of Title 28 of the United States Code.

7. This matter is primarily a core proceeding and therefore the Bankruptcy Court has jurisdiction to enter a final order. However, in the event this case is determined to be a non-core proceeding then and in that event the Plaintiff consents to the entry of a final order by the Bankruptcy Judge.

8. Venue lies in this District pursuant to Section 1391(b) of Title 28 of the United States Code.

Parties

9. _____ (the Plaintiff) is a citizen and resident of Kings Mountain, Cleveland County, North Carolina. The Plaintiff is also a debtor under Chapter 13 of Title 11 of the United States Code.

10. The Defendant, _____ is upon information and belief a professional limited liability company organized under the laws of the State of Montana. Upon information and belief _____ is not licensed by the North Carolina Department of Insurance to collect debts in the State nor does the firm contain any members that are duly licensed to practice law in the State of North Carolina.

11. The Defendant, _____, is upon information and belief an attorney licensed to practice law in the State of Montana. Upon information and belief _____ is not licensed by the North Carolina Department of Insurance to collect debts in this State nor is _____ licensed to practice law in the State of North Carolina.

12. The Defendant, _____, is upon information and belief an attorney licensed to practice law in the state of Idaho. Upon information and belief _____ is not licensed by the North Carolina Department of Insurance to collect debts in this State nor is _____ licensed to practice law in the State of North Carolina.

13. The Defendant, _____, is upon information and belief a business entity primarily engaged in the collection of consumer debts which maintains a primary place of business at _____. Upon information and belief _____ is not licensed by the North Carolina Department of Insurance to collect debts in this State.

Facts

14. The Chapter 13 case of the Plaintiff was commenced by the filing of a voluntary petition with the Clerk of this Court on _____.

15. The 341(a) meeting of creditors is scheduled to be held in Shelby, North

Carolina on _____.

16. The Chapter 13 plan of the Plaintiff has not yet been confirmed by order of this Court.

17. The Chapter 13 plan includes an unsecured to Chase Manhattan Bank for credit services in the disputed amount of \$4494.00.

18. The claim of Chase Manhattan Bank is currently identified on the records of the Trustee as claim number 0026.

19. On or about _____, the Plaintiff received a debt collection letter from the Defendant. The letter was signed by the Defendant. This letter is attached to the Complaint as Exhibit "A".

20. The letterhead contains the following: _____

21. The letter states that the creditor is: _____ and that the Original Creditor was CHASE. The letter states that the "amount placed" is \$4,494.00 and that the Account Number is _____.

22. The debt that is the subject of the collection letter (Exhibit A) arises out of a consumer debt between the Plaintiff and the originator, in this case Chase Manhattan Bank.

23. The letter states *"should you wish to make arrangements, short of litigation, it is imperative that you contact this office upon receipt of this letter"*. The letter further states *"If you do not respond, we will interpret this as a refusal to pay your debt and take this as a direct invitation to proceed with any legal steps we deem necessary, as provided by law, to collect this debt"*. The letterhead is entitled "A Law Firm". Defendants _____ and _____ both have the initials "esq." at the end of their names. Furthermore, the letter is signed "_____" All of these would induce any reasonable consumer to believe they were being threatened with immediate legal action by the Defendants.

FIRST CLAIM - VIOLATION OF THE FAIR DEBT COLLECTION PRACTICES ACT

24. The allegations of paragraphs 1-23 above are realleged and incorporated herein by reference.

25. The Defendants violated 15 U.S.C. §§ 1692e,(3),(5), (9), (10), and 1692f(6) by misrepresenting the imminence of legal action and making other false and misleading representations concerning any potential litigation against the Plaintiff. The statements "should you wish to make arrangements, short of litigation, it is imperative that you contact this office upon receipt of this letter", "At this point we have exhausted all reasonable attempts to make contact from our office to work with you on a voluntary basis for the resolution of this matter" and the numerous use of the terms "Law Firm" and "Esquire" are patently misleading because they imply that Defendant is capable of filing suit against Plaintiff yet the Defendant is not a licensed attorney in the State of North Carolina and therefore cannot legally file suit in this state. Furthermore, the Defendants have neither the intention nor the ability of immediately filing suit against the Plaintiff. Upon information and belief they have not retained an in-state attorney to proceed with any lawsuit.

26. Furthermore, these violations of the Fair Debt Collection Acts are willful and done with malice in order to intimidate the debtor into doing whatever is necessary to pay the debt in order to stay immediate legal action. Upon information and believe the Defendants have a pattern or practice of threatening legal action in states throughout the Country with no intention of pursuing such action in order to increase their collection percentage by tricking debtors into thinking they will get sued. As part of their business model, the defendants have

chosen to ignore the Fair Debt Collection Act.

27. The Plaintiff is therefore entitled to an award of statutory damages, punitive damages and legal fees pursuant to 11 U.S.C. § 1692k.

SECOND CLAIM – ADDITIONAL VIOLATIONS OF THE FDCPA

28. The allegations in paragraphs 1-27 of this complaint are realleged and incorporated herein by this reference.

29. The Defendant additionally violated the FDCPA. Defendants' violations include but are not limited to engaging in any conduct the natural consequences of which is to harass, oppress, or abuse any person in connection with the collection of a debt, 15 U.S.C. Section 1692d. In the letter sent to the Plaintiff, Defendant's misleading and untrue statements are intended to create a false assumption in the Plaintiff's mind that he will be sued immediately if he does not pay the debt. Furthermore, the use of a Law Firm located in Kalispell, Montana, instead of a local law firm, is a deliberate attempt to trick and deceive the Plaintiff into thinking the creditor intends to sue him in a town located 2,400 miles northwest of Kings Mountain, North Carolina.

30. The Defendants have violated Section 1692(e)(3) of the FDCPA. Upon information and belief the Defendant collection agency and the Attorneys are acting in concert to create the impression that an attorney has been retained to collect the subject debt. While in reality, the Attorney has not adequately reviewed the status of the file, the legitimacy of the subject debt, nor made any preparations or work concerning litigation. Upon information and belief the only work the attorney defendants have done is to provide the collection agency access to their letterhead and signatures. Since the collection agency cannot legally be an attorney, its use of an attorney's letterhead is merely an attempt to circumvent its inability to practice law. Exhibit "A" is clearly a computer generated form letter made from some sort of software program that merges data maintained by the collection agency with the form attorney letterhead. This is a violation of Section 1692(e)(3) because the de facto (collection agency) creator and producer of this letter is posing as an attorney.

31. The Plaintiff as a result of the conduct of the Defendants has suffered mental anguish, emotional distress.

32. As a result of the above violations of the FDCPA, the Defendants are liable to the Plaintiff for actual damages, statutory damages of \$1,000.00, and attorney's fees.

WHEREFORE, the Plaintiff having set forth his claims for relief against the Defendants respectfully prays of the Court as follows:

- A. That the Plaintiff recover against the Defendants a sum to be determined by the Court in the form of actual damages for its violations of the Fair Debt Collection Act;
- B. That the Plaintiff recover against the Defendants a sum to be determined by the Court in the form of statutory damages;
- C. That the Plaintiff recover against the Defendants a sum to be determined by the Court in the form of punitive damages for the willful violations of these acts and to prevent Defendants from making non compliance with Federal and State law a profit center;
- D. That the Plaintiff recover against the Defendants all reasonable legal fees and expenses incurred by their attorney;

E. That the Plaintiff has such other and further relief as the Court may deem just and proper.

Date this the _____ day of _____, 2008.

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**IN THE UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:)	
)	
John Q. Public,	)	CASE NO.
	)	OUR FILE NO.
Debtor.)	
)	
John Q. Public,	)	ADV. PROC. NO.
)	
Plaintiff,)	
)	
vs.)	
)	
NCB Management Services, Inc.,)	
)	
Defendant.)	
)	
)	

COMPLAINT FOR VIOLATIONS OF THE FDCPA
(PRE PETITION ATTEMPTS TO COLLECT A DEBT-BARRAGE OF TELEPHONE CALLS
NC Telephone Solicitation Laws, Autodialer laws)

1. Jurisdiction of this Court arises under 28 U.S.C. § 1331, 28 U.S.C. § 1334, 15 U.S.C. § 1692k(d), 47 U.S.C. § 227, and pursuant to 28 U.S.C. § 1367 for pendent state law claims.
2. This Court has both personal and subject matter jurisdiction to hear this case pursuant to 28 U.S.C. § 1334, 28 U.S.C. § 157(b)(2), and pursuant to the Order entered by the Judges of the United States District Court for the Western District of North Carolina on July 30, 1984 (the Referral Order), which Order was entered in accordance with the Bankruptcy Amendments and Federal Judgeship Act of 1984.
3. This action arises out of Defendant's repeated pre-petition violations of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 et seq. ("FDCPA") in its illegal efforts to collect a consumer debt from Plaintiff. This claim was duly listed on Schedules B and C filed in this case and on the Statement of Financial Affairs.
4. This matter is primarily a core proceeding and therefore the Bankruptcy Court has jurisdiction to enter a final order. However, in the event this case is determined to be a non-core proceeding, then and in that event the Plaintiff consents to the entry of a final order by the Bankruptcy Judge.
5. Venue is proper in this District because the acts and transactions occurred here, Plaintiff resides here, and Defendant transacts business here.

PARTIES

6. Plaintiff John Q. Public is a natural person who resides in the City of Shelby, County of Cleveland, North Carolina, and is a "consumer" as that term is defined by 15 U.S.C. § 1692a(3) or a person affected by a violation of the FDCPA with standing to assert this claim under 15 U.S.C. § 1692k(a).
7. Defendant NCB Management Services, Inc. (hereinafter "Defendant NCB") is a collection agency operating from an address of 1 Allied Drive, Trevose, Pennsylvania 19053 and is a "debt collector" as that term is defined by 15 U.S.C. § 1692a(6).

FACTUAL ALLEGATIONS

8. The Chapter 13 case of the Plaintiff was commenced by the filing of a voluntary position with the Clerk of this Court on _____.
9. The 341(a) meeting of creditors was held in Shelby, North Carolina on _____.
10. The Chapter 13 plan of the Plaintiff has been recommended for confirmation by the Chapter 13 Trustee.
11. Prior to filing this Chapter 13 case, Plaintiff allegedly incurred a financial obligation that was primarily for personal, family or household purposes and is therefore a "debt" as that term is defined by 15 U.S.C. § 1692a(5), namely, a personal car loan. This debt was not a part of Plaintiff's Chapter 13 case.
12. Sometime thereafter, the debt was assigned, sold, placed or otherwise transferred to Defendant NCB for collection.

Collection Calls

13. On or about _____, Defendant NCB began contacting Plaintiff by telephone in an effort to collect this debt, which were "communication[s]" in an attempt to collect a debt as that term is defined by 15 U.S.C. § 1692a(2).
14. Plaintiff has no prior personal or professional relationship with Defendant NCB of any kind.
15. The initial calls came in from Defendant NCB's phone number of 800-828-1110 and went to Plaintiff's home answering machine.
16. Defendant NCB's automated dialer left Plaintiff a prerecorded synthesized message indicated that the call was for Plaintiff's son.
17. Defendant NCB's message went on to say that if this was not the right phone number for Jack Q. Public, that Plaintiff was to press a button on the telephone.¹
18. After three of these messages from Defendant NCB, Plaintiff eventually answered a call.

¹ Pressing any button on the telephone would have been ineffectual for Plaintiff, given that this was a prerecorded synthesized message from Defendant NCB.

19. Plaintiff spoke with one of Defendant NCB's employee debt collectors, named "Vicki" at _____ a.m. on _____, from her extension #_____.
20. Plaintiff told Vicki that his adult son had a different phone number and to stop calling his home as these calls were annoying to him.
21. Vicki told Plaintiff to give his son a message that she had called.

Continuing Barrage of Collection Calls

22. Despite having been previously told that the son did not have that telephone number and told to stop calling Plaintiff, Defendant NCB caused to be made at least 20 more collection communications to Plaintiff's home.
23. Each of these communications came in the form of telephone messages left using a prerecorded or synthesized voice, which asked to speak with Plaintiff's son, Jack Q. Public.
24. These messages were disruptive and frustrating to Plaintiff because he did not owe this alleged debt and his adult son had a different phone number.
25. These prerecorded messages also failed to disclose the identity of the person making the call or the company name of Defendant NCB.
26. None of these collection communications contained the notices required by 15 U.S.C. § 1692e(11).
27. These calls occurred between the dates of _____ and _____.
28. These communications as more further described above were attempts to collect a debt by illegally contacting a third-party using an illegal autodialer and using a prerecorded voice message, done in violation of numerous and multiple provisions of the FDCPA, including but not limited to 15 U.S.C. § 1692b(1), 1692b(3), 1692d, 1692d(5), 1692d(6), 1692e, 1692e(5), 1692e(10), 1692e(11), 1692e(14), and 1692f, amongst others.

Violation of North Carolina Telephone Solicitation Law

29. Plaintiff received at least 24 of these prerecorded or synthesized collection calls from Defendant NCB at his home.
30. These communications were accomplished through the use of an autodialer device that used a prerecorded and/or synthesized voice to initially contact Plaintiff.
31. These autodialed calls were "communication[s]" in an attempt to collect a debt as that term is defined by 15 U.S.C. § 1692a(2).
32. These autodialed messages using a prerecorded and/or synthesized voice during the message are prohibited by North Carolina law unless there is an established business relationship between a telephone solicitor and a telephone subscriber. N.C.G.S. §§ 75-101, 75-102, 75-103 and 75-104.

33. Although the purpose of the unsolicited autodialed message was in connection with an alleged existing debt for which payment had not been completed at the time of the unsolicited telephone call, Plaintiff was not the debtor and not the proper recipient of the unsolicited autodialed telephone call.
34. Plaintiff is a "telephone subscriber" as that term is defined in N.C.G.S. § 75-101.
35. Defendant NCB is a "telephone solicitor" as that term is defined in N.C.G.S. § 75-101.
36. There was no pre-existing business or personal relationship between Plaintiff and Defendant NCB.
37. Plaintiff did not knowingly or voluntarily request, consent to, permit, or authorize the receipt of any messages from Defendant NCB through the use of any "automatic dialing and recorded message player" as that term is defined by N.C.G.S. § 75-101.
38. Defendant NCB's prerecorded/synthesized message failed to state that it was a communication from a debt collector in violation of 15 U.S.C. § 1692e(11).
39. Defendant NCB's use of an automatic dialing and recorded message player to transmit information to Plaintiff was also a harassing, false, and deceptive collection practice done in violation of North Carolina law, and done in violation of numerous and multiple provisions of the FDCPA, including but not limited to 15 U.S.C. §§ 1692d, 1692d(5), 1692e, 1692e(5), 1692e(10), 1692e(11), and 1692f, amongst others.
40. Plaintiff is therefore entitled to the remedies found at N.C.G.S. § 75-105.

Violation of Federal Autodialer Law

41. The Telephone Consumer Protection Act ("TCPA") 47 U.S.C. § 227 prohibits the initiation of "any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call is initiated for emergency purposes or is exempted by rule or order by the [Federal Trade] Commission..."
42. There was no established business relationship between Plaintiff and Defendant NCB that would have permitted or justified its use of an autodialer to contact Plaintiff.
43. Moreover, Plaintiff never expressly or implicitly consented to such autodialed and prerecorded calls from Defendant NCB.
44. Plaintiff has a right to enjoin any such further calls from Defendant NCB under 27 U.S.C. § 447(b)(3).
45. Plaintiff has a right to recover \$500 in statutory damages for each of the 24 calls received from Defendant NCB under 27 U.S.C. § 447(b)(3).

Summary

46. All of the above-described collection communications made to Plaintiff by Defendant NCB and other collection employees employed by Defendant NCB, were made in

violation of numerous and multiple provisions of the FDCPA, the TCPA, and the North Carolina Autodialer Law.

47. During their collection communications, Defendant NCB and these individual debt collectors employed by Defendant NCB repeatedly failed to provide Plaintiffs with the notices required by 15 U.S.C. § 1692e(11), in violation of numerous and multiple provisions of the FDCPA, including but not limited to 15 U.S.C. § 1692e, 1692e(2), 1692e(5), 1692e(10), 1692e(11), and 1692f, amongst others.
48. The above-detailed conduct by Defendant NCB of harassing Plaintiff in an effort to collect this debt was a violation of numerous and multiple provisions of the FDCPA, including but not limited to all of the above mentioned provisions of the FDCPA, as well as an invasion of Plaintiff's privacy by an intrusion upon seclusion and resulted in actual damages to Plaintiff.
49. Defendant NCB's repeated communications with Plaintiff to collect this debt, a person whom did not owe this debt, were an invasion of Plaintiff's privacy and Plaintiff's right to be left alone.
50. Plaintiff has suffered actual damages as a result of these illegal collection communications by Defendant in the form of anger, anxiety, emotional distress, frustration, upset, humiliation, embarrassment, amongst other negative emotions, as well as suffering from unjustified and abusive invasions of personal privacy.

Respondeat Superior Liability

51. The acts and omissions of Defendant NCB, and the other debt collectors employed as agents by Defendant NCB who communicated with Plaintiff as more further described herein, were committed within the time and space limits of their agency relationship with their principal, Defendant NCB.
52. The acts and omissions by Defendant NCB and these other debt collectors were incidental to, or of the same general nature as, the responsibilities these agents were authorized to perform by Defendant NCB in collecting consumer debts.
53. By committing these acts and omissions against Plaintiff, these employee debt collectors were motivated to benefit their principal, Defendant NCB.
54. Defendant NCB is therefore liable to Plaintiff through the Doctrine of Respondeat Superior for the intentional and negligent acts, errors, and omissions done in violation of state and federal law by its collection employees, including but not limited to violations of federal and North Carolina law, in their attempts to collect this debt.

CAUSES OF ACTION

COUNT I.

VIOLATIONS OF THE FAIR DEBT COLLECTION PRACTICES ACT

15 U.S.C. § 1692 et seq.

56. Plaintiff incorporates by reference all of the above paragraphs of this Complaint as though fully stated herein.
57. The foregoing acts and omissions of Defendant NCB and its agents constitute numerous and multiple violations of the FDCPA including, but not limited to, each and every one of the above-cited provisions of the FDCPA, 15 U.S.C. § 1692 et seq., with respect to Plaintiff.
58. As a result of Defendant NCB's violations of the FDCPA, Plaintiff is entitled to actual damages pursuant to 15 U.S.C. § 1692k(a)(1); statutory damages in an amount up to \$1,000.00 pursuant to 15 U.S.C. § 1692k(a)(2)(A); and, reasonable attorney's fees and costs pursuant to 15 U.S.C. § 1692k(a)(3), from Defendant NCB.

COUNT II.

VIOLATIONS OF THE TELEPHONE CONSUMER PROTECTION ACT

47 U.S.C. § 227 et seq.

59. Plaintiffs incorporate by reference all of the above paragraphs of this Complaint as though fully stated herein.
60. The foregoing acts and omissions of each and every Defendant constitute numerous and multiple violations of the TCPA including, but not limited to, each and every one of the above-cited provisions of the TCPA, 47 U.S.C. § 227 et seq., with respect to each Plaintiff.
61. As a result of each and every Defendant's violations of the TCPA, Plaintiffs are entitled to actual damages pursuant to 47 U.S.C. § 227 et seq.; statutory damages in an amount up to \$500.00 for each violation pursuant to 47 U.S.C. § 227 et seq.; and, reasonable attorney's fees and costs pursuant to 47 U.S.C. § 227 et seq. from each and every Defendant herein.

COUNT III.

VIOLATIONS OF THE NORTH CAROLINA TELEPHONE SOLICITATIONS LAW

N.C.G.S. § 75-101 et seq.

62. Plaintiff incorporates by reference all of the paragraphs of this Complaint as though fully stated herein.
63. The foregoing acts and omissions of each and every Defendant constitute numerous and multiple violations of the North Carolina Telephone Solicitations Statutes,

N.C.G.S. § 75-101 et seq., including but not limited to, each and every one of the above cited provisions of that law with respect to Plaintiff.

64. As a result of Defendant NCB's violations of N.C.G.S. § 75-101 et seq., Plaintiff is entitled to an award of actual damages and attorney's fees and costs pursuant to N.C.G.S. § 75-105 against Defendant NCB.

COUNT IV.

INVASION OF PRIVACY BY INTRUSION UPON SECLUSION

65. Plaintiff incorporates by reference all of the paragraphs of this Complaint as though fully stated herein.
66. Congress explicitly recognized a consumer's inherent right to privacy in collection matters in passing the Fair Debt Collection Practices Act, when it stated as part of its findings:

Abusive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and **to invasions of individual privacy.**

15 U.S.C. § 1692(a)(emphasis added).

67. Congress further recognized a consumer's right to privacy in financial data in passing the Gramm Leech Bliley Act, which regulates the privacy of consumer financial data for a broad range of "financial institutions" including debt collectors, albeit without a private right of action, when it stated as part of its purposes:

It is the policy of the Congress that **each financial institution has an affirmative and continuing obligation to respect the privacy of its customers** and to protect the security and confidentiality of those customers' nonpublic personal information.

15 U.S.C. § 6801(a) (emphasis added).

68. Defendant NCB and/or its agents intentionally and/or negligently interfered, physically or otherwise, with the solitude, seclusion and or private concerns or affairs of Plaintiff, namely, by repeatedly and unlawfully attempting to collect a debt and thereby invaded Plaintiff's privacy.
69. Defendant NCB and their agents intentionally and/or negligently caused emotional harm to Plaintiff by engaging in highly offensive conduct in the course of collecting this debt, thereby invading and intruding upon Plaintiff's rights to privacy.
70. Plaintiff had a reasonable expectation of privacy in Plaintiff's solitude, seclusion, private concerns or affairs, and private financial information.
71. Defendant NCB's and its agents' conduct in engaging in the above-described illegal collection conduct against Plaintiff, resulted in multiple intrusions and invasions of privacy by these Defendants which occurred in a way that would be highly offensive to a reasonable person in that position.

72. As a result of such intrusions and invasions of privacy, Plaintiff is entitled to actual damages in an amount to be determined at trial from each and every Defendant.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays judgment be entered against Defendant NCB:

COUNT I.

VIOLATIONS OF THE FAIR DEBT COLLECTION PRACTICES ACT

15 U.S.C. § 1692 et seq.

- for an award of actual damages pursuant to 15 U.S.C. § 1692k(a)(1) against Defendant NCB and for Plaintiff;
- for an award of statutory damages of \$1,000.00 pursuant to 15 U.S.C. § 1692k(a)(2)(A) against Defendant NCB and for Plaintiff;
- for an award of costs of litigation and reasonable attorney's fees pursuant to 15 U.S.C. § 1692k(a)(3) against Defendant NCB and for Plaintiff;

COUNT II.

VIOLATIONS OF THE FEDERAL TCPA

47 U.S.C. § 227 et seq.

- for an award of \$500.00 in statutory damages per illegal autodialer call from Defendant NCB and attorney's fees and costs pursuant to 47 U.S.C. § 227(b)(3) and for Plaintiff;
- for an order enjoining Defendant NCB from making further autodialer calls to Plaintiff pursuant to 47 U.S.C. § 227(b)(3) and for Plaintiff;

COUNT III.

VIOLATIONS OF THE NORTH CAROLINA TELEPHONE SOLICITIONS LAW

N.C.G.S. § 75-101 et seq.

- for an award of actual damages and attorney's fees and costs pursuant to N.C.G.S. § 75-105 against Defendant NCB and for Plaintiff;

COUNT IV.

INVASION OF PRIVACY BY INTRUSION UPON SECLUSION AND BY REVELATION OF PRIVATE FINANCIAL FACTS TO THIRD PARTY

- for an award of actual damages from each and every Defendant for the emotional distress suffered as a result of the intentional and/or negligent FD CPA

violations and intentional and/or negligent invasions of privacy in an amount to be determined at trial and for each Plaintiff; and

- for such other and further relief as may be just and proper.

Respectfully submitted, this _____ day of _____, 2010.

O. Max Gardner III
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**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME:

**Chapter 13 No.
Our File No.**

ADDRESS:

SSN:

Debtors.

PLAINTIFF,

Adv. Proc. No. 08- _____

versus

DEFENDANTS.

**COMPLAINT SEEKING DAMAGES IN CORE ADVERSARY PROCEEDING PURSUANT TO
THE NORTH CAROLINA UNFAIR AND DECEPTIVE ACTS AND PRACTICES LAWS**

(The violations giving rise to this complaint center around an attempted repossession of a Dell computer inside the Debtors' home. After being advised that the Debtor was represented by an attorney, the agent tried to force his way into the home, causing physical damage to the doorframe and scaring the debtors' 4 year old. The agent also made threats of legal action.)

Introduction

1. This action seeks redress for the unlawful and deceptive practices committed by the Defendants in connection with their pre-petition efforts to collect a debt and repossess collateral from the Plaintiffs. Plaintiffs seek monetary relief based on Defendants' violations of the North Carolina Unfair and Deceptive Acts and Practices Laws, G.S. Section 75-50 *et seq*, and for an improper and unlawful attempted pre-petition repossession.

2. The violations giving rise to this complaint center around an attempted repossession that occurred on August 5, 2005. The Plaintiffs do not dispute that they owe the debt that is the subject of this action and in fact they have chosen to repay the secured creditor the full value of the claim through their Chapter 13 plan. This claim for relief has also been duly listed on Schedule B of the petition and plan filed in this case and has been designated as part of the funding mechanism for the Chapter 13 plan.

Jurisdiction

3. Jurisdiction is conferred on this Court pursuant to the provisions of Section 1334 of Title 28 of the United States Code in that this proceeding arises in and is related to the above-captioned Chapter 13 case under Title 11 and concerns property of the Debtors in that case.

4. This Court has both personal and subject matter jurisdiction to hear this case pursuant to Section 1334 of Title 28 of the United States Code, Section 157(b)(2) of Title 28 of the United States Code, and pursuant to the Order entered by the Judges of the United

States District Court for the Western District of North Carolina on July 30, 1984 (the Referral Order), which Order was entered in accordance with the Bankruptcy Amendments and Federal Judgeship Act of 1984.

5. This Court has supplemental jurisdiction to hear all state law claims pursuant to Section 1367 of Title 28 of the United States Code.

6. This Court also has jurisdiction pursuant to Section 1331 of Title 28 of the United States Code.

7. This matter is primarily a core proceeding and therefore the Bankruptcy Court has jurisdiction to enter a final order. However, in the event this case is determined to be a non-core proceeding then and in that event the Plaintiff consents to the entry of a final order by the Bankruptcy Judge.

8. Venue lies in this District pursuant to Section 1391(b) of Title 28 of the United States Code.

Parties

9. _____ ("Plaintiffs" or "Debtors") are citizens and residents of Kings Mountain, Cleveland County, North Carolina. The Plaintiffs are also debtors under Chapter 13 of Title 11 of the United States Code.

10. The Defendant, _____, is upon information and belief a business located at _____.

11. The Defendant, _____, is upon information and belief a business located at 1 _____.

12. The Defendant, _____, is upon information and belief a Georgia Corporation with a principal office address of _____. The Defendants are hereinafter collectively referred to as _____.

Facts

13. The Chapter 13 case of the Plaintiffs was commenced by the filing of a voluntary petition with the Clerk of this Court on _____.

14. The 341(a) meeting of creditors was held in Shelby, North Carolina on _____.

15. The Chapter 13 plan of the Plaintiffs has been confirmed by order of this Court.

16. The Chapter 13 plan includes two secured claims of the Defendants in the amount of \$1540.35. These claims are secured by 2 Loveseats and one Dell computer.

17. On the morning of August 5, 2005, the male Plaintiff was sleeping after working third shift the previous night. Around 10:00 AM, the male Plaintiff was awakened by a loud knocking at the front door of his residence.

18. Before the Plaintiff could see who was at the front door, the knocking stopped and then started again on the back door of the residence.

19. The Plaintiff went outside to investigate. The man who was knocking stated he was there to take certain items from the Plaintiffs. These items were collateral that secured a debt owed to the Defendants.

20. The Plaintiff advised the man that he could not take the goods from the house. He also advised the man that he was represented by the Law Office of O. Max Gardner III and gave the contact information for the law firm. The man refused to call the Plaintiffs' attorney and stated that the Plaintiffs' attorney needed to "read the Lease Laws."

21. After this, the Plaintiff walked back towards his house and the man began to follow him. The Plaintiff entered his house and the man attempted to follow him inside. The Plaintiff quickly shut the door in hopes of preventing the man from entering into his house. While shutting the door, the man forced his arm through the closing door in an attempt to jam the door open and allow his entry into the house. The Plaintiff had to physically remove the man's arm from the door in order to get the door fully closed.

22. After this altercation, the Plaintiff again demanded that the man leave the property and that he was going to call the police if he did not. The man shouted back that he was going to call the police and have them take the furniture from his house and have him arrested for keeping the collateral. The man went back to his car and began talking on his cell phone.

23. The Plaintiff called the police because the man would not leave his house. Before the police arrived, the man left the scene.

FIRST CLAIM - NORTH CAROLINA UNFAIR AND DECEPTIVE ACTS AND PRACTICES

24. The allegations in paragraphs 1-23 of this complaint are realleged and incorporated herein by this reference.

25. The Plaintiff is a "consumer" as that term is defined by Article 2 of Chapter 75 of the North Carolina General Statutes.

26. The Plaintiff's relationship with the Defendants arose out of a "consumer debt" as that term is defined in Article 2 of Chapter 75 of the North Carolina General Statutes.

27. The Defendants were and are "debt collectors" as that term is defined by applicable provisions of Article 2 of Chapter 75 of the North Carolina General Statutes.

28. Under the provision of Section 75-52 of the North Carolina General Statutes the Defendants were and are prohibited from engaging in any conduct the natural consequences of which is to oppress, harass or abuse any person. The Defendants' repossession agent violently attempted to break into the Plaintiffs' house, threatened to call the police, and went from front door to back door loudly knocking. All this was done in clear view of the Plaintiffs' 4 year old child.

29. As a result, the Defendants are liable for statutory damages in the sum of no less than \$2,000.00 for violation of N.C.G.S. Section 75-50, et seq. and the payment of legal fees and expenses.

SECOND CLAIM – ADDITIONAL VIOLATIONS OF NCUDAP

30. The allegations in paragraphs 1-29 of this complaint are realleged and incorporated herein by this reference.

31. The actions and conduct of the Defendants were oppressive and abusive in violation of the applicable provisions of Article 2 of Chapter 75 of the North Carolina General Statutes as follows:

- (a) The Defendants violated 75-54 by making a false representation to the Plaintiffs that they must pay the debt or allow the repossession or be subject to arrest. Section 75-54 states "No debt collector shall collect or attempt to collect a debt...by any fraudulent, deceptive, or misleading representation". The Defendants further violated this section by implying that they had a right to enter the residence against the desires of the Plaintiffs and take possession of the collateral.
- (b) The Defendants violated 75-55 by collecting or attempting to collect a debt by use of unconscionable means.
- (c) The Defendants violated Section 75-51(1) by using violence to cause harm to the property of the Plaintiffs.
- (d) The Defendants violated Section 75-51(2) by accusing the Plaintiffs of a crime.
- (e) The Defendants violated Section 75-51(5) by representing that not allowing the repossession or payment would result in arrest.
- (f) The defendants violated Section 75-51(8) by taking numerous actions that are violations of the law including but not limited to, breaking and entering, trespass, and assault.

32. The actions and conduct of the Defendants were oppressive and abusive in violation of the applicable provisions of Article 2 of Chapter 75 of the North Carolina General Statutes.

33. Defendants numerous violations were willful and done with malice. Furthermore, the conduct of the defendants was egregious, criminal, and violent.

34. Plaintiff has suffered actual damages in form of damage to his front door and the cost and expense in dealing with this problem. Furthermore, the Plaintiffs have suffered emotional distress from the incident. This emotional distress was further heightened because the whole incident was witnessed by the Plaintiffs' four year old son and the Plaintiffs feared going to jail.

35. As a result of each separate violation of the NCUDAP, the Defendants are liable to the Plaintiffs for actual damages, statutory damages and attorney's fees for each separate violation. Furthermore, the Plaintiffs are seeking punitive damages due to the willful, egregious, and criminal nature of these numerous violations.

THIRD CLAIM – UNLAWFUL REPOSSESSION

36. The allegations in paragraphs 1-35 of this complaint are realleged and incorporated herein by this reference.

37. The attempted foreclosure by the Defendants was in violation of General Statute Section 25-9-609(b)(2) because it constituted a flagrant breach of the peace.

38. The Plaintiffs are entitled to damages for the attempted unlawful foreclosure.

WHEREFORE, the Plaintiffs having set forth their claims for relief against the Defendants respectfully pray of the Court as follows:

- A. That the Plaintiffs recover against the Defendants a sum to be determined by the Court in the form of actual damages for its violations of the Fair Debt Collection Act and the North Carolina UDAP statute;
- B. That the Plaintiffs recover against the Defendants a sum to be determined by the Court in the form of statutory damages including a separate amount for each individual violation of the North Carolina UDAP statute;
- C. That the Plaintiffs recover against the Defendants a sum to be determined by the Court in the form of actual damages for the attempted improper and unlawful repossession.
- D. That the Plaintiffs recover against the Defendants a sum to be determined by the Court in the form of punitive damages for the willful violations of these acts and to prevent Defendants from making non compliance with Federal and State law part of their debt collection practices;
- E. That the Plaintiffs recover against the Defendants all reasonable legal fees and expenses incurred by their attorney;
- F. That the Plaintiffs have such other and further relief as the Court may deem just and proper.

Date this the _____ day of _____, 2008.

O. Max Gardner III
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**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME:

**Chapter 13 No.
Our File No.**

ADDRESS:

SSN:

Debtor.

versus

PLAINTIFF,

Adv. Proc. No. 08- _____

CREDIT FINANCIAL SERVICES

DEFENDANT.

**COMPLAINT SEEKING DAMAGES IN CORE ADVERSARY PROCEEDING
PURSUANT TO THE FAIR DEBT COLLECTION PRACTICES ACT AND
THE NORTH CAROLINA UNFAIR AND DECEPTIVE ACT AND PRACTICES LAWS**

(The violations giving rise to this complaint center around pre-petition efforts by debt collection agency to collect a medical debt in the amount of \$236.00. Defendants' conduct involves implying that failure to pay a debt to Cleveland Emergency Services would result in the Plaintiff being denied hospital care in an emergency situation. The demand letter stated, "This account can no longer be neglected....it must be paid!" and "In an emergency...or when you need credit...will you be able to get it? Will you be turned down because of your past due account".)

Introduction

1. This action seeks redress for the unlawful and deceptive practices committed by the Defendants in connection with their pre-petition efforts to collect a debt. Defendants' conduct involves implying that failure to pay a \$236.00 debt to Cleveland Emergency Services would result in the Plaintiff being denied hospital care in an emergency situation. Plaintiff seeks monetary relief based on Defendants' violations of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et seq* and the North Carolina Unfair and Deceptive Act and Practices Laws, G.S. Section 75-50 *et seq*.

2. The violations center around a debt collection letter sent from the Defendant on or around May 19th, 2006. The Plaintiff does not dispute that she owes the debt that is the subject of this action and in fact she has chosen to repay a percentage of this debt as part of her Chapter 13 plan. This claim for relief has also been duly listed on Schedule B of the petition filed in this case and has been designated as part of the funding mechanism for the Chapter 13 plan.

Jurisdiction

3. Jurisdiction is conferred on this Court pursuant to the provisions of Section 1334 of Title 28 of the United States Code in that this proceeding arises in and is related to the above-captioned Chapter 13 case under Title 11 and concerns property of the Debtors in that case.

4. This Court has both personal and subject matter jurisdiction to hear this case pursuant to Section 1334 of Title 28 of the United States Code, Section 157(b)(2) of Title 28 of the United States Code, and pursuant to the Order entered by the Judges of the United States District Court for the Western District of North Carolina on July 30, 1984 (the Referral Order), which Order was entered in accordance with the Bankruptcy Amendments and Federal Judgeship Act of 1984.

5. This Court has supplemental jurisdiction to hear all state law claims pursuant to Section 1367 of Title 28 of the United States Code.

6. This Court also has jurisdiction to hear the Fair Debt Collection Practices Act violations pursuant to Section 1692 of Title 15 of the United States Code; thus, federal subject matter jurisdiction is properly founded upon Section 1331 of Title 28 of the United States Code.

7. This matter is primarily a core proceeding and therefore the Bankruptcy Court has jurisdiction to enter a final order. However, in the event this case is determined to be a non-core proceeding then and in that event the Plaintiff consents to the entry of a final order by the Bankruptcy Judge.

8. Venue lies in this District pursuant to Section 1391(b) of Title 28 of the United States Code.

Parties

9. _____ (the Plaintiff) is a citizen and resident of Shelby, Cleveland County, North Carolina. The Plaintiff is also a debtor under Chapter 13 of Title 11 of the United States Code.

10. The Defendant, Credit Financial Services, is upon information and belief a professional limited liability company organized under the laws of the State of North Carolina.

Facts

11. The Chapter 13 case of the Plaintiff was commenced by the filing of a voluntary petition with the Clerk of this Court on _____.

12. The 341(a) meeting of creditors was held in Shelby, North Carolina on _____.

13. The Chapter 13 plan of the Plaintiff has been recommended for confirmation by the Chapter 13 Trustee.

14. The Chapter 13 plan includes an unsecured to Credit Financial Services for alleged unpaid medical bills in the amount of \$236.00.

15. On or about _____, the Plaintiff received a debt collection letter from the Defendant. This letter is attached to the Complaint as Exhibit "A".

16. The original creditor is Cleveland Emergency Services which provided the Plaintiff with emergency medical services.

17. The letter contains the following statements: "This account can no longer be neglected....it must be paid!" and "In an emergency...or when you need credit...will you be able to get it? Will you be turned down because of your past due account".

FIRST CLAIM - VIOLATION OF THE FAIR DEBT COLLECTION PRACTICES ACT

18. The allegations of paragraphs 1-17 above are realleged and incorporated herein by reference.

19. The Defendant's collection letter violates 15 U.S.C. Section 1692(e). This Section states, "A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt." The letter is misleading because it implies and states that failure to pay this medical bill will result in a denial of emergency services in the future. The language "In an emergency...or when you need credit...will you be able to get it? Will you be turned down because of your past due account" clearly is designed to make debtors worry that if they don't pay this debt then they will not be able to get emergency medical care in the future.

20. This statement is misleading because a debtor will not be denied emergency services based on not paying a \$236.00 hospital debt. The Defendant seeks to put in the minds of debtors that ambulance or emergency services are not available to people who owe hospitals money and that to be allowed to use these services again, the debtor must pay the past due amount. The Defendant has also made such statements with respect to the relationship between the Plaintiff and a publicly funded Hospital (Cleveland Regional Medical Center), which has received funds pursuant to the Hill-Burton Act.

21. The Plaintiff is therefore entitled to an award of statutory damages, punitive damages and legal fees pursuant to 11 U.S.C. § 1692k. The punitive damages are based on the gravity of the Defendants misconduct. The Defendant's letter is dangerous and can cause debtors extreme anxiety where they cannot pay a debt but still have medical problems and worry they will die because they will be denied emergency services.

SECOND CLAIM - NORTH CAROLINA UNFAIR AND DECEPTIVE ACTS AND PRACTICES

22. The allegations in paragraphs 1-21 of this complaint are realleged and incorporated herein by this reference.

23. The Plaintiff is a "consumer" as that term is defined by Article 2 of Chapter 75 of the North Carolina General Statutes.

24. The Plaintiff's relationship with the Defendants arose out of a "consumer debt" as that term is defined in Article 2 of Chapter 75 of the North Carolina General Statutes.

25. The Defendants were and are "debt collectors" as that term is defined by applicable provisions of Article 2 of Chapter 75 of the North Carolina General Statutes.

26. Under the provision of Section 75-52 of the North Carolina General Statutes the Defendants were and are prohibited from engaging in any conduct the natural consequences of which is to oppress, harass or abuse any person. All of the FDCPA violations are realleged and incorporated herein by this reference and taken together constitute the conduct prohibited by this section. The misleading statements contained in the letter are clearly abusive in that they make the misrepresentation that sick people who owe passed due medical bills are precluded from emergency rooms and services.

27. As a result, the Defendants are liable for statutory damages in the sum of no less than \$2,000.00 for violation of N.C.G.S. Section 75-50, et seq. and the payment of legal fees and expenses.

WHEREFORE, the Plaintiff having set forth his claims for relief against the Defendant respectfully prays of the Court as follows:

- A. That the Plaintiff recover against the Defendants a sum to be determined by the Court in the form of actual damages for its violations of the Fair Debt Collection Act and the North Carolina UDAP statute;
- B. That the Plaintiff recover against the Defendants a sum to be determined by the Court in the form of statutory damages including a separate amount for each individual violation of the North Carolina UDAP statute;
- C. That the Plaintiff recover against the Defendants a sum to be determined by the Court in the form of punitive damages for the willful violations of these acts and to prevent Defendants from making non compliance with Federal and State law a profit center;
- D. That the Plaintiff recover against the Defendants all reasonable legal fees and expenses incurred by their attorney;
- E. That the Plaintiff has such other and further relief as the Court may deem just and proper.

Date this the _____ day of _____, 2008.

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**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME:

**Chapter 13 No.
Our File No.**

ADDRESS:

SSN:

Debtor.

PLAINTIFF,

Adv. Proc. No. 08- _____

versus

Allied Interstate, Inc.

DEFENDANT.

**COMPLAINT SEEKING DAMAGES IN CORE ADVERSARY PROCEEDING
PURSUANT TO THE FAIR DEBT COLLECTION PRACTICES ACT AND
THE NORTH CAROLINA UNFAIR AND DECEPTIVE ACT AND PRACTICES LAWS**

(The violations giving rise to this complaint center around pre-petition efforts by debt collection agency to collect on an account despite notice of legal representation of the debtor.)

Introduction

1. This action seeks redress for the unlawful and deceptive practices committed by the Defendants in connection with their pre-petition efforts to collect a debt. Defendants' conduct involves attempting to collect on a debt after receiving notice of the legal representation of the Plaintiff by an attorney. Plaintiff seeks monetary relief based on Defendants' violations of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et seq* and the North Carolina Unfair and Deceptive Act and Practices Laws, G.S. Section 75-50 *et seq*.

2. The violations center around debt collection letters sent from the Defendant on or around May 15, 2008 and June 15, 2008 all letters having been sent to the Plaintiff following a Notice of Legal Representation from the Plaintiff's attorney to the Defendant dated April 25, 2008. The Plaintiff does not dispute that she owes the debt that is the subject of this action and in fact she has chosen to repay a percentage of this debt as part of her Chapter 13 plan. This claim for relief has also been duly listed on Schedule B of the petition filed in this case and has been designated as part of the funding mechanism for the Chapter 13 plan.

Jurisdiction

3. Jurisdiction is conferred on this Court pursuant to the provisions of Section 1334 of Title 28 of the United States Code in that this proceeding arises in and is related to the above-captioned Chapter 13 case under Title 11 and concerns property of the Debtors in that case.

4. This Court has both personal and subject matter jurisdiction to hear this case pursuant to Section 1334 of Title 28 of the United States Code, Section 157(b)(2) of Title 28 of the United States Code, and pursuant to the Order entered by the Judges of the United States District Court for the Western District of North Carolina on July 30, 1984 (the Referral Order), which Order was entered in accordance with the Bankruptcy Amendments

and Federal Judgeship Act of 1984.

5. This Court has supplemental jurisdiction to hear all state law claims pursuant to Section 1367 of Title 28 of the United States Code.

6. This Court also has jurisdiction to hear the Fair Debt Collection Practices Act violations pursuant to Section 1692 of Title 15 of the United States Code; thus, federal subject matter jurisdiction is properly founded upon Section 1331 of Title 28 of the United States Code.

7. This matter is primarily a core proceeding and therefore the Bankruptcy Court has jurisdiction to enter a final order. However, in the event this case is determined to be a non-core proceeding then and in that event the Plaintiff consents to the entry of a final order by the Bankruptcy Judge.

8. Venue lies in this District pursuant to Section 1391(b) of Title 28 of the United States Code.

Parties

9. _____ (the Plaintiff) is a citizen and resident of Shelby, Cleveland County, North Carolina. The Plaintiff is also a debtor under Chapter 13 of Title 11 of the United States Code.

10. The Defendant, Allied Interstate, Inc. ("Allied") upon information and belief is a corporation organized and existing under the laws of the state of _____.

Facts

11. The Chapter 13 case of the Plaintiff was commenced by the filing of a voluntary petition with the Clerk of this Court on _____.

12. The 341(a) meeting of creditors was held in Shelby, North Carolina on _____.

13. The Chapter 13 plan of the Plaintiff has been recommended for confirmation by the Chapter 13 Trustee.

14. The Chapter 13 plan includes an unsecured debt to Capital One Bank for alleged credit card charges of \$555.00.

15. On or about April 25, 2008 the attorney for the Plaintiff sent a Notice of Legal Representation letter to Allied advising them of his representation of the debtor. Said Notice stated in pertinent part:

Please be advised that the consumer debtor in the matter referenced above has retained the services of the Law Offices of O. Max Gardner III, P.C. to assist in the matter of debt relief. The purpose of this letter is to provide you with written notice in your capacity as a creditor, collection agent, or collection attorney that this consumer debtor, now our client, is in fact and in law **REPRESENTED BY AN ATTORNEY**. As a result of this notice, and pursuant to Section 1692(b)(6) of Title 15 of the United States Code and Section 75.55(3) of the North Carolina General Statutes, you are to immediately terminate any further direct or indirect contacts with our client. Please note that such prohibited contacts include, but are not limited to, all forms of communication by letter, phone, fax, email or any other means. This also includes any contact directly or indirectly with any employer, family member, friend, or other creditor of our client.

16. On or about May 15, 2008 the Plaintiff received a debt collection letter from the Defendant. This letter is attached to the Complaint as Exhibit "A".

17. On or about June 15, 2008 the Plaintiff received a debt collection letter from the Defendant. This letter is attached to the Complaint as Exhibit "B".

18. The letters both contained the following statements: "This account can no longer be neglected....it must be paid!" and "Please contact us immediately to make arrangements to pay your past due account".

FIRST CLAIM - VIOLATION OF THE FAIR DEBT COLLECTION PRACTICES ACT

19. The allegations of paragraphs 1-18 above are realleged and incorporated herein by reference.

20. The Defendant's collection letters violate 15 U.S.C. Section 1692c(a)(2). This Section states, "Without the prior consent of the consumer given directly to the debt collector or the express permission of a court of competent jurisdiction, a debt collector may not communicate with a consumer in connection with the collection of any debt--if the debt collector knows the consumer is represented by an attorney with respect to such debt and has knowledge of, or can readily ascertain, such attorney's name and address, unless the attorney fails to respond within a reasonable period of time to a communication from the debt collector or unless the attorney consents to direct communication with the consumer."

21. The Plaintiff is therefore entitled to an award of statutory damages, punitive damages and legal fees pursuant to 11 U.S.C. § 1692k.

SECOND CLAIM - NORTH CAROLINA UNFAIR AND DECEPTIVE ACTS AND PRACTICES

22. The allegations in paragraphs 1-21 of this complaint are realleged and incorporated herein by this reference.

23. The Plaintiff is a "consumer" as that term is defined by Article 2 of Chapter 75 of the North Carolina General Statutes.

24. The Plaintiff's relationship with the Defendants arose out of a "consumer debt" as that term is defined in Article 2 of Chapter 75 of the North Carolina General Statutes.

25. The Defendants were and are "debt collectors" as that term is defined by applicable provisions of Article 2 of Chapter 75 of the North Carolina General Statutes.

26. Under the provision of Section 58-70-115 of the North Carolina General Statutes the Defendants were and are prohibited from collecting or attempting to collect a "debt by use of any unconscionable means, including: (3) communicating with a consumer whenever the collection agency has been notified by the consumer's attorney that he represents said consumer."

27. As a result, the Defendants are liable for statutory damages in the sum of no less than \$2,000.00 for violation of N.C.G.S. Section 75-50, et seq. and the payment of legal fees and expenses.

WHEREFORE, the Plaintiff having set forth his claims for relief against the Defendant respectfully prays of the Court as follows:

- A. That the Plaintiff recover against the Defendants a sum to be determined by the Court in the form of actual damages for its violations of the Fair Debt Collection Act and the North Carolina UDAP statute;
- B. That the Plaintiff recover against the Defendants a sum to be determined by the Court in the form of statutory damages including a separate amount for each individual violation of the North Carolina UDAP statute;
- C. That the Plaintiff recover against the Defendants a sum to be determined by the Court in the form of punitive damages for the willful violations of these acts and to prevent Defendants from making non compliance with Federal and State law a profit center;
- D. That the Plaintiff recover against the Defendants all reasonable legal fees and expenses incurred by their attorney;
- E. That the Plaintiff has such other and further relief as the Court may deem just and proper.

Date this the _____ day of _____, 2008.

O. Max Gardner III
Law Offices of O. Max Gardner III, P.C.
Attorney for the Plaintiff
N.C. State Bar No. 6164
P.O. Box 1000
Shelby, NC 28151-1000
Phone (704) 487-0616
Fax (704) 487-0619
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**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

**JOHN Q. PUBLIC and
MARY PUBLIC,**

Debtors.

**CHAPTER 13 CASE NO.
Our File No.**

**JOHN Q. PUBLIC and wife,
MARY PUBLIC,**

Plaintiffs,

versus

DEBT COLLECTOR,

Defendant.

Adversary Proc. No.

**Complaint Seeking Damages in Core Adversary Proceeding
(Demands for Violations of FTCPA, FDCPA and NCUDAP)**

Introduction

1. This is an action for actual and punitive damages filed by the debtors pursuant to Section 362 of the Bankruptcy Code, the Federal Telephone Consumer Protection Act, 47 U.S.C. Section 227 et seq. (hereinafter referred to as "FTCPA"), the Fair Debt Collection Practices Act, 15 U.S.C. Section 1692 et seq. (hereinafter referred to as "FDCPA"), and the North Carolina Unfair and Deceptive Acts and Practices Laws, G.S. Section 75-50 et seq., (hereinafter referred to as "Acts" and "UDAP").

2. This action is also filed to enforce the Order of Confirmation duly entered in this Chapter 13 case and to enforce and to implement other Bankruptcy Code provisions and Rules related thereto.

Jurisdiction and Venue

3. Jurisdiction is conferred on this Court pursuant to the provisions of Section 1334 of Title 28 of the United States Code in that this proceeding arises in and is related to the above-captioned Chapter 13 case under Title 11 and concerns property of the Debtors in that case.

4. This Court has both personal and subject matter jurisdiction to hear this case pursuant to Section 1334 of Title 28 of the United States Code, Section 157(b)(2) of Title 28 of the United States Code, and pursuant to the Order entered by the Judges of the United States District Court for the Western District of North Carolina on July 30, 1984 (the Referral Order), which Order was entered in accordance with the Bankruptcy Amendments and Federal Judgeship Act of 1984.

5. This Court has supplemental jurisdiction to hear all state law claims pursuant to Section 1367 of Title 28 of the United States Code.

6. This Court also has jurisdiction to hear the Fair Debt Collection Practices Act violations pursuant to Section 1692 of Title 15 of the United States Code; thus, federal subject matter jurisdiction is properly founded upon Section 1331 of Title 28 of the United States Code.

7. This matter is primarily a core proceeding and therefore the Bankruptcy Court has jurisdiction to enter a final order. However, in the event this case is determined to be a non-core proceeding then and in that event the Plaintiff consents to the entry of a final order by the Bankruptcy Judge.

8. Venue lies in this District pursuant to Section 1391(b) of Title 28 of the United States Code.

Parties

9. The Plaintiffs in this case were and are debtors under Chapter 13 of Title 11 of the United States Code in case number 10-00000, which case is presently pending before this court. The Plaintiffs are hereinafter referred to as the Plaintiffs or the debtors.

10. The Defendant, Debt Collector, is a corporation organized and existing under the laws of the State of North Carolina with its principal place of business located Somewhere, Shelby, Cleveland County, North Carolina 28150.

11. The Chapter 13 case of the Plaintiffs was commenced by the filing of a voluntary petition with the Clerk of this Court on _____, 2010.

12. The 341(a) meeting of creditors was held in Shelby, North Carolina on May 10, 2010.

13. The Chapter 13 plan of the Plaintiffs was subsequently confirmed by order of this Court dated _____, 2010.

14. The Chapter 13 plan as confirmed included a debt to Debt Collector in the amount of \$100.00 which was scheduled as an unsecured claim for the credit card debt purchased by Debt Collector.

15. On or about _____, 2010, the attorney for the debtors, O. Max Gardner III, caused a written notice of his representation of the debtors, of the filing of the Chapter 13 case, and of the automatic stay to be mailed to all the creditors in this proceeding, including Debt Collector, via first class mail, postage prepaid.

16. The Trustee in this case caused a written notice of the filing, of the automatic stay, and of the 341 meeting of creditors to be mailed to all parties on the master mailing matrix by first class mail and that such notice was in fact received by Debt Collector.

17. The debtors allege upon information and belief that the notice mailed by the Trustee included the following warning to all creditors: "**CREDITORS MAY NOT TAKE CERTAIN ACTIONS:** The filing of the bankruptcy case automatically **stays** certain collection and other actions against the debtor, debtor's property, and certain co-debtors. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be **penalized**."

18. The debtors aver that all of these documents were served on the Defendant and received by the Defendant including other documents filed in this case.

19. The claim of Debt Collector is identified on the records of the Trustee as claim number 0005. Debt Collector filed a sworn proof of claim for the unsecured claim in the amount of \$100.00 on the courts records as claim number 03.

20. Subsequent to filing their bankruptcy case, the debtors received a prerecorded voice message demanding payment for the subject Debt Collector debt. The prerecorded message, approximately 30 seconds in duration, did not identify the caller at the beginning of the message and did not give an address or phone number of the caller during the message. According to the Debtors' caller ID, the telephone call was generated by an automated dialer with a telephone number identified as coming from Debt Collector. The debtors attempted to return a phone call to

the number identified on debtors' caller ID, but the number did not receive incoming calls.

21. Within a week, the debtors received four more automated prerecorded telephone calls at their home telephone number identical to the call described in the preceding paragraph. All of the prerecorded messages demanded payment for the subject Debt Collector debt.

22. The debtors continue to receive automated prerecorded telephone calls on their home telephone number from Debt Collector's number and as of this date, have received five automated prerecorded telephone calls per week.

23. Plaintiff John Q. Public has also received two automated prerecorded voice messages per week from Debt Collector's number on his cell phone. These automated prerecorded collection calls were also generated by an automated dialer with the same telephone number identified on debtors' caller ID.

24. All of the prerecorded voice messages from Defendant were generated by an automated dialer and willfully made without the express consent of the Debtors.

25. The Plaintiffs have been harassed and damaged by the Defendant's repeated and continued actions in that they have been and continue to be forced to expend their time and expenses toward the defense of this contested matter.

First Claim for Relief (Violation of the Automatic Stay)

26. The allegations in paragraphs 1 through 25 of this complaint are realleged and incorporated herein by this reference.

27. The actions of the Defendant, in causing the improper demands for payment to the debtors, constitute a gross violation of the automatic stay as set forth in 11 U.S.C. Section 362(a)(3).

28. As a result of the above violations of 11 U.S.C. Section 362, the Defendant is liable to the Plaintiffs for actual damages, punitive damages and legal fees.

Second Claim for Relief (Federal Telephone Consumer Protection Act)

29. The allegations in paragraphs 1 through 28 of this complaint are realleged and incorporated herein by this reference.

30. The Defendant is in willful violation of the Federal Telephone Consumer Protection Act, 47 U.S.C. § 227 et seq.

31. 47 U.S.C. § 227(b)(1)(B) prohibits Defendant from initiating a telephone call to Debtors' residential telephone line "using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party." Defendants willfully violated the Act by placing five such calls per week to Debtors' residential telephone number.

32. Pursuant to 47 U.S.C. § 227(b)(1)(A)(iii), it is unlawful for any person "to make any call using any automatic telephone dialing system or an artificial or prerecorded voice to any telephone number assigned to a paging service, cellular telephone service...." Defendants willfully violated the Act by placing two such calls per week to Debtor John Q. Public's cell phone number.

33. Defendant, in violation of 47 U.S.C. § 227(d)(3)(A), transmitted to Debtors a prerecorded voice message via telephone (i) without clearly stating, at the beginning of the message, the identity of the business, individual, or entity initiating the call, and (ii) without, during or after the message, clearly stating the telephone number or address of such business, other entity, or individual.

34. Furthermore, the automated telephone calls from Defendant did not automatically release the Debtors' line "within 5 seconds of the time notification is transmitted to the system that the called party has hung up, to allow the called party's line to be used to make or receive other calls." 47 U.S.C. § 227(d)(3)(B).

35. The actions and conduct of the Defendant were and are in willful violation of 47 U.S.C. § 227 et seq., and Defendant is liable for damages in the amount of \$500.00 for each violation, and because Defendant willfully and knowingly violated the FTCPA, such damages may be increased to an amount equal to not more than three times the amount awarded, plus legal fees and expenses.

Third Claim for Relief (North Carolina Unfair and Deceptive Acts and Practices)

36. The allegations in paragraphs 1 through 35 of this complaint are realleged and incorporated herein by this reference.

37. The Plaintiffs are "consumers" as that term is defined by Article 2 of Chapter 75 of the North Carolina General Statutes.

38. The Plaintiffs' relationship with the Defendant arose out of a "consumer debt" as that term is defined in Article 2 of Chapter 75 of the North Carolina General Statutes.

39. The Defendant was and is a "debt collector" as that term is defined by applicable provisions of Article 2 of Chapter 75 of the North Carolina General Statutes.

40. Under the provision of Section 75-52 of the North Carolina General Statutes the Defendant was and is prohibited from engaging in any conduct the natural consequences of which is to oppress, harass or abuse any person.

41. The actions and conduct of the Defendant were and are oppressive and abusive in violation of the applicable provisions of Article 2 of Chapter 75 of the North Carolina General Statutes.

42. As a result thereof, the Defendant is liable for statutory damages in the sum of no less than \$2,000.00 for violation of N.C.G.S. Section 75-50, et seq. and the payment of legal fees and expenses.

Fourth Claim for Relief (Fair Debt Collection Practices Act)

43. The allegations in paragraphs 1 through 42 of this complaint are realleged and incorporated herein by this reference.

44. The Defendant violated the FDCPA. Defendant's violations include but are not limited to engaging in any conduct the natural consequences of which is to harass, oppress, or abuse any person in connection with the collection of a debt, 15 U.S.C. Section 1692d.

45. As a result of the above violations of the FDCPA, the Defendant is liable to the Plaintiffs for actual damages, statutory damages of \$1,000.00, and attorney's fees.

WHEREFORE, the Plaintiffs having set forth their claims for relief against the Defendant respectfully pray of the Court as follows:

- A. That the Plaintiffs have and recover against the Defendant a sum to be determined by the Court in the form of actual damages;
- B. That the Plaintiffs have and recover against the Defendant a sum to be determined by the Court in the form of statutory damages;

- C. That the Plaintiffs have and recover against the Defendant a sum to be determined by the Court in the form of punitive damages;
- D. That the Plaintiffs have and recover against the Defendant all reasonable legal fees and expenses incurred by their attorney;
- E. That this Court order the Defendant to pay additional damages for each violation and statutory damages in a sum to be determined by the Court for violating the FTCPA pursuant to Federal Telephone Consumer Protection Act, 47 U.S.C. § 227(c)(5)(B) and (C).
- E. That this Court order the Defendant to pay additional actual damages and statutory damages in a sum to be determined by the Court for violation of N.C.G.S. Section 75-50, et seq.;
- F. That this Court order the Defendant to pay additional actual damages and statutory damages in a sum to be determined by the Court for violating the FDCPA pursuant to 15 U.S.C. Section 1692k;
- G. That the underlying debt to the Defendant be forever canceled and discharged; and
- H That the Plaintiffs have such other and further relief as the Court may deem just and proper.

Date this the _____ day of _____, 2010.

O. Max Gardner III
Gardner & Gardner PLLC
Attorney for Debtors/Plaintiffs
N.C. State Bar No. 6164
P.O. Box 1000
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"HIGHLIGHTS"

TELEPHONE CONSUMER PROTECTION ACT (TCPA) & FEDERAL COMMUNICATIONS COMMISSIONS (FCC)

Definitions (as defined in FCC rules):

"Unsolicited advertisement" is "any material advertising the commercial availability or quality of any property, goods, or services, which is transmitted to any person without that person's prior express invitation or permission, in writing or otherwise."

"Established business relationship" or "EBR" is "a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a business or residential subscriber with or without an exchange of consideration (payment), on the basis of an inquiry, application, purchase or transaction by the business or residential subscriber regarding products or services offered by such person or entity, which relationship has not been previously terminated by either party."

Unlawful to send unsolicited advertisements to any fax machine – both business and residence – without recipient's prior express invitation or permission. Fax advertisements MAY be sent to recipients with whom the sender has an EBR, as long as the fax number was provided voluntarily by the recipient. A fax advertisement may be sent to an EBR customer if the sender ALSO:

- Obtains the fax number directly from the recipient, through, for example, an application, contact information form, or membership renewal form; or
- Obtains the fax number from the recipient's *own* directory, advertisement, or site on the internet, unless the recipient has noted on such materials that it does not accept unsolicited advertisements at the fax number in question; or
- Has taken reasonable steps to verify that the recipient consented to have the number listed, if obtained from a directory or other source of information compiled by a third party.
- If the sender had an EBR with the recipient and possessed the recipient's fax number before July 9, 2005 (the date the Junk Fax Prevention Act became law), the sender may send the fax advertisements WITHOUT demonstrating how the number was obtained.

Senders of permissible fax advertisements must provide notice and contact information on the fax that allows recipients to "opt-out" of future faxes. The notice must:

- Be clear and conspicuous and on the FIRST PAGE of the advertisement;
- State that the recipient may make a request to the sender not to send any future faxes and that failure to comply with the request within 30 days is unlawful; and
- Include a telephone number, fax number, and cost-free mechanism (including a toll-free telephone number, local number for local recipients, toll-free fax number, Website address, or e-mail address) to opt-out of faxes. These numbers and cost-free mechanism must permit consumers to make opt-out requests 24 hours a day, seven days a week.

Opt-out Requests by Consumers must:

- Identify the fax number or numbers to which it relates; and
- Be sent to the telephone number, fax number, Website address, or e-mail address identified on the fax advertisement.

Fax Broadcasters – fax advertisements sent in bulk on behalf of a business or entity by separate professional fax broadcasters. Generally, the person or business on whose behalf a fax is sent or whose property, goods, or services are advertised is liable for a violation of the junk fax rules, even if the person or business did not physically send the fax. A fax broadcaster also may be liable if it has a “high degree of involvement” in the sender’s fax message, such as supplying the fax numbers to which the message is sent, providing a source of fax numbers, making representations about the legality of faxing to those numbers, or advising about how to comply with the junk fax rules. Also, if a fax broadcaster is “highly involved” in the sender’s fax messages, the fax broadcaster must provide its name on the fax.

REGISTERING A HOME PHONE NUMBER ON THE NATIONAL DO-NOT-CALL LIST PREVENTS ONLY TELEPHONE SOLICITATIONS DIRECTED TO THAT NUMBER, NOT FAX ADVERTISEMENTS TO YOUR HOME OR BUSINESS FAX NUMBER.

THE FCC’S JUNK FAX RULES PROHIBIT FAX ADVERTISEMENTS UNLESS YOU HAVE AN EBR WITH THE SENDER OR HAVE GIVEN YOUR PRIOR EXPRESS PERMISSION TO RECEIVE THE FAX ADVERTISEMENTS.

COMPLAINTS filed with FCC:

How the FCC can help: by issuing warning citations and imposing fines against companies violating or suspected of violating the junk fax rules – BUT DOES NOT AWARD INDIVIDUAL DAMAGES. If you receive a fax advertisement from someone who does not have an EBR with you or to whom you have not provided prior express permission to send fax advertisements, you can file a complaint with the FCC at esupport.fcc.gov/complaints.htm; by e-mailing fccinfo@fcc.gov; by calling 1-888-225-5322; by faxing 1-866-418-0232; or by writing to: Federal Communications Commission, Consumer & Governmental Affairs Bureau, Consumer Inquiries and Complaints Division, 445 12th Street, SW, Washington, DC 20554.

Complaint should include:

- Your name, address, e-mail address, phone number where you can be reached;
- Home or business number where you received the unsolicited fax advertisement;
- Date and time of the fax;
- Whether the fax advertised or sold any property, goods, or services;
- Sender’s name, phone number, or number of the sending fax machine, and whether this information was provided on the first page or in a margin at the top or bottom of each page;
- Any other information such as Website or e-mail address to help identify the sender or individual or company whose property, goods, or services were being advertised or sold;
- Any number, Website, or e-mail address provided to allow you to “opt-out” of future faxes;
- Whether you or anyone else in your household or business gave the sender permission to fax an advertisement to you;
- Whether you have an EBR with the sender (specifically, whether you or anyone else in your household or business made any purchases of property, goods, or services from the sender, or made any inquiry or filed an application with the individual or company prior to receiving the fax); and
- Whether you or anyone in your household or business previously asked the sender or individual or company whose property, goods, or services are being advertised or sold NOT to fax, and when and how (call, e-mail, or Website) you made the request.
- You may also submit a copy of the fax with your complaint, either electronically or by fax or mail using the Consumer Center contact information above.

You can also file TCPA-related complaints with your local or state consumer protection office of your AG's office.

You can also bring a private suit against the violator in an appropriate court of your state. Through a private suit, you can either recover the actual monetary loss that resulted from the TCPA violation, or receive up to \$500 in damages for each violation, whichever is greater. The court may TRIPLE THE DAMAGES for each violation if it finds that the defendant willingly or knowingly committed the violation. Filing a complaint with the FCC does not prevent you from also bring a private suit.

TELEPHONE CONSUMER PROTECTION ACT 47 U.S.C. § 227

DEFINITIONS:

47 U.S.C. § 227(a)

(1) The term "AUTOMATIC TELEPHONE DIALING SYSTEM" means equipment which has the capacity –

(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and

(B) to dial such numbers.

(2) The term "established business relationship", for purposes only of subsection (b)(1)(C)(i), shall have the meaning given the term in section 64.1200 of title 47, Code of Federal Regulations, as in effect on January 1, 2003, except that –

(A) such term shall include a relationship between a person or entity and a business subscriber subject to the same terms applicable under such section to a relationship between a person or entity and a residential subscriber; and

(B) an established business relationship shall be subject to any time limitation established pursuant to paragraph (2)(G).

(3) The term "telephone facsimile machine"

(4) The term "telephone solicitation" means the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person, but such term does NOT include a call or message (A) to any person with that person's prior express invitation or permission, (B) to any person with whom the called has an established business relationship, or (C) by a tax exempt nonprofit organization.

(5) The term "unsolicited advertisement" means any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission, in writing or otherwise.

(b) RESTRICTIONS ON THE USE OF AUTOMATED TELEPHONE EQUIPMENT –

(1) PROHIBITIONS. It shall be unlawful for any person within the United States...

(A) to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice—

(i) to any emergency telephone line (including any “911” line and any emergency line of a hospital, medical physician or service office, health care facility, poison control center, or fire protection or law enforcement agency);

(ii) to the telephone line of any guest room or patient room of a hospital, health care facility, elderly home, or similar establishment; or

(iii) to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call;

(B) to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call is initiated for emergency purposes or is exempted by rule or order by the Commission under paragraph (2)(B);

(C) to use any telephone facsimile machine...

(2) REGULATIONS, EXEMPTIONS AND OTHER PROVISIONS. The Commission shall prescribe regulations to implement the requirements of this subsection. In implementing the requirements of this subsection, the Commission—

(A) shall consider prescribing regulations to allow businesses to avoid receiving calls made using an artificial or prerecorded voice to which they have not given their prior express consent.

(B) may, by rule or order, exempt from the requirements of paragraph (1)(B) of this subsection, subject to such conditions as the Commission may prescribe—

(i) calls that are not made for a commercial purpose; and

(ii) such classes or categories of calls made for commercial purposes as the Commission determines—

(I) will not adversely affect the privacy rights that this section is intended to protect; and

(II) do not include the transmission of any unsolicited advertisement;

(C) may, by rule or order, exempt from the requirements of paragraph (1)(A)(iii) of this subsection calls to a telephone number assigned to a cellular telephone service that are not charged to

the called party, subject to such conditions as the Commission may prescribe as necessary in the interest of the privacy rights this section is intended to protect.

The following actions by debt collectors, telemarketers, and other businesses are violations of the federal Telephone Consumer Protection Act (TCPA):

1. A person or entity may not use an auto dialer or an artificial or prerecorded voice message to call cell phones or pagers. All creditors and debt collectors use auto dialers and most use artificial or prerecorded voice messages. 47 U.S.C. § 227(b)(1)(A)(iii)
2. A person or entity may not leave an artificial or prerecorded voice message for calls to your residential land line without your prior express consent. 47 U.S.C. § 227(b)(1)(B)
3. A person or entity with whom you have no preexisting relationship may not send unsolicited marketing faxes. 47 U.S.C. § 227(b)(1)(C)
4. Anyone using an auto dialer or an artificial or prerecorded voice message to call any number must clearly state the identity of the caller at the beginning of the message and give the address or phone number of the caller during the call. 47 U.S.C. § 227(d)(3)(A) and (B)

Damages recoverable under the TCPA:

When a person or entity violates any of the above provisions of the TCPA, you may recover the following damages.

1. \$500 per call or fax in violation of the FTCPA, or your actual provable damages. If court finds the defendant willfully or knowingly violated such regulations, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available.
2. Attorneys' fees.
3. The costs of the lawsuit.

NORTH CAROLINA
CLEVELAND COUNTY

RELEASE AND SETTLEMENT
AGREEMENT

This SETTLEMENT AGREEMENT AND RELEASE (the "Agreement") is made and executed as of the ____ day of _____, 2008, by and between John Q. Public and Mary E. Public ("Public") (with their heirs, agents, administrators, executors, trustees and assigns) and _____ ("Defendants") (and their heirs, agents and assigns); is intended to extinguish all liabilities, causes of action, or damages either past or present, known or unknown, if any, which the Publics may be entitled to pursue against the Defendants.

RECITALS:

The Publics have alleged that the Defendants committed acts which may constitute violations of the Fair Debt Collections Practices Act and North Carolina Unfair and Deceptive Acts and Practices laws prior to the debtors' filing of a bankruptcy case in the Western District of North Carolina, identified as Case Number _____ ("Bankruptcy Case").

The mutual desire of the parties is to resolve these matters to avoid litigation.

The Defendants agree to tender to the Publics the sum of \$_____ in damages and to the Publics' attorney the sum of \$_____ in legal fees, in satisfaction of all claims the Publics, and/or anyone deriving rights from the Publics, may have against the Defendants; and the Publics have agreed not to pursue litigation or further claims against Defendants. Any fees and expenses to which the attorney is entitled under the terms of his written fee agreement with the debtor(s) shall be deemed the sole and separate property of the attorney and to that extent the attorney shall have a lien on the said proceeds.

Plaintiffs agree to file a Motion for Approval of Settlement seeking the Court's approval to enter into this Agreement. The Motion shall provide notice to all creditors in the Plaintiffs' bankruptcy case. Upon the Court's entry of the order approving the settlement, the Plaintiffs shall file a Stipulation of Voluntary Dismissal With Prejudice signed by all the parties.

NOW, THEREFORE, in consideration of the above recitals and the value set out above and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, and intending to be legally bound, Defendants and the Publics covenant and agree as follows:

1. The Publics hereby release and forever discharge Defendants of and from all claims, causes of actions, suits, debts, agreements, damages, judgments, executions, and demands whatsoever ("Claims"), in law or in equity, which the Publics may have or ever had or have now, known or unknown, which arise from, are based upon, or are related to any action committed related to the Publics' Bankruptcy Case by Defendants.

2. The Publics hereby covenant that, they will now and forevermore forbear and refrain from the institution or prosecution of any Claims, court proceedings or causes of action whatsoever arising at any time prior to the effective date of this Agreement against Defendants.

This covenant may be pleaded as an absolute defense to any court pleading or action brought against Defendants by the Publics as of the date of this Agreement.

3. This Agreement releases any and all Claims based on any action or inaction of Defendants which occurred on or prior to the date of this Agreement.

4. This Agreement shall be construed under and in accordance with the laws of the State of North Carolina.

5. This settlement is made for the express purpose of avoiding the expense of litigation and to resolve the dispute among the parties and is not, nor shall it be construed as, an admission of liability on the part of Defendants.

6. The Publics acknowledge that they have (i) read this Agreement in its entirety and fully understand its tenor and effect, (ii) have discussed this Agreement with counsel, (iii) agree that this Agreement constitutes the entire agreement between the parties, and (iv) by their signatures represent that there have been no other promises or inducements made to them in connection with the execution of this Agreement other than the consideration set forth above.

IN WITNESS WHEREOF, John Q. Public and Mary E. Public have hereby executed this RELEASE AND SETTLEMENT AGREEMENT effective on the day and year written above.

Date

John Q. Public

Date

Mary E. Public

I HEREBY APPROVE THE TERMS AND CONDITIONS OF THE FOREGOING
RELEASE AND SETTLEMENT AGREEMENT.

O. Max Gardner, III
Counsel for Plaintiffs

I HEREBY APPROVE THE TERMS AND CONDITIONS OF THE FOREGOING
RELEASE AND SETTLEMENT AGREEMENT.

Dewey Cheatham
Counsel for Defendants

D – IMPROPER FEES & RESPA

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

**NAME: WRIGHT, RICHARD CHAPTER 13 CASE NO. 04-40765
 WRIGHT, SHERRY OUR FILE NO. 11145**

**ADDRESS: PO BOX 172
 LATTIMORE, NC 28089**

SSN: --- -- 6921 & --- -- 5118

DEBTOR(S).

**RICHARD WRIGHT AND WIFE,
SHERRY WRIGHT,**

Adv. Proc. No. 07- _____

Plaintiffs,

versus

**WELLS FARGO BANK, NA ,
SUCCESSOR BY MERGER TO
WELLS FARGO HOME MORTGAGE, INC.
d/b/a AMERICA'S SERVICING COMPANY,**

Defendant.

**COMPLAINT FOR IMPROPER AND UNAUTHORIZED FEES
(all core claims)**

Introduction

1. This is an action for actual and punitive damages filed by the debtors pursuant to Sections 105, 362, 501, 502, 503 and 506 of the Bankruptcy Code, and Rules 2016(a) and 3001(e) of the Bankruptcy Rules.

2. This action is also filed to enforce the Order of Confirmation duly entered in this Chapter 13 case and to enforce and to implement other Bankruptcy Code provisions and Rules related thereto.

Jurisdiction and Venue

3. Jurisdiction is conferred on this Court pursuant to the provisions of Section 1334 of Title 28 of the United States Code in that this proceeding arises in and is related to the above-captioned Chapter 13 case under Title 11 and concerns property of the Debtor in that case.

4. This Court has both personal and subject matter jurisdiction to hear this case pursuant to Section 1334 of Title 28 of the United States Code, Section 157(b)(2) of Title 28 of the United States Code, and pursuant to the Order entered by the Judges of the United States

District Court for the Western District of North Carolina on July 30, 1984 (the Referral Order), which Order was entered in accordance with the Bankruptcy Amendments and Federal Judgeship Act of 1984.

5. This matter is primarily a core proceeding and therefore the Bankruptcy Court has jurisdiction to enter a final order. However, in the event this case is determined to be a non-core proceeding then and in that event the Plaintiffs consent to the entry of a final order by the Bankruptcy Judge.

6. Venue lies in this District pursuant to Section 1391(b) of Title 28 of the United States Code.

Parties

7. The Plaintiffs in this case were and are debtors under Chapter 13 of Title 11 of the United States Code in case number 04-40765, which case is presently pending before this court. The Plaintiffs are hereinafter referred to as the Plaintiffs or the debtors.

8. The Defendant, Wells Fargo Bank, NA ("Wells Fargo"), is a foreign corporation and successor by merger to Wells Fargo Home Mortgage, Inc.

9. The Plaintiffs allege upon information and belief that Wells Fargo is the owner and holder of a Promissory Note and Deed of Trust on the Plaintiffs' residential real estate, by sale, transfer and/or assignment from the originator, Key Bank USA, NA ("Key Bank"), said sale, transfer or assignment occurring in approximately February of 2005.

10. The Plaintiffs are informed and believe and therefore allege that Wells Fargo Home Mortgage Company, Inc. is a wholly owned subsidiary of Wells Fargo and does business under the name of America's Servicing Company ("America's Servicing"). The Plaintiffs also allege on information and belief that America's Servicing services the subject Note and Deed of Trust.

Factual Allegations

11. The Chapter 13 case of the Plaintiff was commenced by the filing of a petition with the Clerk of this Court on July 9, 2004.

12. The 341(a) meeting of creditors was held in Shelby, North Carolina on August 13, 2004.

13. The Chapter 13 plan of the Plaintiff was subsequently confirmed by order of this Court dated September 2, 2004.

14. The Chapter 13 plan as confirmed included a debt to Key Bank in the amount of \$82,000.00, which was scheduled as a claim secured by a first deed of trust on the residential real estate of the Plaintiffs at 3802 Barrier Drive, Lattimore, Cleveland County, North Carolina.

15. The plan provided for the cure of pre-petition arrears to Key Bank in the amount of \$1,450.00 through August of 2004, with the Plaintiffs to resume direct mortgage payments in September of 2004.

16. Key Bank filed a sworn proof of claim for the pre-petition arrears in the amount of \$1791.41.

17. Upon information and belief, in approximately February of 2005, the debt to Key Bank was sold, transferred or assigned to Wells Fargo and the servicing rights were assigned to or

assumed by America's Servicing.

18. The Plaintiffs allege that Wells Fargo and America's Servicing received notice of the bankruptcy filing and of the Order of Confirmation entered in this case pursuant to said transfer and assignment.

19. The claim of Wells Fargo for the first deed of trust is identified on the records of the Trustee as claim number 0012 and the claim for the pre-petition arrears is identified as claim number 0014.

20. By August 30, 2007, the Trustee's office had disbursed the total sum of \$1,841.34 to Wells Fargo on the arrearage claim.

21. On or about January 31, 2006, Wells Fargo, by and through the Law Firm of Shapiro & Ingle, filed a Motion for Relief from Stay in this case as to the first deed of trust, alleging that the Plaintiffs were in default of their mortgage payments from October, 2005 to January, 2006 in the total sum of \$2,801.47 including late charges.

22. On or about February 1, 2006, the Plaintiffs' attorney filed an objection to the motion for relief from stay and requested the matter be set for a preliminary hearing before this Court on February 24, 2006.

23. The matter was subsequently resolved prior to the hearing by the entry of a Consent Order. The Consent Order was entered by the Court on March 13, 2006.

24. The Consent Order provided that the Plaintiffs would have a period of six months to cure the agreed default. However, the Plaintiffs subsequently tendered enough funds to cure the default in a lump sum payment and as of approximately March 23, 2006 they were current on all post-confirmation mortgage payments.

25. The Consent Order also specifically provided for the payment of Wells Fargo's legal fees and expenses in the amount of \$600.00. This amount was to be paid for through the Chapter 13 plan. These fees and expenses were specifically requested and applied for by Wells Fargo in the motion for relief and were approved by this Court upon entry of the Consent Order.

26. Wells Fargo's post-confirmation claim for legal fees and expenses in the amount of \$600.00 is identified on the records of the Trustee as claim number 0077. As of August 30, 2007, the Trustee had disbursed the sum of \$495.45 to Wells Fargo on this claim.

27. In April of 2006, the Plaintiffs received a monthly mortgage statement from America's Servicing which demanded the sum of \$110.72 in late fees in addition to their regular monthly payment.

28. The Plaintiffs allege that they were current as of March 23, 2006 and could not have owed any late fees and brought this matter to the attention of their attorney.

29. The attorney for the debtors sent a "Qualified Written Request" and a request for a written payoff statement to the attorney for Wells Fargo dated May 24, 2006. The attorney for Wells Fargo had previously agreed to accept "service of process" for any "Qualified Written Request" directed to Wells Fargo.

30. Wells Fargo responded to the qualified written request on or about June 26, 2006 with a written payoff statement and written loan transaction history.

31. The payoff statement indicated a total payoff of \$74,570.93 through July 14, 2006

and included \$110.72 in unpaid late charges and \$945.63 in outstanding "Corporate Advance Charges."

32. The loan transactional history specifically listed and identified the following "corporate advance" fees and charges:

May 4, 2005	Property Inspection Fee	\$15.00
June 2, 2005	Property Inspection Fee	\$15.00
June 30, 2005	Property Inspection Fee	\$15.00
August 30, 2005	Property Inspection Fee	\$15.00
September 2, 2005	Property Inspection Fee	\$15.00
October 28, 2005	Property Inspection Fee	\$15.00
November 29, 2005	Property Inspection Fee	\$15.00
December 30, 2005	Property Inspection Fee	\$15.00
February 2, 2006	Property Inspection Fee	\$15.00
February 2, 2006	Bankruptcy Attorney Costs	\$150.63
February 2, 2006	Bankruptcy Attorney Fees	\$550.00
February 24, 2006	Broker's Price Opinion	\$95.00
March 9, 2006	Property Inspection Fee	\$15.00

33. The Plaintiffs allege that the Defendant has improperly assessed their mortgage loan with improper, unauthorized and illegal fees and charges. The Plaintiffs also allege that the Defendant has improperly applied some or all of the post-petition mortgage payments and disbursements from the Trustee's office to a "corporate suspense account" and have used funds posted in that account to pay some of the fees identified in paragraph 33 rather than applying those fees to the arrearage claim and to the post-petition direct mortgage claim.

34. The loan transactional history reveals that the Defendant paid itself from funds being held in suspense, (which funds were otherwise Trustee disbursements intended to pay the pre-petition arrearage claim) on February 14, 2006 in the amount of \$150.63.

35. The loan transactional history reveals that the Defendant paid itself from funds being held in suspense, (which funds were otherwise Trustee disbursements intended to pay the pre-petition arrearage claim) on June 10, 2005 in the amount of \$15.00, on July 18, 2005 in the amount of \$15.00; on September 9, 2005 in the amount of \$15.00; on October 12, 2005 in the amount of \$15.00 and on December 5, 2005 in the amount of \$15.00.

36. The Plaintiffs also allege that the use of this "suspense account" has also resulted in the improper imposition of monthly late charges for payments that in fact were not late. To the extent these fees and charges were not applied for and approved by this Court, the Plaintiffs allege that they are per se unreasonable.

37. The Plaintiffs allege that the Consent Order approving Wells Fargo's legal fees and costs related to the Motion for Relief from Stay of \$600.00 was not entered until March 13, 2006, but the Defendant charged \$700.63 to the Plaintiffs' mortgage account on February 2, 2006, prior to the settlement of the Motion for Relief and prior to the court's approval of any legal fees and costs for the Defendant. The said fees are furthermore in excess of the amount requested, agreed to and approved by this Court.

38. The Plaintiffs allege that the Property Inspection Fees and Broker's Price Opinion Fees are unauthorized and unapproved by the Court, and are therefore illegal and are otherwise excessive and unreasonable. The Plaintiffs also allege that since the Defendant has never applied to the Court for the approval of these fees and charges all of the same are unreasonable per se.

39. In January of 2007 the Plaintiffs received an Escrow Analysis indicating that their

monthly mortgage payment would be increased to \$1,065.27 per month beginning with the payment due for April of 2007. The Plaintiffs were advised that this increase was due in part to real property taxes paid by Wells Fargo and approximately \$1240.00 charged to the debtors for force placed hazard insurance, despite the fact that the debtors have had ongoing continuous homeowner's insurance in place and paid for by the debtors for several years.

40. On or about May 24, 2007 Wells Fargo filed a second Motion for Relief from Stay alleging the debtors were in default for their payments for April and May of 2007 in the amount of \$1065.27 each plus late charges.

41. Attached to the Motion for Relief from Stay was a post petition transaction history prepared by the attorney for Wells Fargo, and not Wells Fargo's own actual transactional history.

42. The attorney for the Plaintiffs herein filed an Objection and Request for Hearing and Request for Production of Documents and Interrogatories on or about June 4, 2007.

43. The Motion for Relief from Stay is currently scheduled for hearing on September 28, 2007.

44. After providing proof of the debtors' own homeowner's insurance coverage and communicating to the attorney for Wells Fargo the Plaintiffs' various questions about the debtors' escrow account, proper credits thereto, the proper payment amount, and application of payments, upon information and belief, it appears that the current alleged default is the result of Wells Fargo's payment of 2004 and 2005 property taxes and penalties on behalf of the debtors in November of 2005; however, Wells Fargo has failed to respond to any of the debtors' Request for Production by providing any documentation whatsoever to assist the debtors in answering their many concerns about the foregoing.

45. The Plaintiffs allege that Wells Fargo's payment of 2004 and 2005 taxes in November of 2005 should have been addressed in conjunction with the settlement of the first Motion for Relief from Stay in March of 2006, since Wells Fargo knew about its payment of those taxes at that time. Furthermore, to the extent that Wells Fargo has paid any pre-petition property taxes Wells Fargo has only purchased the claim of the Cleveland County Tax Collector against this estate in bankruptcy and cannot unilaterally accelerate payments on that claim by conducting an "escrow analysis" and increasing the monthly mortgage payments. The Plaintiffs allege that in this case Wells Fargo would have no greater rights to plan distributions on these tax claims than the prior holder of the tax claims.

46. The Plaintiffs furthermore believe that the current alleged default is also in part due to Wells Fargo's failure to properly post and apply at least one post petition mortgage payment.

47. Since Wells Fargo has failed to provide responses to the debtors' Requests to Produce and Interrogatories, the Plaintiffs allege upon information and belief that Wells Fargo has assessed their mortgage loan even more "rolling" late charges, improper and unauthorized fees, charges, Broker's Price Opinions, Property Inspections and other bankruptcy related fees and charges from and after March of 2006 to the present date.

48. The Plaintiffs have been damaged by the Defendant's actions in that they have been and continue to be forced to expend their time and expenses toward the defense of this contested matter to enforce their rights and have incurred substantial and significant legal fees and expenses in connection therewith. The Plaintiffs have feared and do fear losing their home.

**First Claim for Relief
(Violation of the Automatic Stay)**

49. The allegations in paragraphs 1 through 48 of this complaint are realleged and incorporated herein by this reference.

50. The actions of the Defendant in imposing improper, unauthorized and unapproved fees and charges to the Plaintiffs' mortgage loan account and in using property of the estate place in a "suspense account" to pay all or a part of the said fees and charges constitute a gross and willful violation of the automatic stay as set forth in 11 U.S.C. Section 362(a)(3).

51. The imposition of the said unapproved property inspection fees constitutes unlawful and illegal bankruptcy fees in violation of the automatic stay and inconsistent with the decision of this court in *In re Stark*, 242 B.R. 866 (W.D.N.C. 1999).

52. As a result of the above violations of 11 U.S.C. Section 362, the Defendant is liable to the Plaintiffs for actual damages, punitive damages and legal fees.

53. These acts of the Defendant are also violations of the North Carolina Consumer Protection Act. Under the provision of Section 75-52 of the North Carolina General Statutes the Defendant was and is prohibited from engaging in any conduct the natural consequences of which is to oppress, harass or abuse any person. The actions and conduct of the Defendant were oppressive and abusive in violation of the applicable provisions of Article 2 of Chapter 75 of the North Carolina General Statutes. Such violations of state law further support imposing punitive damages for the stay violations identified herein.

54. All actions of the Defendant contained in this Complaint were done in bad faith and as such were violations of the covenant of good faith and fair dealing contained and implied in the Deed of Trust and mortgage note. Such bad faith conduct and unfair dealing further supports imposing punitive damages for the stay violations.

Second Claim for Relief (Sections 105 and 506 of Title 11 of the United States Code)

55. The allegations in paragraphs 1 through 54 of this complaint are realleged and incorporated herein by this reference.

56. The actions of the Defendant in charging post-petition and pre-confirmation legal fees and expenses as alleged herein without any prior notice to or approval by this Court constitute willful, intentional, gross and flagrant violations of the provisions of Sections 105(a) and 506(b) of Title 11 of the United States Code and Rule 2016(a) of the Federal Rules of Bankruptcy Procedure which provides, in pertinent part, that: "An entity seeking interim or final compensation for services, or reimbursement of necessary expenses, from the estate shall file an application setting forth a detailed statement of (1) the services rendered, time expended and expenses incurred, and (2) the amounts requested."

57. As a result of the above violations, the Defendant is are liable to the Plaintiffs for actual damages, punitive damages and legal fees.

Third Claim for Relief (Improper and Unauthorized Fees)

58. The allegations in paragraphs 1 through 57 of this complaint are realleged and incorporated herein by this reference.

59. The actions alleged herein are acts in violation of Sections 362(a)(3) and 506(b) of

Title 11 of the United States Code and Rule 3001(e) of the Bankruptcy Rules as the said claims of the Cleveland County Tax Collector have been used to form the basis for a purported escrow review and an increase in the monthly mortgage payment when in fact and in law the acquisitions of such claims by payment granted to the Defendant no greater rights than would have been held by the said Tax Collector.

60. The Plaintiffs allege that the collection and the attempt to collect said taxes by the enhanced monthly payments violate the provisions of 362(a)(3) and 506(b) of the Code and Rule 3001(e) of the Bankruptcy Rules.

61. The Plaintiffs further allege that the alleged misconduct of the Defendant is aggravated by their failure to file the mandatory notice of transfer or assignment of a proof of claim as required by Rule 3001(e)(1) of the Bankruptcy Rules.

62. The Plaintiffs are also informed and believe and therefore allege that said fees are also in violation of the ruling of this Court in Smith v. TMS Mortgage (Case No. 00-31220) and the Order in Aid of Case Administration entered by this Court on April 6, 2001.

63. As a result of the above violation, the Defendant is liable to the Plaintiffs for actual damages, punitive damages and legal fees.

Fourth Claim for Relief (Contempt of Court Orders)

64. The allegations in paragraphs 1 through 63 are realleged and incorporated herein by this reference.

65. The Plaintiffs allege that the conduct of the Defendant in charging and assigning legal fees and expenses to their mortgage loan "before" such fees were approved by this Court and in an amount "in excess" of the fees and expenses actually approved by this Court constitutes actions in contempt and in violation of the Order entered by this Court on or about March 13, 2006. The Plaintiffs also allege that such conduct also is in direct violation of the Order Confirming the Chapter 13 Plan entered in this case on September 2, 2004.

66. The Plaintiffs allege that this Court has authority under Section 105(a) of Title 11 of the United States Code this Court has authority to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title."

67. The Plaintiffs allege that this Court should impose serious and severe sanctions against the Defendant for assessing and charging the Plaintiffs loan account with legal fees and charges in excess of the amounts requested and actually approved by this court.

Fifth Claim for Relief (Breach of Contract)

68. The allegations in paragraphs 1 through 67 are realleged and incorporated herein by this reference.

69. The Plaintiffs allege that the Order entered by this Court on March 13, 2006, was the result of a negotiated settlement between the Plaintiffs and the Defendant.

70. The Plaintiffs allege that as consideration for their acceptance of the terms of the said settlement they agreed that the Defendant would charge and that they would repay fees and expenses of exactly \$600.00.

71. The Plaintiffs allege that they relied upon the promises and representations of the Defendant in agreeing to the terms and conditions of the Consent Order.

72. The Plaintiffs are informed and believe and therefore allege that at the time these negotiations were active between the parties the Defendant already knew that it had charged fees and expenses to the Plaintiffs' loan in excess of the amounts represented to the Plaintiffs.

73. The Plaintiffs allege that such conduct constituted an anticipatory breach of the settlement agreement between the parties.

74. The Plaintiffs allege that such conduct lead to an actual breach of the settlement agreement by the collection and payment or some or all of the additional fees.

75. The Plaintiffs are informed and believe and therefore allege that the terms and conditions of their Chapter 13 Plan specifically provided that the Defendant could not charge any fees or expenses to the mortgage loan without proper notice, the right to a hearing, and the entry of an Order approving the same.

76. The Plaintiffs allege that the Confirmation of the Plan created a new and binding contract between the Plaintiffs and Defendant.

77. The Plaintiffs allege that the Conduct of the Defendant as alleged herein is consistent with a breach of the terms of the Confirmed Plan.

78. The Plaintiffs allege that the conduct of the Defendant in this matter was in bad faith, was fraudulent, and was otherwise improper.

79. The Plaintiffs allege that as a result of such conduct they are entitled to the award of damages, costs and fees from the Defendant.

80. The Plaintiffs are informed and believe and therefore allege that this Court should impose punitive damages in order to deter the Defendant from such future conduct in this case and in other cases before this Court.

WHEREFORE, the Plaintiffs having set forth their claims for relief against the Defendant respectfully pray of the Court as follows:

- A. That the Plaintiffs have and recover against the Defendant a sum to be determined by the Court in the form of actual damages;
- B. That the Plaintiffs have and recover against the Defendant a sum to be determined by the Court in the form of statutory damages;
- C. That the Plaintiffs have and recover against the Defendant a sum to be determined by the Court in the form of punitive damages;
- D. That the Plaintiffs have and recover against the Defendant all reasonable legal fees and expenses incurred by their attorney;
- E. That the Plaintiffs have such other and further relief as the Court may deem just and proper.

Dated this the _____ day of _____.



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**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME:

**CHAPTER 13 CASE NO.
OUR FILE NO.**

ADDRESS:

SSN:

DEBTORS.

Adversary Proc. No._____

Plaintiffs,

versus

SELECT PORTFOLIO SERVICING,

Defendant.

**Complaint Seeking Damages in Core Adversary Proceeding for Improper Fees
(105, 506(a), 2016(a), FDCPA, UDAP)**

Introduction

1. This is an action for actual and punitive damages filed by the debtors pursuant to Sections 105, 362, 501, 502, 503 and 506 of the Bankruptcy Code, and Rules 2016 and 9011 of the Bankruptcy Rules, the Fair Debt Collection Practices Act, 15 U.S.C. Section 1692 et seq. (hereinafter referred to as "FDCPA"), and the North Carolina Unfair and Deceptive Act and Practices Laws, G.S. Section 75-50 et seq., (hereinafter referred to as "Acts" and "UDAP").

2. This action is also filed to enforce the Order of Confirmation duly entered in this Chapter 13 case and to enforce and to implement other Bankruptcy Code provisions and Rules related thereto.

Jurisdiction and Venue

3. Jurisdiction is conferred on this Court pursuant to the provisions of Section 1334 of Title 28 of the United States Code in that this proceeding arises in and is related to the above-captioned Chapter 13 case under Title 11 and concerns property of the Debtors in that case.

4. This Court has both personal and subject matter jurisdiction to hear this case pursuant to Section 1334 of Title 28 of the United States Code, Section 157(b)(2) of Title 28 of the United States Code, and pursuant to the Order entered by the Judges of the United States District Court for the Western District of North Carolina on July 30, 1984 (the Referral Order),

which Order was entered in accordance with the Bankruptcy Amendments and Federal Judgeship Act of 1984.

5. This Court has supplemental jurisdiction to hear all state law claims pursuant to Section 1367 of Title 28 of the United States Code.

6. This Court also has jurisdiction to hear the Fair Debt Collection Practices Act violations pursuant to Section 1692 of Title 15 of the United States Code; thus, federal subject matter jurisdiction is properly founded upon Section 1331 of Title 28 of the United States Code.

7. This matter is primarily a core proceeding and therefore the Bankruptcy Court has jurisdiction to enter a final order. However, in the event this case is determined to be a non-core proceeding then and in that event the Plaintiff consents to the entry of a final order by the Bankruptcy Judge.

8. Venue lies in this District pursuant to Section 1391(b) of Title 28 of the United States Code.

Parties

9. The Plaintiffs in this case were and are debtors under Chapter 13 of Title 11 of the United States Code in case number _____, which case is presently pending before this court. The Plaintiffs are hereinafter referred to as the Plaintiffs or the debtors.

10. The Defendant, Fairbanks Capital Corporation, (hereinafter "Fairbanks") is a corporation engaged in the business of real estate mortgage servicing with its principal place of business located at 3815 South West Temple, Salt Lake City, Utah, 84115-4412.

11. The Chapter 13 case of the Plaintiff was commenced by the filing of a voluntary petition with the Clerk of this Court on March 7, 2003. On _____ the Bankruptcy Noticing Center notified Defendant of Plaintiffs' bankruptcy case.

13. The 341(a) meeting of creditors was held in Shelby, North Carolina on April 17, 2003

14. The Chapter 13 plan of the Plaintiff was subsequently confirmed by order of this Court dated May 22, 2003.

15. The Chapter 13 plan as confirmed included a debt to Fairbanks in the amount of \$101,300.71, which was scheduled as a claim secured by a first deed of trust on the residential real estate of the Plaintiffs at _____ with an estimated value of \$128,000.00. The plan provided for the cure of pre-petition arrears to Fairbanks in the amount of \$8,505.57 through March of 2003, with the Plaintiffs to resume direct payments in April of 2003.

16. The Defendant had notice of the bankruptcy filing and of the Order of Confirmation entered in this case.

17. The claim of Fairbanks for the first deed of trust is identified on the records of the Trustee as claim number 0005 and the claim for the pre-petition arrears is identified as claim number 0008.

18. Fairbanks filed a sworn proof of claim for the pre-petition arrears in the amount of \$11,319.38. The Trustee's office has disbursed the total sum of \$1,215.66 to Fairbanks on this claim.

19. The debtors made their regular monthly mortgage payments directly to Fairbanks

for the months of April, May and June of 2003.

20. On or about August 5, 2003, the debtors filed a motion to modify to add two mortgage payments to Fairbanks for the months of July and August of 2003 to their plan, due to financial hardship resulting from the female debtor's being out of work. The female debtor was and continues to be out of work due to a medical diagnosis of congestive heart failure.

21. The motion to modify was served on Fairbanks as well as Grady Ingle of the law firm of Shapiro & Ingle, LLP, attorneys for Fairbanks, pursuant to a Notice of Appearance filed with the Court on or about March 26, 2003.

22. An Order granting the debtors motion was entered by this Court on or about September 10, 2003, after proper notice of hearing and no objections having been filed.

23. The Order was served on Fairbanks as well as Grady Ingle.

24. The additional arrearage claim in favor of Fairbanks is identified on the records of the Trustee as claim number 0052 in the amount of \$1,935.14. Fairbanks has received the total sum of \$61.33 in disbursements from the Trustee's office toward this claim.

25. On or about September 16, 2003, Fairbanks, by and through Grady Ingle, filed a Motion for Relief from Stay in this case as to the first deed of trust, alleging that the Debtors were in default of their mortgage payments from July to September, 2003 in the sum of \$2,827.26.

26. On or about September 25, 2003, the Plaintiffs' attorney filed an objection to the motion for relief from stay and requested the matter be set for a preliminary hearing before this Court on October 31, 2003.

27. A transaction history attached to Fairbanks' motion for relief indicated the following improper, unauthorized and unapproved post-petition fees and charges:

	<u>Description</u>	<u>Date</u>	<u>Amount</u>
a.	Foreclosure/BPO fee	March 18, 2003	\$105.00
b.	Inspection fee	March 28, 2003	\$11.35
c.	Bankruptcy attorney fee	April 8, 2003	\$200.00
d.	Bankruptcy Costs	April 8, 2003	\$14.00
e.	Foreclosure/BPO fee	August 8, 2003	\$105.00
f.	Foreclosure/BPO fee	August 20, 2003	\$115.00

Total			\$550.35
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28. On or about September 30, 2003 the Plaintiffs' attorney sent Grady Ingle a letter which stated, "I provided you with a copy of the motion, as well as the Order granting the motion. The debtors have paid their September payment and contend they are current on their mortgage payments. I am therefore requesting you withdraw the motion for relief filed on or about September 16, 2003." The letter further stated, "I have identified approximately \$550.35 in unapproved foreclosure, bankruptcy, attorney, inspection and BPO fees charged to this mortgage account, post-petition. I am requesting these unlawful and unapproved fees be immediately removed from the debtors' mortgage account. I am further requesting confirmation in writing that these fees have been removed. If we do not receive confirmation within 10 days, we will consider the filing of an adversary proceeding against Fairbanks." The letter is attached hereto as **Exhibit A**, and is incorporated herein by this reference.

29. The Plaintiffs aver that their attorney has never received any type of response to the September 30, 2003 letter or the pleadings filed in this case, no confirmation of the removal

of the improper fees from the mortgage loan account, and no withdrawal of Fairbanks' motion for relief.

30. The Plaintiffs have been damaged by the Defendants' actions in that they have been and continue to be forced to expend their time and expenses toward the defense of this contested matter to avoid the loss of their real property. The Plaintiffs allege that they have been harassed and have feared losing their home. The female debtor's health is tenuous and her condition has been exasperated by these events and the actions of Fairbanks.

**First Claim for Relief
(Violation of the Automatic Stay)**

31. The allegations in paragraphs 1 through 30 of this complaint are realleged and incorporated herein by this reference.

32. The actions of Fairbanks in imposing improper, unauthorized and unapproved fees and charges to their mortgage loan account, constitute a gross violation of the automatic stay as set forth in 11 U.S.C. Section 362(a)(3).

33. The imposition of the said unapproved fees constitutes unlawful and illegal bankruptcy fees in violation of the automatic stay and inconsistent with the decision of this court in *In re Stark*, 242 B.R. 866 (W.D.N.C. 1999).

34. As a result of the above violations of 11 U.S.C. Section 362, Fairbanks is liable to the Plaintiffs for actual damages, punitive damages and legal fees.

**Second Claim for Relief
(North Carolina Unfair and Deceptive Acts and Practices)**

35. The allegations in paragraphs 1 through 34 of this complaint are realleged and incorporated herein by this reference.

36. The Plaintiffs are "consumers" as that term is defined by Article 2 of Chapter 75 of the North Carolina General Statutes.

37. The Plaintiffs' relationship with Fairbanks arose out of a "consumer debt" as that term is defined in Article 2 of Chapter 75 of the North Carolina General Statutes.

38. Fairbanks was and is a "debt collector" as that term is defined by applicable provisions of Article 2 of Chapter 75 of the North Carolina General Statutes.

39. Under the provision of Section 75-52 of the North Carolina General Statutes Fairbanks was and is prohibited from engaging in any conduct the natural consequences of which is to oppress, harass or abuse any person.

40. The actions and conduct of Fairbanks were oppressive and abusive in violation of the applicable provisions of Article 2 of Chapter 75 of the North Carolina General Statutes.

41. As a result thereof, Fairbanks is liable for statutory damages in the sum of no less than \$2,000.00 for violation of N.C.G.S. Section 75-50, et seq. and the payment of legal fees and expenses.

**Third Claim for Relief
(Fair Debt Collection Practices Act)**

42. The allegations in paragraphs 1 through 41 of this complaint are realleged and incorporated herein by this reference.

43. The Plaintiffs allege that Fairbanks violated the FDCPA. Fairbanks violated the FDCPA. Defendant's violations include but are not limited to engaging in any conduct the natural consequences of which is to harass, oppress, or abuse any person in connection with the collection of a debt, 15 U.S.C. Section 1692d. Defendant has demanded an amount due from Plaintiff which is inaccurate and inflated, and in violation of any contract between the parties. As such, Defendant has also violated Sections 1692e and Section 1692f of the FDCPA.

44. As a result of the above violations of the FDCPA, the Defendant is liable to the Plaintiffs for actual damages, statutory damages of \$1,000.00, and attorney's fees.

**Fourth Claim for Relief
(Sections 105 and 506 of Title 11 of the United States Code)**

45. The allegations in paragraphs 1 through 44 of this complaint are realleged and incorporated herein by this reference.

46. The actions of Fairbanks by charging post-petition legal fees and expenses as alleged herein without any prior notice or Court approval constitute willful, intentional, gross and flagrant violations of the provisions of Sections 105 and 506(b) of Title 11 of the United States Code and Rule 2016(a) of the Federal Rules of Bankruptcy Procedure which provides, in pertinent part, that: "An entity seeking interim or final compensation for services, or reimbursement of necessary expenses, from the estate shall file an application setting forth a detailed statement of (1) the services rendered, time expended and expenses incurred, and (2) the amounts requested."

47. As a result of the above violations, the Defendant is liable to the Plaintiffs for actual damages, punitive damages and legal fees.

**Fifth Claim for Relief
(Improper and Unauthorized Fees)**

48. The allegations in paragraphs 1 through 47 of this complaint are realleged and incorporated herein by this reference.

49. The Plaintiff avers, upon information and belief, that the actions alleged herein are acts in violation of Section 506 of Title 11 of the United States Code as the said fees charged by Fairbanks were not part of the underlying agreement by and between Fairbanks and the debtors, and the fees and costs are otherwise unreasonable and excessive.

50. The Plaintiff further avers, upon information and belief, that the said fees are in violation of the ruling of this Court in *Smith v. TMS Mortgage* (Case No. 00-31220) and the Order in Aid of Case Administration entered by this Court on April 6, 2001.

51. As a result of the above violation, Fairbanks is liable to the Plaintiffs for actual damages, punitive damages and legal fees.

**Sixth Claim for Relief
(Federal Rules of Bankruptcy Procedure Rules 2016)**

52. The allegations in paragraphs 1 through 51 of this complaint are realleged and incorporated herein by this reference.

53. The Plaintiffs allege upon information and belief that the Defendant violated Rule 2016(a) of the Federal Rules of Bankruptcy Procedure by failing to secure prior court approval for all of the alleged fees and charges.

54. The Plaintiff by have also violated the Bankruptcy Code and Rules by presenting papers and documents in a contested case that they knew were false and which had no evidentiary support and which were intended to mislead the debtors and to prevent the debtors from pursuing rights allowed under the Bankruptcy Code. The Motion for Relief filed in this case on September 16, 2003 fraudulently alleged that the debtors were in default in the amount of \$2,827.26. The debtors allege that the motion for relief from stay was filed for the following improper purposes:

- a. To harass the debtors;
- b. To cause unnecessary delay;
- c. To needlessly increase the cost of the bankruptcy case;
- d. To improperly increase the fees that the defendants could charge to the debtors;
- e. To unlawfully and improperly force the debtors to dismiss their Chapter 13 case;
- f. To secure relief from stay without adequate legal or factual grounds therefore;
- g. To improperly increase the amount of the debt; and
- h. To improperly increase the legal fees and expenses of the debtors.

55. As a result of the Defendant's violation of federal rules of procedure as alleged herein, the Defendant is liable to the Plaintiffs for monetary damages and legal fees.

WHEREFORE, the Plaintiffs having set forth their claims for relief against the Defendant respectfully pray of the Court as follows:

- A. That the Plaintiffs have and recover against the Defendant a sum to be determined by the Court in the form of actual damages;
- B. That the Plaintiffs have and recover against the Defendant a sum to be determined by the Court in the form of statutory damages;
- C. That the Plaintiffs have and recover against the Defendant a sum to be determined by the Court in the form of punitive damages;
- D. That the Plaintiffs have and recover against the Defendant all reasonable legal fees and expenses incurred by their attorney;
- E. That this Court order Fairbanks to pay additional actual damages and statutory damages in a sum to be determined by the Court for violation of N.C.G.S. Section 75-50, et seq.;
- F. That this Court order Fairbanks to pay additional actual damages and statutory damages in a sum to be determined by the Court for violating the FDCPA pursuant to 15 U.S.C. Section 1692k;

- G. That the underlying debt to Fairbanks be forever canceled and discharged and the Defendant be ordered to release all liens on the residence of the debtor and mark "paid in full" on all loan documents with said documents to be delivered to the debtors with all liens duly canceled and released as an additional sanction provided for under Section 362(h) of Title 11 of the United States Code; and
- H That the Plaintiffs have such other and further relief as the Court may deem just and proper.

Date this the _____ day of _____, 2008.

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**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME:

**CHAPTER 13 CASE NO.
OUR FILE NO.**

ADDRESS:

SSN:

DEBTORS.

Adversary Proc. No. _____

Plaintiffs,

versus

WASHINGTON MUTUAL BANK, FA

Defendant.

**Complaint Seeking Damages in Core Adversary Proceeding for
Improper Fees and Violation of RESPA**

Introduction

1. This is an action for actual and punitive damages filed by the debtors pursuant to Sections 105, 362, 501, 502, 503 and 506 of the Bankruptcy Code, the Fair Debt Collection Practices Act, 15 U.S.C. Section 1692 et seq. ("FDCPA"), and the North Carolina Unfair and Deceptive Act and Practices Laws, G.S. Section 75-50 et seq., ("Acts" and "UDAP"), and for actual and punitive damages pursuant to Sections 2605(e)(1)(A) and 2605(e)(1)(B)(2) of Title 12 of the United States Code and Sections 3500.21(e)(1) and 3500.21(e)(3) of Regulation X.

2. This action is also filed to enforce the Order of Confirmation duly entered in this Chapter 13 case and to enforce and to implement other Bankruptcy Code provisions and Rules related thereto.

Jurisdiction and Venue

3. Jurisdiction is conferred on this Court pursuant to the provisions of Section 1334 of Title 28 of the United States Code in that this proceeding arises in and is related to the above-captioned Chapter 13 case under Title 11 and concerns property of the Debtors in that case.

4. This Court has both personal and subject matter jurisdiction to hear this case pursuant to Section 1334 of Title 28 of the United States Code, Section 157(b)(2) of Title 28 of the United States Code, and pursuant to the Order entered by the Judges of the United States District Court for the Western District of North Carolina on July 30, 1984 (the Referral Order), which Order was entered in accordance with the Bankruptcy Amendments and Federal Judgeship Act of 1984.

5. This Court has supplemental jurisdiction to hear all state law claims pursuant to

Section 1367 of Title 28 of the United States Code.

6. This Court also has jurisdiction to hear the Fair Debt Collection Practices Act violations pursuant to Section 1692 of Title 15 of the United States Code; thus, federal subject matter jurisdiction is properly founded upon Section 1331 of Title 28 of the United States Code.

7. This matter is primarily a core proceeding and therefore the Bankruptcy Court has jurisdiction to enter a final order. However, in the event this case is determined to be a non-core proceeding then and in that event the Plaintiff consents to the entry of a final order by the Bankruptcy Judge.

8. Venue lies in this District pursuant to Section 1391(b) of Title 28 of the United States Code.

Parties

9. The Plaintiffs in this case were and are debtors under Chapter 13 of Title 11 of the United States Code in case number _____, which case is presently pending before this court. The Plaintiffs are hereinafter referred to as the Plaintiffs or the debtors.

10. The Defendant, Washington Mutual Bank, FA, (hereinafter "WAMU") is a Federally Chartered Bank with a principal office address of 9600 Oakdale Ave., Chatsworth, California 91311.

Factual Allegations

11. The Chapter 13 case of the Plaintiffs was commenced by the filing of a voluntary petition with the Clerk of this Court on _____.

12. The 341(a) meeting of creditors was held in Shelby, North Carolina on _____.

13. The Chapter 13 plan of the Plaintiff was subsequently confirmed by order of this Court dated _____.

14. The Chapter 13 plan as confirmed included a debt to Chase Manhattan Mortgage Corporation ("Chase") in the amount of \$70,801.39, which was scheduled as a claim secured by a first deed of trust on the residential real estate of the Plaintiffs at _____.

15. The plan provided for the cure of pre-petition arrears to Chase in the amount of \$926.49 through _____, with the Plaintiffs to resume direct payments in _____.

16. Chase received notice of the bankruptcy filing and of the Order of Confirmation entered in this case.

17. Chase filed a sworn proof of claim for the first deed of trust in the amount of \$69,977.18 and for the pre-petition arrears in the amount of \$1468.84.

18. Sometime following the filing of the debtors' chapter 13 case, Chase sold, transferred or assigned the subject mortgage debt to Homeside Lending, Inc. ("Homeside").

19. By _____, the Trustee's office disbursed the total sum of \$1,785.45 to Chase and Homeside. The debtors allege that the pre-petition arrearage claim is therefore paid in full.

20. Homeside subsequently sold, transferred or assigned the subject mortgage debt to WAMU in approximately _____.

21. The claim of WAMU for the first deed of trust is identified on the records of the Trustee as claim number 0008 and the claim for the pre-petition arrears is identified as claim number 0010.

22. In approximately _____, the Plaintiffs received a notice from WAMU that their monthly mortgage payment was being increased from \$879.73 to \$1205.55. The Plaintiffs reported to their attorney that they were having various servicing questions with regard to their mortgage payments to WAMU, WAMU's handling of escrow and suspense accounts, various escrow refunds and the various changes in their monthly payment. The debtors' attorney tendered a "Qualified Written Request" to WAMU, pursuant to the Real Estate Settlement Procedures Act on or about _____.

23. The Qualified Written Request was addressed to a Customer Care Specialist for WAMU at P O Box 3139, Milwaukee, WI 53201-3139.

24. As of the filing of this pleading WAMU has failed to have any form of communication with the debtors' attorney, or with the debtors either to acknowledge or respond to the aforesaid "Qualified Written Request" regarding the subject account.

25. On _____, the debtors filed a Motion seeking approval of a new mortgage loan to refinance the first and second mortgage loans on the debtors' home and to payoff the Chapter 13 plan.

26. On _____, an Order was entered approving the new mortgage loan.

27. In connection with the new mortgage loan, the debtors received a Payoff Statement from WAMU dated _____. Said payoff included a "Recoverable Balance" of \$439.63. The "Recoverable Balance" included charges for Bankruptcy Attorney Fees and Costs assessed to the debtors' loan on _____. The Payoff also included an "Escrow/Impound Overdraft" of \$929.03.

28. The debtors allege that the "Recoverable Balance" charges are improper, unauthorized and unapproved post-petition corporate advances. The debtors further allege that they were making their monthly mortgage payments to WAMU in an amount in excess of the monthly payment due, for approximately one year after having received notice of a decrease in their monthly payment. The debtors received two escrow refunds in the amount of several hundred dollars each, and do not believe the "Escrow/Impound Overdraft" is correct.

29. In an effort to secure the new mortgage refinancing and payoff their Chapter 13 plan, the debtors consummated the closing of the new mortgage and paid WAMU the balance alleged to be owed by the debtors under protest, reserving any cause of action they may have regarding any improper charges.

30. The Plaintiffs allege that WAMU has charged their mortgage loan account improper, unapproved, unauthorized and unlawful charges and fees inconsistent with the decision of this court in *In re Stark*, 242 B.R. 866 (W.D.N.C. 1999).

31. The Plaintiffs have been damaged by the Defendants' actions in that they have been and continue to be forced to expend their time and expenses toward the defense of this contested matter.

First Claim for Relief (Violation of RESPA)

32. The allegations in paragraphs 1 through 31 of this complaint are realleged and incorporated herein by this reference.

33. The Defendant is the servicer of a "federally related mortgage loan" as that term is defined in Section 2602(1) of Title 12 of the United States Code.

34. The "qualified written request" was not acknowledged within 20 days of receipt as required by Section 2605(e)(1)(A) of Title 12 of the United States Code and Section 3500.21(e)(1) of Reg. X.

35. The Defendant did not, within 60 days of receipt of the "qualified written request," provide the information requested and inform the Plaintiffs of its actions as required by Section 2605(e)(1)(B)(2) of Title 12 of the United States Code and Section 3500.21(e)(3) of Reg. X.

36. The Defendant has failed to comply with Section 2605 of Title 12 of the United States Code.

37. Pursuant to Section 2605(f) of Title 12 of the United States Code and Section 3500.21(f) of Reg. X, the Plaintiffs may recover of the Defendant actual damages, costs and reasonable attorney fees for each failure of the Defendant to comply with any part of Section 2605 of Title 12 of the United States Code.

Second Claim for Relief (Violation of the Automatic Stay)

38. The allegations in paragraphs 1 through 37 of this complaint are realleged and incorporated herein by this reference.

39. The actions of WAMU in imposing improper, unauthorized and unapproved fees and charges to their mortgage loan account, constitute a gross violation of the automatic stay as set forth in 11 U.S.C. Section 362(a)(3).

40. The imposition of the said unapproved fees constitutes unlawful and illegal bankruptcy fees in violation of the automatic stay and inconsistent with the decision of this court in *In re Stark*, 242 B.R. 866 (W.D.N.C. 1999).

41. As a result of the above violations of 11 U.S.C. Section 362, WAMU is liable to the Plaintiffs for actual damages, punitive damages and legal fees.

Third Claim for Relief (North Carolina Unfair and Deceptive Acts and Practices)

42. The allegations in paragraphs 1 through 41 of this complaint are realleged and incorporated herein by this reference.

43. The Plaintiffs are "consumers" as that term is defined by Article 2 of Chapter 75 of the North Carolina General Statutes.

44. The Plaintiffs' relationship with WAMU arose out of a "consumer debt" as that term is defined in Article 2 of Chapter 75 of the North Carolina General Statutes.

45. WAMU was and is a "debt collector" as that term is defined by applicable provisions of Article 2 of Chapter 75 of the North Carolina General Statutes.

46. Under the provision of Section 75-52 of the North Carolina General Statutes WAMU was and is prohibited from engaging in any conduct the natural consequences of which is to oppress, harass or abuse any person.

47. The actions and conduct of WAMU were oppressive and abusive in violation of the applicable provisions of Article 2 of Chapter 75 of the North Carolina General Statutes.

48. As a result thereof, WAMU is liable for statutory damages in the sum of no less than \$2,000.00 for violation of N.C.G.S. Section 75-50, et seq. and the payment of legal fees and expenses.

**Fourth Claim for Relief
(Fair Debt Collection Practices Act)**

49. The allegations in paragraphs 1 through 48 of this complaint are realleged and incorporated herein by this reference.

50. WAMU violated the FDCPA. Defendant's violations include but are not limited to engaging in any conduct the natural consequences of which is to harass, oppress, or abuse any person in connection with the collection of a debt, 15 U.S.C. Section 1692d.

51. As a result of the above violations of the FDCPA, the Defendant is liable to the Plaintiffs for actual damages, statutory damages of \$1,000.00, and attorney's fees.

**Fifth Claim for Relief
(Sections 105 and 506 of Title 11 of the United States Code)**

52. The allegations in paragraphs 1 through 51 of this complaint are realleged and incorporated herein by this reference.

53. The actions of WAMU by charging post-petition legal fees and expenses as alleged herein without any prior notice or Court approval constitute willful, intentional, gross and flagrant violations of the provisions of Sections 105 and 506 of Title 11 of the United States Code and Rule 2016 of the Federal Rules of Bankruptcy Procedure which provides, in pertinent part, that: "An entity seeking interim or final compensation for services, or reimbursement of necessary expenses, from the estate shall file an application setting forth a detailed statement of (1) the services rendered, time expended and expenses incurred, and (2) the amounts requested."

54. As a result of the above violations, the Defendant is liable to the Plaintiffs for actual damages, punitive damages and legal fees.

**Sixth Claim for Relief
(Improper and Unauthorized Fees)**

55. The allegations in paragraphs 1 through 54 of this complaint are realleged and incorporated herein by this reference.

56. The actions alleged herein are acts in violation of Section 506 of Title 11 of the United States Code as the said fees charged by WAMU were not part of the underlying agreement by and between WAMU and the debtors, and the fees and costs are otherwise unreasonable and excessive.

57. The Plaintiffs further aver, upon information and belief, that the said fees are in violation of the ruling of this Court in Smith v. TMS Mortgage (Case No. 00-31220) and the Order in Aid of Case Administration entered by this Court on April 6, 2001.

58. As a result of the above violation, WAMU is liable to the Plaintiffs for actual damages, punitive damages and legal fees.

WHEREFORE, the Plaintiffs having set forth their claims for relief against the Defendant respectfully pray of the Court as follows:

- A. That the Plaintiffs have and recover against the Defendant a sum to be determined by the Court in the form of actual damages;
- B. That the Plaintiffs have and recover against the Defendant a sum to be determined by the Court in the form of statutory damages;
- C. That the Plaintiffs have and recover against the Defendant a sum to be determined

by the Court in the form of punitive damages;

- D. That the Plaintiffs have and recover against the Defendant all reasonable legal fees and expenses incurred by their attorney;
- E. That this Court order WAMU to pay additional actual damages and statutory damages in a sum to be determined by the Court for violation of N.C.G.S. Section 75-50, et seq.;
- F. That this Court order WAMU to pay additional actual damages and statutory damages in a sum to be determined by the Court for violating the FDCPA pursuant to 15 U.S.C. Section 1692k;
- G. That the Plaintiffs have such other and further relief as the Court may deem just and proper.

Date this the _____ day of _____, 2008.

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**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME:

**CHAPTER 13 NO.
OUR FILE NO.**

ADDRESS:

SSN:

DEBTORS

Adv. Proc. No. _____

Plaintiffs,

versus

**FAIRBLUFF CORPORATION and
MANIPULATORS TRUST COMPANY,**

Defendants.

**Complaint Seeking Damages in Core Adversary Proceeding for Improper Fees and
Breach of a Settlement Agreement and Mutual Releases**

Introduction

1. This is an action for actual and punitive damages filed by the debtors pursuant to Sections 105, 362, 501, 502, 503 and 506 of the Bankruptcy Code, the Fair Debt Collection Practices Act, 15 U.S.C. Section 1692 et seq. (hereinafter referred to as "FDCPA"), and the North Carolina Unfair and Deceptive Act and Practices Laws, G.S. Section 75-50 et seq., (hereinafter referred to as "Acts" and "UDAP") and for breach of a Settlement Agreement and Mutual Releases executed by the Plaintiffs and the Defendants herein on _____.

2. This action is also filed to enforce the Order of Confirmation duly entered in this Chapter 13 case and to enforce and to implement other Bankruptcy Code provisions and Rules related thereto.

Jurisdiction and Venue

3. Jurisdiction is conferred on this Court pursuant to the provisions of Section 1334 of Title 28 of the United States Code in that this proceeding arises in and is related to the above-captioned Chapter 13 case under Title 11 and concerns property of the Debtors in that case.

4. This Court has both personal and subject matter jurisdiction to hear this case pursuant to Section 1334 of Title 28 of the United States Code, Section 157(b)(2) of Title 28 of the United States Code, and pursuant to the Order entered by the Judges of the United States District Court for the Western District of North Carolina on July 30, 1984 (the Referral Order),

which Order was entered in accordance with the Bankruptcy Amendments and Federal Judgeship Act of 1984.

5. This Court has supplemental jurisdiction to hear all state law claims pursuant to Section 1367 of Title 28 of the United States Code.

6. This Court also has jurisdiction to hear the Fair Debt Collection Practices Act violations pursuant to Section 1692 of Title 15 of the United States Code; thus, federal subject matter jurisdiction is properly founded upon Section 1331 of Title 28 of the United States Code.

7. This matter is primarily a core proceeding and therefore the Bankruptcy Court has jurisdiction to enter a final order. However, in the event this case is determined to be a non-core proceeding then and in that event the Plaintiff consents to the entry of a final order by the Bankruptcy Judge.

8. Venue lies in this District pursuant to Section 1391(b) of Title 28 of the United States Code.

Parties

9. The Plaintiffs in this case were and are debtors under Chapter 13 of Title 11 of the United States Code in case number _____, which case is presently pending before this court. The Plaintiffs are hereinafter referred to as the Plaintiffs or the debtors.

10. The Defendant, Fairbluff Corporation, (hereinafter "Fairbluff") is a corporation engaged in the business of real estate mortgage servicing with its principal place of business located at 1234 Uptheriver Street, Gofu, South Dakota 23415.

11. The Defendant Manipulators Trust Company is a commercial bank or trust company organized under the laws of the State of New York with a principal place of business located at One Manipulators Plaza, Gofu, South Dakota 23415.

12. The Chapter 13 case of the Plaintiff was commenced by the filing of a voluntary petition with the Clerk of this Court on _____. On _____ the Bankruptcy Noticing Center notified Defendant of Plaintiffs' bankruptcy case.

13. The 341(a) meeting of creditors was held in Shelby, North Carolina on _____.

14. The Chapter 13 plan of the Plaintiff was subsequently confirmed by order of this Court dated _____.

15. On or about _____, the Plaintiffs filed a Complaint seeking damages against the Defendants named herein for alleged stay violations, imposing improper and unauthorized fees and charges to the debtors' mortgage loan account, misapplication of mortgage payments, RESPA violations, violations of the Fair Debt Collection Practices Act, violations of the North Carolina Unfair and Deceptive Acts and Practices Laws, and a violation of Rule 9011 of the Bankruptcy Rules of Procedure in presenting false and fraudulent documents in a bankruptcy case. The matter was assigned case number _____ by this Court.

16. The Defendants named herein were served with the first Summons and Complaint and filed an Answer on or about _____.

17. Following discovery and extensive negotiations, Adversary Proceeding No. _____ was resolved by a confidential Settlement Agreement and Mutual Releases dated _____ ("Settlement Agreement") and a Stipulation of Dismissal of the adversary case was filed

with this Court on _____.

19. In connection with the settlement, on or about _____ the attorney for the debtors electronically mailed correspondence to the attorney for the Defendants which stated, "Please send me an email reply with the total now due on the mortgage for February, March and April. We have sufficient funds in trust to make these payments. Also the debtors have requested a 'safe harbor' address for making all future payments to Fairbluff."

20. The attorney for the Defendants emailed the debtors' attorney on or about _____ and reported that the "total amount due in payments is \$1,597.02. Please send those to the following address: Fairbluff Corp, Payment Processing, P O Box 666, Demon City, SD 23416."

21. On or about _____, the attorney for the Plaintiffs provided his trust account check numbered in the amount of \$1,597.02 to Fairbluff at the address provided by the Defendants' attorney. A cover letter provided with the check stated, "This check represents the mortgage payments due through the month of April under the terms of the settlement agreement in this case. Please confirm receipt of the same by a proper invoice or statement."

22. The debtors allege that the terms of the settlement are confidential except in the case of a breach of the terms contained therein. The debtors allege that the actions described below will show that the Defendants have breached the terms of the Settlement Agreement.

23. The Settlement Agreement provided that the Defendants would deem the debtors' mortgage loan current through the month of _____; that the Defendants would permanently remove any actual or contingent fees or charges of any nature whatsoever up to and including _____ from any type of account related to the debtors' mortgage loan; that the Defendants would agree to never charge such accounts any legal fees or expenses incurred in defense of the Adversary Proceeding or the Plaintiffs' current bankruptcy case; that the Defendants would refrain from collecting such fees and expenses from the Plaintiffs or the bankruptcy estate unless the Defendants had filed a proper application with the Bankruptcy Court, and would further agree not to charge any such fees and expenses to any account of the Plaintiffs unless the Bankruptcy Court approved of such application; that the Defendants would waive and cancel any such fees and charges not approved by the Bankruptcy Court in this case upon the entry of the final discharge order in this case; and that the Defendants would fully comply with all local rules, administrative orders and case law having effect in the Bankruptcy Court with respect to this bankruptcy case.

24. On _____, Fairbluff caused a written demand and threat of foreclosure to be sent to the Plaintiffs which stated, "DEMAND LETTER – YOU COULD LOSE YOUR HOME!" Said letter further stated, "This letter constitutes formal notice of default under the terms of the Note and Deed of Trust or Mortgage because of failure to make payments required by the Note, Mortgage or Deed of Trust." The demand further stated, "This letter is formal demand to pay the amount due. In event that these sums are not paid to Fairbluff Corp. 'Fairbluff' within 30 days of this letter, the entire unpaid balance, together with accrued interest, legal fees and expenses, WILL BE ACCELERATED and foreclosure proceedings will be instituted." The demand referenced loan number _____ and stated that the amount due as of _____ was \$12,160.18.

25. On or about _____, Fairbluff refused the Plaintiffs' mortgage payment and returned it to the Plaintiffs, said payment being a personal check numbered _____ in the amount of \$532.33 and dated _____. Enclosed with the debtors' check was a letter which stated, "Enclosed is your check number _____ in the amount of \$532.33 which we cannot accept at this time. This payment is less than the full amount due." The letter further stated, "Please contact our office at 1-888-XXX-XXXX for the amount required to bring your loan current." The letter further stated, "This letter is from a debt collector and is an attempt to collect a debt. Any

information obtained will be used for that purpose.” The debtors also received another letter which was not dated, but stated, “The Servicing Center has several options, other than foreclosure, that may be available to you to satisfy all or part of your obligations in connection with the property identified above.” This letter also stated, “This letter is from a debt collector and is an attempt to collect a debt. Any information obtained will be used for that purpose.”

26. At all times relevant herein, the Plaintiffs allege that they have made all of their mortgage payments.

27. The Plaintiffs allege that their attorney has never been provided with a confirmation receipt, invoice or statement for the _____ check identified above, which satisfied the debtors’ mortgage payments from February through April.

28. The Plaintiffs have been damaged by the Defendants’ actions in that they have been and continue to be forced to expend more time and expense toward the defense of this contested matter to avoid the loss of their Real Property and to enforce the terms of the Settlement Agreement. The Plaintiffs have been harassed and have feared losing their home.

First Claim for Relief (Violation of the Automatic Stay)

29. The allegations in paragraphs 1 through 28 of this complaint are realleged and incorporated herein by this reference.

30. The actions of Fairbluff in threatening to foreclose on the debtors’ residence constitute a gross violation of the automatic stay as set forth in 11 U.S.C. Section 362(a).

31. Communicating with the debtors as alleged herein when the Defendants knew the debtors were being represented by an attorney in a bankruptcy case constitutes a further gross violation of the automatic stay as set forth in 11 U.S.C. Section 362(a).

32. As a result of the above violations of 11 U.S.C. Section 362, Fairbluff is liable to the Plaintiffs for actual damages, punitive damages and legal fees.

Second Claim for Relief (Breach of Settlement Agreement)

33. The allegations in paragraphs 1 through 32 of this complaint are realleged and incorporated herein by this reference.

34. The threat of foreclosure received by the Plaintiffs demands the sum of \$12,160.18. The Plaintiffs allege that Fairbluff has again improperly and illegally charged or “packed” the debtors’ mortgage loan account, post-petition, with unapproved and unapplied for legal fees, property inspection fees, foreclosure fees, inappropriate interest, late charges and possibly other fees and charges, and/or failed to bring the debtors’ mortgage loan account current through and including _____, pursuant to the terms of the Settlement Agreement.

35. Fairbluff is in breach of the Settlement Agreement, which declared the debtors’ mortgage account current as of _____ and which denied the Defendants any right to any type of fees and charges whatsoever, without proper application and prior approval from the Court.

36. As a result of the Defendants’ breach of the Settlement Agreement, the Defendants are liable to the Plaintiffs for actual damages, punitive damages and legal fees.

Third Claim for Relief
(North Carolina Unfair and Deceptive Acts and Practices)

37. The allegations in paragraphs 1 through 36 of this complaint are realleged and incorporated herein by this reference.

38. The Plaintiffs are "consumers" as that term is defined by Article 2 of Chapter 75 of the North Carolina General Statutes.

39. The Plaintiffs' relationship with Fairbluff arose out of a "consumer debt" as that term is defined in Article 2 of Chapter 75 of the North Carolina General Statutes.

40. Fairbluff was and is a "debt collector" as that term is defined by applicable provisions of Article 2 of Chapter 75 of the North Carolina General Statutes.

41. Under the provision of Section 75-52 of the North Carolina General Statutes Fairbluff was and is prohibited from engaging in any conduct the natural consequences of which is to oppress, harass or abuse any person.

42. The actions and conduct of Fairbluff were oppressive and abusive in violation of the applicable provisions of Article 2 of Chapter 75 of the North Carolina General Statutes.

43. As a result thereof, Fairbluff is liable for statutory damages in the sum of no less than \$2,000.00 for violation of N.C.G.S. Section 75-50, et seq. and the payment of legal fees and expenses.

Fourth Claim for Relief
(Fair Debt Collection Practices Act)

44. The allegations in paragraphs 1 through 43 of this complaint are realleged and incorporated herein by this reference.

45. The Defendants violated the FDCPA. Defendants' violations include but are not limited to engaging in any conduct the natural consequences of which is to harass, oppress, or abuse any person in connection with the collection of a debt, 15 U.S.C. Section 1692d.

46. As a result of the above violations of the FDCPA, the Defendants are liable to the Plaintiffs for actual damages, statutory damages of \$1,000.00, and attorney's fees.

Fifth Claim for Relief
(Sections 105 and 506 of Title 11 of the United States Code)

47. The allegations in paragraphs 1 through 46 of this complaint are realleged and incorporated herein by this reference.

48. The threat of foreclosure received by the Plaintiffs demands the sum of \$12,160.18. The Plaintiffs allege that Fairbluff has again improperly and illegally charged or "packed" the debtors' mortgage loan account, post-petition, with unapproved and unapplied for legal fees, property inspection fees, foreclosure fees, inappropriate interest, late charges and possibly other fees and charges, and/or failed to bring the debtors' mortgage loan account current through and including _____, pursuant to the terms of the Settlement Agreement.

49. The actions of Fairbluff by charging these post-petition fees and charges as alleged herein without any prior notice or Court approval constitute willful, intentional, gross and flagrant violations of the provisions of Section 105 and 506 of Title 11 of the United States Code and Rule

2016 of the Federal Rules of Bankruptcy Procedure which provides, in pertinent part, that: "An entity seeking interim or final compensation for services, or reimbursement of necessary expenses, from the estate shall file an application setting forth a detailed statement of (1) the services rendered, time expended and expenses incurred, and (2) the amounts requested."

50. As a result of the above violations, the Defendant is liable to the Plaintiffs for actual damages, punitive damages and legal fees.

**Sixth Claim for Relief
(Improper and Unauthorized Fees)**

51. The allegations in paragraphs 1 through 50 of this complaint are realleged and incorporated herein by this reference.

52. The Plaintiffs aver that the actions alleged herein are acts in violation of Section 506 of Title 11 of the United States Code as the said fees charged by Fairbluff were not part of the underlying agreement by and between Fairbluff and the debtors, and the fees and costs are otherwise unreasonable and excessive.

53. The Plaintiffs further aver, upon information and belief, that the said fees are in violation of the ruling of this Court in Smith v. TMS Mortgage (Case No. 00-31220) and the Order in Aid of Case Administration entered by this Court on April 6, 2001.

54. As a result of the above violation, Fairbluff is liable to the Plaintiffs for actual damages, punitive damages and legal fees.

WHEREFORE, the Plaintiffs having set forth their claims for relief against the Defendants respectfully pray of the Court as follows:

- A. That the Plaintiffs have and recover against the Defendants a sum to be determined by the Court in the form of actual damages;
- B. That the Plaintiffs have and recover against the Defendant a sum to be determined by the Court in the form of statutory damages;
- C. That the Plaintiffs have and recover against the Defendant a sum to be determined by the Court in the form of punitive damages;
- D. That the Plaintiffs have and recover against the Defendants all reasonable legal fees and expenses incurred by their attorney;
- E. That this Court order Fairbluff to pay additional actual damages and statutory damages in a sum to be determined by the Court for violation of N.C.G.S. Section 75-50, et seq.;
- F. That this Court order Fairbluff to pay additional actual damages and statutory damages in a sum to be determined by the Court for violating the FDCPA pursuant to 15 U.S.C. Section 1692k;
- G. That the underlying debt to Fairbluff be forever canceled and discharged and the Defendant be ordered to release all liens on the residence of the debtor and mark "paid in full" on all loan documents with said documents to be delivered to the debtors with all liens duly canceled and released as an additional sanction provided for under Section 362(h) of Title 11 of the United States Code; and

H That the Plaintiffs have such other and further relief as the Court may deem just and proper.

Date this the _____ day of _____, 2008.

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**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME:

**Chapter 13 No.
Our File No.**

ADDRESS:

SSN:

Debtors.

Adv. Proc. No. _____

Plaintiffs,

versus

SUNTRUST MORTGAGE, INC.

Defendant.

**Complaint Seeking Damages in Core Adversary Proceeding
for Violation of RESPA**

Introduction

1. This is an action for actual and punitive damages filed by the debtors pursuant to Sections 2605(e)(1)(A) and 2605(e)(1)(B)(2) of Title 12 of the United States Code and Sections 3500.21(e)(1) and 3500.21(e)(3) of Regulation X.

Jurisdiction and Venue

2. Jurisdiction is conferred on this Court pursuant to the provisions of Section 1334 of Title 28 of the United States Code in that this proceeding arises in and is related to the above-captioned Chapter 13 case under Title 11 and concerns property of the debtors in that case.

3. This Court has both personal and subject matter jurisdiction to hear this case pursuant to Section 1334 of Title 28 of the United States Code, Section 157(b)(2) of Title 28 of the United States Code, and pursuant to the Order entered by the Judges of the United States District Court for the Western District of North Carolina on July 30, 1984 (the Referral Order), which Order was entered in accordance with the Bankruptcy Amendments and Federal Judgeship Act of 1984.

4. This court has supplemental jurisdiction to hear all state law claims pursuant to Section 1367 of Title 28 of the United States Code.

5. This Court has jurisdiction to hear the claims for relief under the Real Estate Settlement Procedures Act pursuant to Section 2614 of Title 12 of the United States Code.

6. This matter is a core proceeding and therefore the Bankruptcy Court has jurisdiction to enter a final order. However, in the event this case is determined to be a non-core proceeding then and in that event the Plaintiffs consent to the entry of a final order by the Bankruptcy Judge.

7. Venue lies in this District pursuant to Section 1391(b) of Title 28 of the United States Code.

Parties

8. The Plaintiffs in this case were and are debtors under Chapter 13 of Title 11 in the above-captioned case.

9. The Defendant, SunTrust Mortgage, Inc. (hereinafter "SunTrust") is a mortgage banking corporation organized and existing under the laws of the State of Virginia, with a principal place of business located at 901 Semmes Ave., Richmond, Virginia 23224.

Factual Allegations

10. The Chapter 13 case of the Plaintiffs herein was commenced by the filing of a voluntary petition with the Clerk of this Court on _____. On _____ the Bankruptcy Noticing Center notified Defendant of Plaintiffs' bankruptcy case.

11. The 341(a) meeting of creditors in this case was held in Shelby, North Carolina on _____.

12. The Chapter 13 plan of the Plaintiffs and Debtors herein was subsequently confirmed by order of this Court filed and entered on _____.

13. The Chapter 13 plan as filed and confirmed included a debt to SunTrust which was scheduled as a debt secured by a deed of trust on the residential real estate of the debtors with an estimated value of \$100,074.00. The Plaintiffs aver that the plan as confirmed provided for the cure of the post-petition arrears to SunTrust for the month of _____ in the amount of \$1,225.00, with the debtors to resume direct payments to SunTrust in _____.

14. The Plaintiffs allege that SunTrust received notice of the 341(a) meeting from documents mailed by the Trustee's office and also received a "filed" copy of the Order of Confirmation.

15. The Defendant filed a sworn proof of claim with the Chapter 13 Trustee for the mortgage arrears in the amount of \$1,247.35. The Plaintiffs aver upon information and belief that the sworn proof of claim filed by the Defendant was identified as claim number 0024 on the records of the Trustee, and is being treated as an unsecured claim due to SunTrust's failure to attach a recorded Deed of Trust to the proof of claim.

16. The debtors aver that they were only behind one monthly mortgage payment at the time of the filing of their Chapter 13 case and that they have made all of their post-

petition mortgage payments on time within the month they were due. However, the debtors have continued to receive billing statements from SunTrust indicating they are one month behind on their mortgage payments. Said billing statements reflect late charges accruing each month for the said late payment. The debtors believe that each of their direct and current mortgage payments has been improperly applied to the prior month.

17. The Plaintiffs took this matter up with their attorney as they believed they were current on their payments. The debtors' attorney tendered a "Qualified Written Request" via Certified Mail to SunTrust, pursuant to the Real Estate Settlement Procedures Act on or about _____. A copy of the said request is attached hereto as "Exhibit A" and is incorporated herein by reference.

18. The Plaintiffs aver that the Defendant received the Qualified Written Request as evidenced by Postal Service Form 3811 dated _____. A copy of this form is attached hereto as "Exhibit B" and is incorporated herein by this reference.

19. As of the filing of this pleading the said Defendant has failed to have any form of communication with the debtors' attorney, or with the debtors to respond to or acknowledge the aforesaid Qualified Written Request regarding the subject account.

Claim for Relief

20. The allegations in paragraphs 1 through 19 of this complaint are realleged and incorporated herein by this reference.

21. The Defendant is the servicer of a "federally related mortgage loan" as that term is defined in Section 2602(1) of Title 12 of the United States Code.

22. The "qualified written request" was not acknowledged within 20 days of receipt as required by Section 2605(e)(1)(A) of Title 12 of the United States Code and Section 3500.21(e)(1) of Reg. X.

23. The Defendant did not, within 60 days of receipt of the "qualified written request," provide the information requested and inform the Plaintiffs of its actions as required by Section 2605(e)(1)(B)(2) of Title 12 of the United States Code and Section 3500.21(e)(3) of Reg. X.

24. The Defendant has failed to comply with Section 2605 of Title 12 of the United States Code.

25. Pursuant to Section 2605(f) of Title 12 of the United States Code and Section 3500.21(f) of Reg. X, the Plaintiffs may recover of the Defendant actual damages, costs and reasonable attorney fees for each failure of the Defendant to comply with any part of Section 2605 of Title 12 of the United States Code.

WHEREFORE, the Plaintiffs having set forth their claims for relief against the Defendant respectfully pray of the Court as follows:

- A. That the Plaintiffs have and recover against the Defendant a sum to be determined by the Court in the form of actual damages;
- B. That the Plaintiffs have and recover against the Defendant a sum to be

determined by the Court in the form of statutory damages;

- C. That the Plaintiffs have and recover against the Defendant a sum to be determined by the Court in the form of punitive damages;
- D. That the Plaintiffs have and recover against the Defendant all reasonable legal fees and expenses incurred by their attorney;
- E. That the underlying debt to SunTrust be forever canceled and discharged and the Defendant be ordered to release all liens on the residence of the debtors and mark "paid in full" on all loan documents with said documents to be delivered to the debtors with all liens duly canceled and released as an additional sanction provided for under Section 362(h) of Title 11 of the United States Code; and
- F That this Court order the Defendant to pay to the Plaintiffs their attorney's fees and costs and additional actual damages a sum to be determined by the Court for each failure to comply with any part of Section 2605 of Title 12 of the United States Code pursuant to Section 2605(f) of Title 12 of the United States Code and Section 3500.21(f) of Reg. X; and
- G. That the Plaintiffs have such other and further relief as the Court may deem just and proper.

Date this the _____ day of _____, 2008.

O. Max Gardner III
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Attorney for the Plaintiffs
State Bar No. 6164
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**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN RE		*	
		*	
		*	CASE NO.
	*		
DEBTOR		*	CHAPTER 13
		*	
		*	
Plaintiff		*	
		*	
		*	
VS.		*	Adv. Pro No.
		*	
AMERICAN HOME MORTGAGE		*	
SERVICING, INC.		*	
Defendant		*	
		*	

**COMPLAINT
(Failure to Respond to QWR per Dodd Frank Amendments)**

This is an action for damages brought by an individual consumer for Defendant’s violations of the Truth in Lending Act, 15 U.S.C. §§ 1601 et seq. (“TILA”), and the Real Estate Settlement Procedures Act, 12 U.S.C. §§ 2601 et seq. (“RESPA”). Specifically, Plaintiff seeks the remedies as provided in TILA and RESPA for Defendant’s failures to respond to requests for the identity of the creditors of Plaintiff’s three mortgage loans as required by 15 U.S.C. §1641(f) and 12 U.S.C. § 2605(e).

Jurisdiction

1. Jurisdiction is conferred on this Court pursuant to the provisions of 28 U.S.C § 1334 in that this proceeding arises in and is related to the above-captioned Chapter 13 case under Title 11 and concerns property of the debtors in that case.
2. This Court has both personal and subject matter jurisdiction to hear this case pursuant to 28 U.S.C §§ 157(b)(2), 1334.
3. This court has supplemental jurisdiction to hear all state law claims pursuant to 28 U.S.C. § 1367.
4. This Court has jurisdiction to hear the claims for relief under the Real Estate Settlement Procedures Act pursuant to 12 U.S.C. § 2614.

5. This matter is a core proceeding and therefore the Bankruptcy Court has jurisdiction to enter a final order. However, in the event this case is determined to be a non-core proceeding then and in that event the Plaintiff consents to the entry of a final order by the Bankruptcy Judge.
6. Venue lies in this District pursuant to of 28 U.S.C. § 1391(b).

Parties

7. The Plaintiff, _____, is a natural person residing in Shelby, North Carolina.
8. Defendant, American Home Mortgage Servicing, Inc. is a corporation that services residential mortgage loans. Defendant is headquartered at 4600 Regent Boulevard, Suite 200, Irving, Texas 75063. Defendant was formerly a subsidiary of American Home Mortgage Investment Corporation (“AHM”) and was engaged in originating, purchasing, and selling residential mortgages before it was purchased by Wilbur Ross & Co. LLC.

Facts

9. The Chapter 13 case of the Plaintiff herein was commenced by the filing of a voluntary petition with the Clerk of this Court on July 14, 2010. On the same day the Bankruptcy Noticing Center notified Defendant of Plaintiff’s bankruptcy case.
10. The 341(a) meeting of creditors in this case was held in Shelby, North Carolina on _____
11. On November 23, 2005 AHM made a mortgage loan to Plaintiff for the purpose of acquiring a dwelling at _____ (the “First Property”), referred to in this Complaint as the “First Mortgage Loan”.
12. In connection with the First Mortgage Loan the Plaintiff executed a promissory note (the “First Mortgage Note”) in the original principal amount of \$267,000 payable to AHM.
13. The First Mortgage Note was secured by a Deed of Trust on the First Property dated November 23, 2005 and recorded in the Register of Deeds of Cleveland County, NC, which named Alvin E. Friedman as Trustee, AHM as Lender, and Mortgage Electronic Registration Systems, Inc., a Delaware corporation (“MERS”) as beneficiary of the Deed of Trust and as “nominee” for AHM.
14. On January 31, 2006 AHM made a mortgage loan to Plaintiff for the purpose of acquiring a dwelling at _____ (the “Second Property”), referred to in this Complaint as the “Second Mortgage Loan”.
15. In connection with the Second Mortgage Loan the Plaintiff executed a promissory note (the “Second Mortgage Note”) in the original principal amount of \$40,800 payable to AHM.

16. The Second Mortgage Note was secured by a Deed of Trust on the Second Property dated January 31, 2006 and recorded in the Office of the Cleveland County Register of Deeds (the “Second Deed of Trust”), which named Douglas Douglas and Connie Iampiere as Trustees, the Defendant as Lender, and MERS as beneficiary of the Deed of Trust and as “nominee” for AHM.
17. On April 7, 2006 Defendant made a mortgage loan to Plaintiff for the purpose of acquiring a dwelling at _____ (the “Third Property”), referred to in this Complaint as the “Third Mortgage Loan”.
18. In connection with the Third Mortgage Loan the Plaintiff executed a promissory note (the Third Mortgage Note”) in the original principal amount of \$101,500 payable to AHM.
19. The Third Mortgage Note was secured by a Deed of Trust on the Third Property dated April 7, 2006 and recorded in the Office of the Cleveland County Register of Deeds (the “Third Deed of Trust”), which named Douglas Douglas as Trustee, AHM as Lender, and MERS as beneficiary of the Deed of Trust and as “nominee” for AHM.
20. To the best of Plaintiff’s knowledge, information and belief, these Mortgage Loans are serviced by the Defendant.
21. Plaintiff believes and therefore alleges that the true holder and owners of the First, Second, and Third Mortgage Notes are unknown securitized trusts.
22. The First Mortgage Loan, Second Mortgage Loan, and Third Mortgage Loan are consumer credit transactions within the meaning of, and subject to, TILA.
23. The First Mortgage Loan, Second Mortgage Loan, and Third Mortgage Loan are “federally related mortgage loans” as defined in 12 U.S.C. §2602(1) and therefore subject to RESPA.

COUNT 1: Failure to provide the identity of the owner or master servicer of the First Mortgage Note as required by TILA §131(f) [15 U.S.C. §1641(f)] and failure to respond to a “qualified written request” regarding the First Mortgage Loan §6(e)(1)(B) of the Real Estate Settlement Procedures Act (“RESPA”) [12 U.S.C. §2605(e)(1)].

24. The allegations of paragraphs 1 through 23 of this Complaint are hereby re-alleged and incorporated by reference.
25. On or about July 26, 2010 Plaintiff, through counsel, mailed a letter to Defendant requesting the name of the owner of the First Mortgage Note and clearly alerting Defendant to the fact that his request was being made pursuant to TILA §131(f). A copy of Plaintiff’s request, the original of which Plaintiff’s counsel mailed certified with return receipt requested, is attached hereto as Exhibit A.
26. Plaintiff’s July 26, 2010 letter to Defendant is a “qualified written request” as defined in §6(e)(1)(B) of the Real Estate Settlement Procedures Act (“RESPA”) [12 U.S.C. 2605(e)(1)(B)]. Thus Plaintiff’s

July 26, 2010 letter had the dual effect of invoking Plaintiff's rights under TILA §131(f) as well Plaintiff's rights under RESPA §6(e)(1).

27. Defendant failed to acknowledge receipt of the Qualified Written Request within 5 days as required by U.S.C. Section 2605(e)(1)(A) as amended effective July 16, 2010 by the Dodd-Frank Financial Reform Act and Reg. X Section 3500.21(e)(1).
28. On or about August 10, 2010, Defendant mailed a response which included the payment history, a copy of the Note, and a copy of the Deed of Trust but did not respond to Plaintiff's request for the name of the owner of the First Mortgage Note as required by §6(e)(1) of RESPA [12 U.S.C. §2605(e)(1)]. A copy of this is attached hereto as Exhibit B.
29. On or about August 19, 2010, Plaintiff's Counsel mailed a second letter to Defendant alerting Defendant of its noncompliance with RESPA and TILA and again requesting, within 5 days of receipt of the letter, the identification of the owner of the First Mortgage Note. A copy of this letter, the original of which Plaintiff's counsel mailed certified, return receipt requested, is attached hereto as Exhibit C.
30. On or about September 9, 2010, Plaintiff's counsel filed a Certificate of Service for both the Qualified Written Request and the letter sent on August 19, 2010.
31. Defendant failed to identify the owner of the First Mortgage note within 10 days of receipt of the letter as required by 12 U.S.C. 2605(k) as amended effective July 16, 2010 by the Dodd-Frank Financial Reform Act and as recently as September 13, 2010 has never provided Plaintiff with a response, thus violating both 12 U.S.C. §2605(e)(1) (RESPA) and 15 U.S.C. §1641(f) (TILA) with respect to the First Mortgage Loan.

WHEREFORE, the Plaintiff having set forth his claims for relief against the Defendant respectfully prays of the Court as follows:

That the Plaintiff be granted relief provided by TILA as to the violation of TILA set forth above, including statutory damages in the amount of \$4,000.00; and

That the Plaintiff be granted relief provided by RESPA as to the violation of RESPA set forth above, including statutory damages in the amount of \$2,000.00; and

That the Plaintiff be granted actual damages if any be proven, reasonable attorney's fees, and costs expended in this proceeding; and

That the Plaintiffs have such other and further relief as the Court may deem just and proper.

COUNT 2: Failure to provide the identity of the owner or master servicer of the Second Mortgage Note as required by TILA §131(f) [15 U.S.C. §1641(f)] and failure to respond to a "qualified written request" regarding the Second Mortgage Loan §6(e)(1)(B) of the Real Estate Settlement Procedures Act

(“RESPA”) [12 U.S.C. §2605(e)(1).

32. The allegations of paragraphs 1 through 31 of this Complaint are hereby re-alleged and incorporated by reference.
33. On or about July 26, 2010 Plaintiff, through counsel, mailed a letter to Defendant requesting the name of the owner of the Second Mortgage Note and clearly alerting Defendant to the fact that his request was being made pursuant to TILA §131(f). A copy of Plaintiff’s request, the original of which Plaintiff’s counsel mailed certified with return receipt requested, is attached hereto as Exhibit D.
34. Plaintiff’s July 26, 2010 letter to Defendant is a “qualified written request” as defined in §6(e)(1)(B) of the Real Estate Settlement Procedures Act (“RESPA”) [12 U.S.C. 2605(e)(1)(B)]. Thus Plaintiff’s July 26, 2010 letter had the dual effect of invoking Plaintiff’s rights under TILA §131(f) as well Plaintiff’s rights under RESPA §6(e)(1).
35. On or about August 12, 2010, Defendant mailed a response which included the payment history, a copy of the Note, and a copy of the Deed of Trust but did not respond to Plaintiff’s request for the name of the owner of the Second Mortgage Note as required by §6(e)(1) of RESPA [12 U.S.C. §2605(e)(1). A copy of this is attached hereto as Exhibit E.
36. On or about August 19, 2010, Plaintiff’s Counsel mailed a second letter to Defendant alerting Defendant of its noncompliance with RESPA and TILA and again requesting, within 5 days of receipt of the letter, the identification of the owner of the Second Mortgage Note. A copy of this letter, the original of which Plaintiff’s counsel mailed certified, return receipt requested, is attached hereto as Exhibit F.
37. On or about September 9, 2010, Plaintiff’s counsel filed a Certificate of Service for both the Qualified Written Request and the letter sent on August 19, 2010.
38. On or about September 10, 2010, the Defendant faxed over a cover letter alleging that it had responded to the Plaintiff’s Qualified Written Request. This fax included a copy of Defendant’s first response dated August 12, 2010 but still failed to respond to Plaintiff’s request for the name of the owner of the Second Mortgage Note. A copy of the cover letter is attached hereto as Exhibit G.
39. Defendant failed to identify the owner of the Second Mortgage Note within 10 days of receipt of the letter as required by 12 U.S.C. 2605(k) as amended effective July 16, 2010 by the Dodd-Frank Financial Reform Act and as recently as September 13, 2010 has never provided Plaintiff with a response, thus violating both 12 U.S.C. §2605(e)(1) (RESPA) and 15 U.S.C. §1641(f) (TILA) with respect to the Second Mortgage Loan.

WHEREFORE, the Plaintiff having set forth his claims for relief against the Defendant respectfully prays of the Court as follows:

That the Plaintiff be granted relief provided by TILA as to the violation of TILA set forth above, including statutory damages in the amount of \$4,000.00; and

That the Plaintiff be granted relief provided by RESPA as to the violation of RESPA set forth above, including statutory damages in the amount of \$2,000.00; and

That the Plaintiff be granted actual damages if any be proven, reasonable attorney's fees, and costs expended in this proceeding; and

That the Plaintiff have such other and further relief as the Court may deem just and proper.

COUNT 3: Failure to provide the identity of the owner or master servicer of the Third Mortgage Note as required by TILA §131(f) [15 U.S.C. §1641(f)] and failure to respond to a “qualified written request” regarding the Third Mortgage Loan §6(e)(1)(B) of the Real Estate Settlement Procedures Act (“RESPA”) [12 U.S.C. §2605(e)(1)].

40. The allegations of paragraphs 1 through 39 of this Complaint are hereby re-alleged and incorporated by reference.
41. On or about July 26, 2010 Plaintiff, through counsel, mailed a letter to Defendant requesting the name of the owner of the Third Mortgage Note and clearly alerting Defendant to the fact that his request was being made pursuant to TILA §131(f). A copy of Plaintiff's request, the original of which Plaintiff's counsel mailed certified with return receipt requested, is attached hereto as Exhibit H.
42. Plaintiff's July 26, 2010 letter to Defendant is a “qualified written request” as defined in §6(e)(1)(B) of the Real Estate Settlement Procedures Act (“RESPA”) [12 U.S.C. 2605(e)(1)(B)]. Thus Plaintiff's July 26, 2010 letter had the dual effect of invoking Plaintiff's rights under TILA §131(f) as well Plaintiff's rights under RESPA §6(e)(1).
43. Defendant failed to acknowledge receipt of the Qualified Written Request within 5 days as required by U.S.C. Section 2605(e)(1)(A) as amended effective July 16, 2010 by the Dodd-Frank Financial Reform Act and Reg. X Section 3500.21(e)(1).
44. On or about August 9, 2010, Defendant mailed a response which included the payment history, a copy of the Note, and a copy of the Deed of Trust but did not respond to Plaintiff's request for the name of the owner of the Third Mortgage Note as required by §6(e)(1) of RESPA [12 U.S.C. §2605(e)(1)]. A copy is hereto attached as Exhibit I.
45. On or about August 12, 2010, Plaintiff's Counsel mailed a second letter to Defendant alerting Defendant of its noncompliance with RESPA and TILA and again requesting, within 5 days of receipt of the letter, the identification of the owner of the Third Mortgage Note. A copy of this letter, the

original of which Plaintiff's counsel mailed certified, return receipt requested, is attached hereto as Exhibit J.

46. On or about September 9, 2010, Plaintiff's counsel filed a Certificate of Service for both the Qualified Written Request and the letter sent on August 19, 2010.
47. On or about September 10, 2010, the Defendant faxed over a cover letter alleging that it had responded to the Plaintiff's Qualified Written Request. This fax included a copy of Defendant's first response dated August 9, 2010 but still failed to respond to Plaintiff's request for the name of the owner of the Third Mortgage Note. A copy of the cover letter is attached hereto as Exhibit K.
48. Defendant failed to identify the owner of the Third Mortgage note within 10 days of receipt of the letter as required by 12 U.S.C. 2605() as amended effective July 16, 2010 by the Dodd-Frank Financial Reform Act and as recently as September 13, 2010 has never provided Plaintiff with a response, thus violating both 12 U.S.C. §2605(e)(1) (RESPA) and 15 U.S.C. §1641(f) (TILA) with respect to the Third Mortgage Loan.

WHEREFORE, the Plaintiff having set forth his claims for relief against the Defendant respectfully prays of the Court as follows:

That the Plaintiff be granted relief provided by TILA as to the violation of TILA set forth above, including statutory damages in the amount of \$4,000.00; and

That the Plaintiff be granted relief provided by RESPA as to the violation of RESPA set forth above, including statutory damages in the amount of \$2,000.00; and

That the Plaintiff be granted actual damages if any be proven, reasonable attorney's fees, and costs expended in this proceeding; and

That the Plaintiff have such other and further relief as the Court may deem just and proper.

Dated this _____ day of _____, 2010.

O. Max Gardner III
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Shelby, NC 28151-1000
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**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION**

IN THE MATTER OF:

**NAME: ANTHONY, MATTHEW TODD
 ANTHONY, MELEAH INGLE**

**CHAPTER 13 CASE NO. 00-31038
OUR FILE NO. 9688**

**ADDRESS: 1445 REQUA ROAD
 CHERRYVILLE, NC 28021**

SSN: --- -- 5027 & --- -- 6900

DEBTOR(S).

**MATTHEW TODD ANTHONY and wife,
MELEAH INGLE ANTHONY**

ADVERSARY PROCEEDING: _____

PLAINTIFFS

VS

HOMEQ SERVICING CORPORATION,

DEFENDANT

**Complaint Seeking Damages in Non-Core Adversary Proceeding
For Improper Fees and Violation of the Automatic Stay and Discharge Injunction**

Introduction

1. This is an action for actual and punitive damages filed by the debtor pursuant to Sections 105, 362(a), 502(b) and 524 of the Bankruptcy Code, Rules 2016 for charging and collecting improper bankruptcy fees and charges.
2. This action is also filed to enforce the Discharge Order entered in this Chapter 13 case and to enforce and to implement other Bankruptcy Code provisions and Rules related thereto.

Jurisdiction and Venue

3. Jurisdiction is conferred on this Court pursuant to the provisions of Section 1334 of Title 28 of the United States Code in that this proceeding arises in and is related to the above-captioned Chapter 13 case under Title 11 and concerns property of the debtor in that case.
4. This Court has both personal and subject matter jurisdiction to hear this case pursuant to Section 1334 of Title 28 of the United States Code, Section 157(b)(2) of Title 28 of the United States Code, and pursuant to the Order entered by the Judges of the United States District Court for the Western District of North Carolina on July 30, 1984 (the Referral Order), which Order was entered in accordance with the Bankruptcy Amendments and Federal Judgeship Act of 1984.

5. This matter is primarily a core proceeding and therefore the Bankruptcy Court has jurisdiction to enter a final order. However, in the event this case is determined to be a non-core proceeding then and in that event the Plaintiff consents to the entry of a final order by the Bankruptcy Judge.
6. Venue lies in this District pursuant to Section 1391(b) of Title 28 of the United States Code.

Parties

7. The Plaintiffs in this case are debtors under Chapter 13 of Title 11 of the United States Code in case number 00-31038. The Plaintiffs have completed all of their plan payments and this case is presently pending before this court in order to resolve this pending dispute.
8. The Defendant, HomEq Servicing Corporation ("HomEq") is a New Jersey corporation engaged in the business of residential real estate mortgage servicing with its principal place of business located at 4837 Watt Avenue, North Highlands, CA 95660. HomEq has submitted to the jurisdiction of this Court by filing one or more claims in this case and regularly services thousands of mortgage loans in the State of North Carolina. The Plaintiffs are informed and believe and therefore allege that HomEq is currently a wholly owned operating subsidiary of Barclays Bank. HomEq was previously known as The Money Store (TMS) and was a wholly owned operating entity of First Union National Bank (First Union). When First Union was acquired by Wachovia Bank and Trust Company, NA (Wachovia), Wachovia changed the name from The Money Store to HomEq. The subject loan was being serviced by First Union through TMS on the petition date.

Factual Allegations

9. The Plaintiffs are homeowners who had a residential mortgage loan secured by a Deed of Trust that was serviced by HomEq.
10. At the time the Plaintiffs filed their Chapter 13 case, they believed they were in arrears two monthly mortgage payments to HomEq in the total sum of \$1,464.44.
11. In their Chapter 13 bankruptcy plan, the Plaintiffs proposed, pursuant to 11 U.S.C. §1322(b)(5), to cure the pre-petition arrears of \$1,464.44 to HomEq by payments made through the Chapter 13 Trustee while continuing to pay their regular contractual monthly payments to HomEq directly "outside of the Chapter 13 plan." The plan was confirmed without any objection or comment by HomEq.
12. On or about December 18, 2000 First Union and TMS filed in the Bankruptcy Court a Motion for Relief from the Automatic Stay alleging that the Plaintiffs were in arrears for post-petition mortgage payments.
13. The Plaintiffs filed an Objection to this Motion and requested a hearing before the Bankruptcy Court. Due to problems with locating loan servicing records, the motion was continued on numerous occasions at the request of First Union-TMS.
14. On January 17, 2001 First Union filed a notice with the Bankruptcy Court that its proof of claim had been transferred to HomEq. HomEq was never substituted as a party movant in the pending motion for relief from stay filed by First Union-TMS.
15. First Union/HomEq's Motion for Relief from the Automatic Stay was subsequently resolved by a Consent Order entered by this Court on January 31, 2001. This Order did not provide for any attorney's fees or expenses to be paid to Defendant due to the failure of First Union to allege any equity in the residential real property. This Consent Order was signed by the attorney for the debtor, the Honorable Judge presiding over the motion, the Chapter 13 Trustee, and the attorney

for First Union/HomEq. This consent order is attached to this complaint as Exhibit "A" and incorporated herein by reference.

16. On or about July 8, 2002, HomEq filed in the Bankruptcy Court a second Motion for Relief from the Automatic Stay alleging that the Plaintiffs were in arrears for post-petition mortgage payments.

17. The Plaintiffs filed an Objection to this Motion requested a hearing before the Bankruptcy Court.

18. HomEq's Motion for Relief from the Automatic Stay was resolved by a Consent Order entered by this Court on October 25, 2002.

19. The October 25, 2002 Consent Order did not provide for HomEq's attorney's fees or expenses. The October 25, 2002 Consent Order is attached to this complaint as Exhibit "B" and is incorporated herein by this reference.

20. In August of 2004, the Plaintiffs obtained a loan offer allowing them to refinance their mortgage loan that was being serviced by HomEq and pay off their pending Chapter 13 plan. This loan was advantageous to the Plaintiffs because it substantially lowered their mortgage interest rate and paid off their Chapter 13 plan.

21. On or about September 7, 2004 the Plaintiffs' mortgage broker obtained an itemized payoff statement from HomEq, a copy of which is attached hereto as "Exhibit C" and incorporated herein by reference (hereinafter "payoff statement"). The total payoff on the said statement was \$70,452.18.

22. Included in the payoff statement was a \$2,563.44 charge described as "pending court approval". The Plaintiffs were not aware of any fees and charges incurred by HomEq that were pending court approval. The payoff statement contained the language, "Certain components of this quote may be subject to bankruptcy approval and may not be required to be paid at this time to satisfy the mortgage," and "Bankruptcy Court approval must accompany payoff". The payoff statement continued, "payoff may be returned if court approval is not provided" and that "due to the delinquent status of the loan, additional legal fees may accrue". The Plaintiffs did not understand these statements and had questions about the \$2,563.44 in "pending charges."

23. On or about September 9, 2004 the Female Plaintiff called the HomEq bankruptcy department at 1-877-867-7378 seeking an explanation of the \$2,563.44 in additional fees. She talked with an employee named Avis. Avis explained that the "pending court approval" item included all the attorney fees, property fees, and other related charges associated with her Chapter 13 bankruptcy. Avis further explained that pending court approval meant it was up to the court to approve the fees and they could get certain fees in some jurisdictions but not in others. Avis further told Mrs. Anthony that HomEq had not filed anything with any court asking for approval of these fees in her case.

24. On October 24, 2004 the Anthony's settlement agent on their new mortgage loan, Robert Forquer, sent a letter on behalf of the Plaintiffs disputing the \$2,563.44 charge contained in the payoff provided by HomEq. The letter stated that the Plaintiffs disputed the payoff amount but were paying it under protest in order to proceed with the refinancing. The Plaintiffs did not want to lose the refinancing offer by holding up the closing.

25. On November 3, 2004 the disbursements from the loan were made to various parties including HomEq who was paid \$69,153.50. Upon information and belief, part of this disbursement included all of the \$2,562.44 in bankruptcy fees and charges demanded in the payoff statement. A copy of the HUD-1 statement is attached as Exhibit "D" and incorporated by reference. The Plaintiffs allege upon information and belief that just prior to the closing HomEq provided Robert

Forquer with an "updated closing statement" that included the \$2,562.44 in the disputed fees.

26. Upon information and belief, the \$2,562.44 in various fees, costs and charges that HomEq has collected from the Plaintiffs are for attorneys fees and expenses incurred by HomEq when filing the two Motions for Relief from the Automatic Stay. This is a violation of the terms of both consent orders which provided for no attorney fees and expenses. Such actions also violated the automatic stay provided by Section 362 of the Bankruptcy Code and Rule 2016 of the Bankruptcy Rules. The Plaintiffs allege that at no time since the closing on November 3, 2004, has HomEq refunded any of this money to the Plaintiffs. The Plaintiffs allege that such action by HomEq violates the discharge injunction provided by Section 524 of the Bankruptcy Code.

27. The Court granted the Plaintiffs' discharge on January 19, 2005. The Plaintiffs made a demand on the Defendant after the entry of the said Order to return the said fees but Defendant willfully failed to do so and in lieu thereof demanded additional fees and charges from the Plaintiffs in the sum of \$1,083.00 and contended that such fees had not been included in the final payoff statement because they were in some type of a "restricted corporate advance account."

Count I – Violation of Discharge Order

28. The allegations in paragraphs 1 through 27 of this complaint are realleged and incorporated herein by this reference.

29. The Plaintiffs are informed and believe and therefore allege that the actions of HomEq constitute a gross violation of the Discharge Injunction Order as set forth in 11 U.S.C. Section 524(a) and the Order entered in this case on January 19th, 2005.

30. The Plaintiffs are informed and believe and therefore allege that the imposition of the said unapproved fees constitutes unlawful and illegal bankruptcy fees in violation of the automatic stay and inconsistent with the decision of this court in *In re Stark*, 242 B.R. 866 (W.D.N.C. 1999).

31. As a result of the above violations of 11 U.S.C. Section 362, HomEq is liable to the Plaintiffs for actual damages, punitive damages and legal fees.

Count II – Improper Fees Not Approved by the Bankruptcy Court

32. The allegations in paragraphs 1 through 31 of this complaint are realleged and incorporated herein by this reference.

33. The Plaintiffs aver that the actions of HomEq by the inclusion of improper and unauthorized legal fees and expenses as alleged herein without any prior notice or Court approval constitute willful, intentional, gross and flagrant violations of the provisions of Section 105 and 506 of Title 11 of the United States Code and Rule 2016 of the Federal Rules of Bankruptcy Procedure which provides, in pertinent part, that: "An entity seeking interim or final compensation for services, or reimbursement of necessary expenses, from the estate shall file an application setting forth a detailed statement of (1) the services rendered, time expended and expenses incurred, and (2) the amounts requested."

34. As a result of the above violations, the Defendant is liable to the Plaintiffs for actual damages, punitive damages and legal fees.

Count III – Violation of 11 U.S.C. Section 506

35. The allegations in paragraphs 1 through 34 of this complaint are realleged and incorporated herein by this reference.

36. The Plaintiffs aver, upon information and belief, that the actions alleged herein are acts in violation of Section 506 of Title 11 of the United States Code in that sum of the fees included in the amended payoff and the post-discharge demand were fees incurred after the petition was filed and before the order confirming the plan was entered by this court. Furthermore, neither one of the Consent Orders entered in this case allowed for any fees or expense to be recovered from the estate, because it was stated that HomEq did not have any equity in the property and was therefore not entitled to any fees and charges on it's claim.

37. The Plaintiffs further aver, upon information and belief, that the said fees are in violation of the ruling of this Court in *Smith v. TMS Mortgage* (Case No. 00-31220) and the Order in Aid of Case Administration entered by this Court on April 6, 2001.

38. As a result of the above violation, the Defendant is liable to the Plaintiffs for actual damages, punitive damages and legal fees.

Count IV – Violation of Consent Orders

39. The allegations in paragraphs 1 through 38 of this complaint are realleged and incorporated herein by this reference.

40. The debtors were involved in two motions for relief from stay that were resolved with consent orders. Neither of these orders provided for the payment of any attorney fees or charges incurred by the Defendant. This was based on the failure to allege that the creditor was over secured and entitled to attorney fees and charges.

41. Upon information and belief, the fees charged and collected by the defendant included fees and charges incurred during those two motions. Charging and collecting these fees were in violation of those consent orders.

Count V – Violation of the Automatic Stay

42. The allegations in paragraphs 1 through 41 of this complaint are realleged and incorporated herein by this reference.

43. The conduct of the Defendant in this case also constitutes a willful and intentional violation of the automatic stay provided for by Section 362(a)(3) of the Bankruptcy Code.

44. The Plaintiffs are informed and believe and therefore allege that these automatic stay violations are substantially aggravated by the fact that the conduct of the Defendant in charging and collecting these fees also constitutes a clear violation of the Local Rules of this Court with respect to the amount of "presumed fees" that will be awarded to a mortgage servicer in the vast majority of motions for relief from stay cases when "such fees are in fact approved."

45. The Plaintiffs allege that the conduct of the Defendant in this case constitutes a clear and present contempt for the Orders and Rules of this Court, for the applicable sections of the Bankruptcy Code, and therefore this Court needs to send a clear message to the Defendant in the form of a substantial punitive damage award in order to secure it's attention and indicate the need for strict compliance with the law.

46. The Plaintiffs also allege that the conduct of the Defendant in this case also violates the Fair Debt Collection Practices Act and the North Carolina Unfair and Deceptive Practices Statute, and that such violations should be considered as "additional aggravating factors" in this case in support of the claim for punitive damages.

Count VI – Pattern and Practice

47. The allegations in paragraphs 1 through 46 of this complaint are realleged and incorporated herein by this reference.

48. Upon information and belief, the Defendant has engaged in a pattern and practice of tracking and charging undisclosed and improper fees during Chapter 13 cases and then attempting to collect those fees upon a mortgage refinance or after the case has been discharged and the debtor is not represented by an attorney or subject to the scrutiny and control of the Bankruptcy Court.

49. These fees are often collected during closings or refinances that occur post discharge where former Chapter 13 debtors want to sell their house or refinance their mortgage to further promote their post discharge fresh start. Many times, instead of delaying the closing by contacting their attorney or filing something with the Bankruptcy Court, the former debtors will simply pay off the alleged fees. It becomes worth it to pay the fees to prevent further prolonging the whole process.

50. Based on this pattern and practice, this Court should grant significant and substantial punitive damages sufficient enough to prevent the Defendant from continuing this pattern and practice and to deter its future conduct in the Western District of North Carolina.

51. The Plaintiffs allege that the imposition of a substantial punitive damage award is required in order to force the Defendant to comply with well-established bankruptcy law.

WHEREFORE, the Plaintiffs having set forth their claims for relief against the Defendant respectfully pray of the Court as follows:

- A. That the Plaintiffs have and recover against the Defendant a sum to be determined by the Court in the form of actual damages;
- B. That the Plaintiffs have and recover against the Defendant a sum to be determined by the Court in the form of punitive damages
- C. That the Plaintiffs have and recover against the Defendant all reasonable legal fees and expenses incurred by their attorney;
- D. That the Plaintiffs have such other and further relief as the Court may deem just and proper.

Date this the _____ day of January 2007.



**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME: LITTLEJOHN, BESSIE LEE

**CHAPTER 13 NO. 01-41188
OUR FILE NO. 9933**

**ADDRESS: 2512 AKEN DRIVE
SHELBY, NC 28150**

SSN: --- -- 5422

DEBTOR(S)

BESSIE LEE LITTLEJOHN,

Adv. Proc. No. 08-_____

PLAINTIFF,

versus

**REGIONS BANK D/B/A REGIONS MORTGAGE
And SELECT PORTFOLIO SERVICING, INC. F/K/A
FAIRBANKS CAPITAL CORPORATION,**

DEFENDANTS.

**Complaint for Contempt of the Permanent Discharge Injunction
and Complaint Seeking Damages in Core Adversary Proceeding
For Improper Fees and Charges in Violation of the Discharge Injunction
And Complaint for a Permanent Injunction**

Introduction

1. This is an action for actual and punitive damages filed by the debtor pursuant to Sections 105, 502(b) and 524 of the Bankruptcy Code and Rule 2016(a) of the Bankruptcy Rules for charging and attempting to collect improper bankruptcy fees and charges after the entry of the Discharge Order in the base case. Plaintiff seeks monetary, declaratory and injunctive relief based on violations of these Sections, the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et seq* and the North Carolina Unfair and Deceptive Act and Practices Laws, G.S. Section 75-50 *et seq*. The Plaintiff also seeks a Permanent Injunction pursuant to Rule 7065 of the Federal Rules of Bankruptcy Procedure and Rule 65 of the Federal Rules of Civil Procedure.

2. This action is also filed to enforce the Discharge Order entered in this Chapter 13 case and to enforce and to implement other Bankruptcy Code provisions and Rules related thereto.

Jurisdiction and Venue

3. Jurisdiction is conferred on this Court pursuant to the provisions of Section 1334 of Title 28 of the United States Code in that this proceeding arises in and is related to the above-captioned Chapter 13 case under Title 11 and concerns property of the debtor in that case.

4. This Court has both personal and subject matter jurisdiction to hear this case pursuant to Section 1334 of Title 28 of the United States Code, Section 157(b)(2) of Title 28 of the United States Code, and pursuant to the Order entered by the Judges of the United States District Court for the Western District of North Carolina on July 30, 1984 (the Referral Order), which Order was entered in accordance with the Bankruptcy Amendments and Federal Judgeship Act of 1984.

5. This matter is a core proceeding and therefore the Bankruptcy Court has jurisdiction to

enter a final order. However, in the unlikely event this case is determined to be a non-core proceeding (which is denied by the Plaintiff) then and in that event the Plaintiff consents to the entry of a final order by the Bankruptcy Judge.

6. Venue lies in this District pursuant to Section 1391(b) of Title 28 of the United States Code.

Parties

7. The Plaintiff in this case was a debtor under Chapter 13 of Title 11 of the United States Code in case number 01-41188 filed before this Court. The Plaintiff has completed all of her Chapter 13 plan payments and received her Discharge. This case was reopened and is presently pending before this Court in order to enforce the bankruptcy violations of the Defendants.

8. The Defendant, Regions Bank d/b/a Regions Mortgage (hereinafter Regions Bank) is upon information and belief a Commercial Bank organized and existing under the laws of the State of Alabama with a principal office address of 417 20th Street North Birmingham, AL 35202-0247 and principal mailing address of P O Box 10247, Birmingham, AL 35202. At all times relevant to the allegations herein Regions Bank is the current servicer for the first mortgage loan on the Plaintiff's single family residence.

9. The Defendant Select Portfolio Servicing, Inc. f/k/a Fairbanks Capital Corporation ("SPS") is a corporation organized and existing under the laws of the State of Utah with a principal office address of 3815 South West Temple, Salt Lake City, UT 84115. SPS was the former servicer for the debtor's first mortgage loan on her single family residence.

Factual Allegations

10. The Plaintiff filed a Chapter 13 Bankruptcy petition on December 22, 2001. The petition was assigned case number 01-41188.

11. The Plaintiff listed in her Plan and in Schedule D a debt to Fairbanks Capital Corporation ("Fairbanks") secured by a first deed of trust on her residential real estate located at 2512 Aken Drive, Shelby, NC. The Plaintiff's plan proposed to pay mortgage arrears to Fairbanks through December, 2001 in the amount of \$2433.53 through her plan, with regular mortgage payments to resume in January, 2002. These regular mortgage payments were to be made by the Plaintiff directly to Fairbanks. After the case was filed, the servicing rights to the first mortgage loan were transferred from Fairbanks to SPS. Those servicing rights are now owned by Regions Bank.

12. During the course of her bankruptcy case, Fairbanks filed a Motion for Relief from Stay on August 23, 2002. This motion was resolved by agreement and was reported as settled at the hearing held on November 1, 2002; however a consent order was never prepared by Fairbanks and therefore no Order was entered as to this motion.

13. Fairbanks filed a second Motion for Relief from Stay on or about April 5, 2004, which was resolved by Consent Order filed with the Court on May 19, 2004.

14. The May 19, 2004 Consent Order provided, among other things, legal fees and expenses in favor of Fairbanks in the amount of \$600.00.

15. The claim for \$600.00 in legal fees and expenses was the only claim applied for and approved by this Court in favor of Fairbanks during the course of the debtor's bankruptcy case.

16. The Debtor received a lawful discharge on October 18, 2006.

17. In approximately October of 2006 Regions Bank took over the servicing rights to the debtor's first deed of trust on her residential real property.

18. On approximately June 26, 2007 the debtor's attorney caused a "Qualified Written Request" to be sent to Regions Bank at the debtor's request, due to the fact that she had some

concerns about the servicing of her mortgage loan by Regions Bank.

19. On approximately September 25, 2007, the debtor's attorney received a response to the "Qualified Written Request" (the "RESPA Response") from Charles N. Parrott of the law firm of Adams and Reese, LLP.

20. The said RESPA Response included a "Customer Account Activity Statement" from Regions Bank, as well as a "Payment History Report" from SPS.

21. The "Payment History Report" from SPS revealed the following post-petition, unauthorized, unapproved and improper corporate advances:

<u>Date:</u>	<u>Payee</u>	<u>Amount</u>	<u>Reason</u>
January 4, 2002	LOGS Financial Services	\$284.96	Statutory Expense Disbursement
January 4, 2002	LOGS Financial Services	\$500.00	Attorney Advance Disbursement
January 25, 2002	LOGS Financial Services	\$8.00	Statutory Expense Disbursement
January 25, 2002	LOGS Financial Services	\$200.00	Attorney Advance Disbursement
September 5, 2002	LOGS Financial Services	\$78.50	Statutory Expense Disbursement
September 5, 2002	LOGS Financial Services	\$200.00	Attorney Advance Disbursement
May 5, 2003	LOGS Financial Services	\$78.50	Statutory Expense Disbursement
May 5, 2003	LOGS Financial Services	\$200.00	Attorney Advance Disbursement
October 6, 2003	Residential Real Estate	\$85.00	Property Preservation Disbursement
April 19, 2004	LOGS Financial Services	\$150.97	Statutory Expense Disbursement
April 19, 2004	LOGS Financial Services	\$500.00	Attorney Advance Disbursement
April 23, 2004	Residential Real Estate	\$85.00	Property Preservation Disbursement
October 27, 2004	Residential Real Estate	\$85.00	Property Preservation Disbursement

22. The April 19, 2004 charges of \$650.97 are presumably for the April 5, 2004 Motion for Relief from Stay, but were charged to the debtor prior to the Court's approval of any fees and charges and are otherwise \$50.97 in excess of the amount approved.

23. The "Customer Account Activity Statement" from Regions Bank revealed the following post-discharge unauthorized, unapproved and improper bankruptcy related corporate advances:

<u>Date:</u>	<u>Amount</u>	<u>Reason</u>
October 20, 2006	\$2054.36	Miscellaneous Foreclosure and Bankruptcy Expenses

24. The debtor alleges that since Regions Bank charged these charges to the debtor two days following her discharge, these are bankruptcy related fees and charges and were not applied for by SPS or Regions Bank prior to her discharge or approved by the bankruptcy court.

25. The cover letter from Charles N. Parrott ("Parrott") which accompanied the RESPA Response stated in part, "Regions certainly understands that it is not allowed to charge the debtor with bankruptcy-related fees and expenses that have not been properly allowed and any corporate advances not allowed *have been deducted*." (Emphasis supplied). The Plaintiff alleges that this statement by Parrott constitutes an admission under Rule 801(d) of the Federal Rules of Evidence.

26. It appears from the "Customer Account Activity Statement" from Regions Bank that the only "deduction" of Corporate Advances occurred on May 24, 2007 in the amount of \$302.63. The remaining charges are well in excess of the \$600.00 approved by the bankruptcy court.

27. The Plaintiff alleges that due to threat of foreclosure and Regions Bank's charging the Plaintiff the improper, illegal and unauthorized bankruptcy related Corporate Advances as alleged herein, the Plaintiff felt forced into selling her property in order to avoid a foreclosure.

28. In connection with the sale of her property, Regions Bank provided the debtor a payoff dated November 26, 2007 which identifies "Recoverable Advance" fees of \$1082.33.

29. On or about November 26, 2008, at the closing of the sale of the Plaintiff's property,

Regions Bank was paid the sum of \$50,541.03. On the payoff check, the Plaintiff retained her right to sue Regions Bank for the violations as alleged herein.

30. On or about December 12, 2007, the Plaintiff received a check from Regions Bank in the sum of \$324.50. On the face of the check the funds were identified as "escrow surplus refund."

31. The Plaintiff alleges that the escrow surplus refund check was not a refund of any amount of corporate advances improperly and illegally charged to her mortgage loan.

32. The Plaintiff alleges that Regions Bank has not deducted the corporate advances and no such fees were applied for or approved by the Bankruptcy Court during the pendency of her plan except in the amount of \$600.00, which the debtor contends was paid in full through her plan.

Count I – Violation of Discharge Order

33. The allegations in paragraphs 1 through 32 of this complaint are realleged and incorporated herein by this reference.

34. The actions of the Defendants constitute a gross violation of the Discharge Injunction Order as set forth in 11 U.S.C. Section 524(a) and the Order entered in this case on October 18, 2006. The Defendants are clearly attempting to collect these fees in violation of 11 U.S.C. Section 524(a).

35. The imposition of the said unapproved fees constitutes unlawful and illegal bankruptcy fees inconsistent with the decision of this court in *In re Stark*, 242 B.R. 866 (W.D.N.C. 1999).

Count II – Improper Fees Not Approved by the Bankruptcy Court

36. The allegations in paragraphs 1 through 35 of this complaint are realleged and incorporated herein by this reference.

37. The actions of the Defendants by including the improper and unauthorized legal fees and expenses constitute willful and intentional and gross violations of the provisions of Sections 105 and 506 of Title 11 of the United States Code and Rule 2016(a) of the Federal Rules of Bankruptcy Procedure.

38. Rule 2016(a) provides, in pertinent part, that: "An entity seeking interim or final compensation for services, or reimbursement of necessary expenses, from the estate shall file an application setting forth a detailed statement of (1) the services rendered, time expended and expenses incurred, and (2) the amounts requested." The Plaintiff alleges that no such application for fees or attorney services was filed with the Bankruptcy Court by the Defendants during the pendency of her case other than \$600.00 for the second Motion for Relief from Stay.

39. As a result of the above violations, the Defendants are liable to the Plaintiff for actual damages, punitive damages and legal fees.

Count III - Violation Of The Fair Debt Collection Practices Act

40. The allegations of paragraphs 1 through 39 above are realleged and incorporated herein by reference.

41. The foregoing acts and omissions by the Defendants constitute violations of the FDCPA, which include, but are not limited to, the following:

- (a) The Defendants violated 15 U.S.C. § 1692f(1) by collecting or attempting to collect amounts not permitted by law and by otherwise using unfair and unconscionable methods.

42. The Plaintiff is therefore entitled to an award of statutory damages and legal fees pursuant to 11 U.S.C. § 1692k.

Count IV – Additional Violation Of The FDCPA

43. The allegations in paragraphs 1 through 42 of this complaint are realleged and incorporated herein by this reference.

44. The Defendants additionally violated the FDCPA. Defendants' violations include but are not limited to engaging in any conduct the natural consequences of which is to harass, oppress, or abuse any person in connection with the collection of a debt, 15 U.S.C. Section 1692d.

45. As a result of the above violations of the FDCPA, the Defendants are liable to the Plaintiff for actual damages, statutory damages of \$1,000.00, and attorney's fees.

Count V – Violation of North Carolina Unfair And Deceptive Acts And Practices Laws

46. The allegations in paragraphs 1 through 45 of this complaint are realleged and incorporated herein by this reference.

47. The Plaintiff is a "consumer" as that term is defined by Article 2 of Chapter 75 of the North Carolina General Statutes.

48. The Plaintiff's relationship with the Defendants arose out of a "consumer debt" as that term is defined in Article 2 of Chapter 75 of the North Carolina General Statutes.

49. The Defendants were and are "debt collectors" as that term is defined by applicable provisions of Article 2 of Chapter 75 of the North Carolina General Statutes.

50. Under the provision of Section 75-52 of the North Carolina General Statutes the Defendants were and are prohibited from engaging in any conduct the natural consequences of which is to oppress, harass or abuse any person.

51. As a result, the Defendants are liable for statutory damages in the sum of no less than \$2,000.00 for violation of N.C.G.S. Section 75-50, et seq. and the payment of legal fees and expenses.

Count VI – Additional Violation Of NCUDAP

52. The allegations in paragraphs 1 through 51 of this complaint are realleged and incorporated herein by this reference.

53. The actions and conduct of the Defendants were oppressive and abusive in violation of the applicable provisions of Article 2 of Chapter 75 of the North Carolina General Statutes as follows:

- (a) The Defendants violated 75-54(4) by falsely representing the character, extent, or amount of a debt owed by the debtor; and
- (b) The Defendants violated 75-54(4) by falsely representing the creditor's rights; and
- (c) The Defendants violated 75-55 by collecting or attempting to collect a debt by use of unconscionable means; and

54. The actions and conduct of the Defendants were oppressive and abusive in violation of the applicable provisions of Article 2 of Chapter 75 of the North Carolina General Statutes.

55. As a result of the above violations of the NCUDAP, the Defendants are liable to the Plaintiff for actual damages, statutory damages and attorney's fees.

Count VII – Pattern and Practice

56. The allegations in paragraphs 1 through 55 of this complaint are realleged and incorporated herein by this reference.

57. Upon information and belief, the Defendants have engaged in a pattern and practice of tracking and then charging undisclosed and improper legal fees and expenses during Chapter 13 cases and then attempting to collect those fees and expenses after the entry of a final discharge order. The Plaintiff alleges that the Defendants seeks to recapture these unlawful charges upon a mortgage refinance or after the case has been discharged and the debtor is not represented by an attorney or when Defendants' conduct is not subject to the direct scrutiny and control of the Bankruptcy Court.

58. As previously alleged, these unlawful fees and charges are often collected during closings or refinancing that occur post discharge where former Chapter 13 debtors want to sell their homes or refinance their mortgage loans in order to further promote their post discharge fresh start. Many times, instead of delaying the closing by contacting their former bankruptcy attorney or filing something with the Bankruptcy Court, the former debtors will simply pay off the illegal fees.

59. The Plaintiff is informed and believes and therefore alleges that the Defendants are aware of this collection model and have used and employed this model on a regular basis for years as part of their standard operating procedures.

60. The inclusion of these fees post discharge also requires both the debtor and the debtor's attorney to incur time and expense in investigating the source of these charges. Debtors become confused and frustrated by the appearance of these fees post discharge where they have made all of their required payments and then are faced with even more charges related to their bankruptcy. These unlawful practices result in many debtors calling their former bankruptcy attorney's office and complaining that the attorney did not do his or her job during the Chapter 13 case with respect to the mortgage claim.

61. Based on this pattern and practice, this Court should grant significant and substantial punitive damages sufficient enough to prevent the Defendants from continuing this pattern and practice and to deter its future conduct in the Western District of North Carolina.

Count VIII – Permanent Injunction

62. The allegations in paragraphs 1 through 61 of this complaint are realleged and incorporated herein by this reference.

63. The Plaintiff also alleges upon information and belief that pursuant to Rule 7065 of the FRBP and Rule 65 of the FRCP, this Court should issue a permanent injunction against the Defendants which would preclude them from charging such fees without court approval after proper notice and hearing.

WHEREFORE, the Plaintiff having set forth her claims for relief against the Defendants respectfully prays of the Court as follows:

- A. That the Plaintiff have and recover against the Defendants a sum to be determined by the Court in the form of actual damages;
- B. That the Plaintiff have and recover against the Defendants a sum to be determined by the Court in the form of punitive damages
- C. That the Plaintiff have and recover against the Defendants all reasonable legal fees and expenses incurred by her attorney;
- D. That this Court order the Defendants to pay additional actual damages and statutory damages in a sum to be determined by the Court for violation of N.C.G.S. Section 75-50, et seq.;

- E. That this Court order the Defendants to pay additional actual damages and statutory damages in a sum to be determined by the Court for violating the FDCPA pursuant to 15 U.S.C. Section 1692k;
- F. That the Defendants be permanently enjoined by this Court from attempting to collect such legal fees and charges unless and until such fees and charges have been approved by the Bankruptcy Court during the bankruptcy case with proper notice and hearing; and
- G. That the Plaintiff have such other and further relief as the Court may deem just and proper.

Dated this the _____ day of February, 2008.



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Only the Westlaw citation is currently available.

United States Bankruptcy Court,
N.D. Mississippi.
In re Janice GALLOWAY, Debtor.
Janice Galloway, Plaintiff

v.

EMC Mortgage Corporation, Defendant.
Bankruptcy No. 05-13504-NPO.
Adversary No. 09-01124-NPO.

Jan. 29, 2010.

[Harry H. Sumner](#), [Harry H. Sumner](#), PLLC, [William Lawrence Deas](#), Tupelo, MS, for Plaintiff.

[Mark H. Tyson](#), Jackson, MS, for Defendant.

**MEMORANDUM OPINION DENYING MOTION
TO DISMISS ADVERSARY PROCEEDING**

[NEIL P. OLACK](#), Bankruptcy Judge.

*1 This matter came on for hearing (the "Hearing") on the Motion to Dismiss (the "Motion")(Adv.Dkt. No. 9) and the Memorandum of Law in Support of the Motion to Dismiss Adversary Complaint (the "Brief")(Adv.Dkt. No. 10), both filed by Mark H. Tyson on behalf of the Defendant, EMC Mortgage Corporation ("EMC"), and the Plaintiff's Opposition to Motion to Dismiss (the "Response")(Adv.Dkt. No. 15), filed by W. Lawrence Deas on behalf of Janice Galloway (the "Debtor") in this adversary proceeding (the "Adversary"). Having considered the pleadings and arguments of counsel, and being fully advised in the premises, the Court finds that the Motion is not well-taken and should be denied as set forth herein. Specifically, the Court finds as follows: [FN1](#)

[FN1](#). The following constitutes the findings of fact and conclusions of law of the Court pursuant to [Federal Rule of Bankruptcy Procedure 7052](#).

Jurisdiction

This Court has jurisdiction over the parties and the subject matter of this proceeding pursuant to [28 U.S.C. § 1334](#). This is a core proceeding pursuant to [28 U.S.C. § 157\(b\)\(2\)\(A\)](#) and (O). Notice of the Hearing was proper under the circumstances.

Factual Allegations

According to the Adversary Complaint (the "Complaint")(Adv.Dkt. No. 1), the Debtor makes the following factual allegations: [FN2](#)

[FN2](#). In considering the Motion pursuant to [Federal Rule of Civil Procedure 12\(b\)\(6\)](#), the Court must "liberally construe the [Debtor's] complaint in favor of the [Debtor as the nonmoving party] and assume the truth of all pleaded facts." [Oliver v. Scott](#), 276 F.3d 736, 740 (5th Cir.2002). [Federal Rule of Civil Procedure 12\(b\)\(6\)](#) is made applicable pursuant to Bankruptcy Rule 7012.

1. The Chapter 13 case of the Debtor was commenced by the filing of a voluntary petition (the "Petition") (Dkt. No. 1) on May 16, 2005, in Case No. 05-13504 (the "Main Case").
2. The Chapter 13 Plan of the Debtor (the "Plan") was subsequently confirmed by order of this Court on October 31, 2005 (the "Confirmation Order")(Dkt. No 43).
3. The Plan as confirmed included a debt to Wells Fargo N.A. ("Wells Fargo"), which was scheduled as a claim secured by a deed of trust on the residential real estate of the Debtor at 1708 Garrard Avenue, Indianola, Mississippi.
4. The Plan provided for the cure of pre-petition arrears to Wells Fargo with ongoing monthly payments on the Debtor's mortgage to be made through the Plan by the chapter 13 trustee (the "Trustee").
5. Wells Fargo received notice of the filing of the Petition and of the Confirmation Order entered in the

Slip Copy, 2010 WL 364336 (Bkrtcy.N.D.Miss.)
(Cite as: 2010 WL 364336 (Bkrtcy.N.D.Miss.))

Main Case.

6. Wells Fargo filed a proof of claim for the first deed of trust and for the pre-petition arrears.

7. During the life of the Plan, Wells Fargo transferred its rights under the note and deed of trust to EMC.

8. Debtor completed her bankruptcy and paid EMC all pre-petition arrears and all monthly payments (Adv.Dkt. No. 1, Ex. B).

9. On September 22, 2008, the Court entered an Order Finding that Long Term Debt Treated Per 1322(b)(5) of EMC Mortgage Current and Defaults Cured ("Order Deeming Current")(Dkt.No. 62).

10. The Court entered the Order Discharging Debtor After Completion of Chapter 13 Plan ("Discharge Order") on November 4, 2008 (Dkt. No. 65).

11. Despite having made no response or other objection to either the Trustee's Notice of Motion for Order Declaring § 1322(b)(5) Claim of EMC Mortgage Current and Defaults Cured (Dkt. No. 61) or the Discharge Order, EMC's records did not show that the Debtor was current as of August 22, 2008, but rather showed that the Debtor owed substantial amounts in "corporate advances" on their mortgage account. (Complaint, ¶ 18).

*2 12. The Debtor alleges that "EMC has charged [the Debtor's] mortgage loan account improper, unapproved, unauthorized and unlawful charges not validated by the Bankruptcy Court, concealed those fees and charges, and unlawfully collected or attempted to collect part of those charges from payments made pursuant to the Debtor's Chapter 13 plan and part of those charges after [Debtor's] discharge." (Complaint, ¶ 19).

13. The Complaint sets forth five (5) counts as follows:

(A) The first count seeks relief for alleged violations of the automatic stay under [11 U.S.C. § 362^{FN3}](#) (¶¶ 20-22);

[FN3](#). Hereinafter all code sections refer to the United States Bankruptcy Code located

at Title 11 of the United States Code unless otherwise noted.

(B) The second count alleges violations of §§ 105 and 506 and Federal Rule of Bankruptcy Procedure ("Bankruptcy Rule") 2016 based upon "failing to properly account for the monies paid" and "attempting to collect charges and other amounts after the entrance of the Court's Order Deeming Current." (¶¶ 24-25);

(C) The third count sets forth an additional claim under Bankruptcy Rule 2016 for allegedly denying the Debtor the right "to cure all arrearages through her Plan." (¶ 28);

(D) The fourth count requests injunctive relief and declaratory relief for alleged "abuse of the bankruptcy process" and disgorgement of alleged "illegal and improper charges and fees." (¶ 31); and,

(E) The fifth count alleges contempt on the part of EMC for allegedly "collecting and attempting to collect, post-discharge, amounts" in violation of § 105 (¶ 36-38).

Issues

EMC's Motion asserts that the Complaint should be dismissed for failure to state a claim. EMC argues that the Debtor has no private causes of action for her claims under § 105, § 506, or Bankruptcy Rule 2016. It further argues that the Debtor's claims regarding violations of the automatic stay fail to raise any "plausible claim for relief" as required by [Ashcroft v. Iqbal](#), ---U.S. ---, 129 S.Ct. 1937, 1949-50, 173 L.Ed 2d 868 (2009).

The issues currently before the Court are whether the Debtor's Complaint should be dismissed because (1) the Debtor has no private causes of action under § 105, § 506, and Bankruptcy Rule 2016, and (2) the Debtor's claims regarding violations of the automatic stay fail to raise any "plausible claim for relief."

Standard of Review

In considering a motion under [Federal Rule of Civil Procedure 12\(b\)\(6\)](#), made applicable pursuant to Bankruptcy Rule 7012, the "court accepts all well-

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pleaded facts as true, viewing them in the light most favorable to the plaintiff.” *Martin K. Eby Constr. Co. v. Dallas Area Rapid Transit*, 369 F.3d 464, 467 (5th Cir.2004). To overcome a 12(b)(6) motion, the Debtor must plead “enough facts to state a claim to relief that is plausible on its face.” *Blackstock v. Sedgwick Claims Mgmt. Servs., Inc.*, 2009 WL 2754761, at * 1 (N.D.Miss. Aug. 26, 2009)(citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007); accord *Ashcroft v. Iqbal*, ---U.S. ---, 129 S.Ct. 1937, 1948-51, 173 L.Ed.2d 868 (2009)). “Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all allegations in the complaint are true (even if doubtful in fact).” *Id.* (citing *Twombly*, 550 U.S. at 555)(internal citations and footnote omitted). “Conversely, ‘when the allegations in a complaint, however true, could not raise a claim of entitlement to relief, this basic deficiency should be exposed at the point of minimum expenditure of time and money by the parties and the court.’ “ *Id.* (quoting *Cuvillier v. Taylor*, 503 F.3d 397, 401 (5th Cir.2007)).

Discussion and Analysis

*3 The bankruptcy system in America has two primary objectives: first, ensuring the equitable and timely repayment of creditors with valid claims; and second, providing debtors a fresh start once they emerge from bankruptcy. *In re Sanchez*, 372 B.R. 289, 296-97 (Bankr.S.D.Tex.2007); *In re Ortiz*, 2006 WL 2946500, at *9 (Bankr .S.D.Tex. Oct. 13, 2006)(quoting *In re T-H New Orleans Ltd. P'ship.*, 188 B.R. 799, 807 (E.D.La.1995), *aff'd* 116 F.3d 790 (5th Cir.1997)). In order for the bankruptcy system to function properly so that these goals are achieved, all entities involved in a bankruptcy proceeding must fully disclose all of the relevant facts. *Id.*; see also *In re Coastal Plains, Inc.*, 179 F.3d 197, 208 (5th Cir.1999)(“The duty of disclosure in a bankruptcy proceeding is a continuing one.”); *In re Ramirez*, 2006 WL 3838176, at *3 (Bankr.S.D.Tex. Dec. 29, 2006)(“[T]he broad policy of the Bankruptcy Code ... favors transparency and disclosure whenever possible.”); *In re eToys, Inc.*, 331 B.R. 176, 187 (Bankr.D.Del.2005)(“Disclosure goes to the heart of the integrity of the bankruptcy system.”)(internal citation omitted); *In re Century Plaza Assoc.*, 154 B.R. 349, 352 (Bankr.S.D.Fla.1992)(“Disclosure of fees is a fundamental concept in bankruptcy.”)

1. Private Right of Action under § 105, § 506, and Bankruptcy Rule 2016

EMC argues that the Debtor has no private right of action in either § 105, § 506, or Bankruptcy Rule 2016. The Court need not address that assertion, however, because the Court may use its equitable powers under § 105(a) to enforce the provisions of § 506 and Bankruptcy Rule 2016. See § 105(a); *In re Sanchez*, 372 B.R. at 309-12. Section 105(a) states:

The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

§ 105(a).

A. The Court's Equitable Powers Under § 105(a)

In *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365, 375, 127 S.Ct. 1105, 1111-12, 166 L.Ed.2d 956 (2007), the Supreme Court held that § 105(a) grants bankruptcy judges “broad authority [] to take any action that is necessary or appropriate ‘to prevent an abuse of process.’ “ The bankruptcy courts’ broad authority under § 105(a) is limited by the language of the statute so that, “[u]nder § 105(a)], a court may exercise its equitable power only as a means to fulfill some specific Code provision.” *Sanchez*, 372 B.R. at 309 (internal citations omitted).

The law is well-established in the Fifth Circuit: Section 105(a) is to be “interpret[ed] liberally,” so long as any action taken pursuant to § 105(a) is “consistent with the rest of the Bankruptcy Code.” *Feld v. Zale Corp. (In re Zale Corp.)*, 62 F.3d 746, 760 (5th Cir.1995). Section 105(a) permits a bankruptcy court “to fashion such orders as are necessary to further the substantive provisions of the Bankruptcy Code.” *Perkins Coie v. Sadkin (In re Sadkin)*, 36 F.3d 473, 478 (5th Cir.1994)(quoting *Chiasson v. Bingler (In re Oxford Mgmt. Inc.)*, 4 F.3d 1329, 1333 (5th Cir.1993)). Therefore, § 105(a) grants a bankruptcy

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(Cite as: 2010 WL 364336 (Bkrtcy.N.D.Miss.))

court authority to exercise its equitable powers to achieve a result the Bankruptcy Code intended. *id.* Furthermore, the bankruptcy court can exercise these equitable powers at its discretion. *Id.* at 478-79; *In re Stern*, 204 F.3d 1117, 1999 WL 1330645, at *2 (5th Cir.1999).

*4 EMC argues (1) that the Bankruptcy Code does not expressly create a legal remedy under either § 506(b) or Bankruptcy Rule 2016, and (2) that this Court cannot imply a private right of action under the analysis set out in *Cort v. Ash*, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975). EMC asserts that if the Court does not dismiss the Debtor's Complaint, it will be granting substantive rights to the Debtor that have no basis in the Bankruptcy Code. This argument is unpersuasive.

The Court finds it plainly evident that § 506(b) and Bankruptcy Rule 2016, in concert, create both rights and duties for creditors in bankruptcy cases. If, as alleged in ¶ 19 of the Complaint, "EMC has charged [the Debtor's] mortgage loan account improper, unapproved, unauthorized and unlawful charges not validated by the Bankruptcy Court, concealed those fees and charges, and unlawfully collected or attempted to collect part of those charges from payments made pursuant to the Debtor's Chapter 13 plan and part of those charges after [Debtor's] discharge," then this Court is justified in using its authority under § 105(a) to remedy the situation. See *Tate v. NationsBanc Mortgage Corp. (In re Tate)*, 253 B.R. 653, 668 (Bankr.W.D.N.C.2000). Just as this Court has the authority to award creditors reasonable fees under § 506(b), so too does it have the authority to sanction creditors for their failure to comply with § 506(b) and Bankruptcy Rule 2016.

B. The Court's Civil Contempt Powers under § 105(a)

The Court also has authority under § 105(a) to issue sanctions pursuant to its civil contempt power. In *Placid Ref. Co. v. Terrebonne Fuel & Lube, Inc.* (*In re Terrebonne Fuel & Lube, Inc.*), 108 F.3d 609, 613 (5th Cir.1997), the Fifth Circuit held that, "[t]he language of [§ 105] is unambiguous. Reading it under its plain meaning, we conclude that a bankruptcy court can issue any order, including a civil contempt order, necessary or appropriate to carry out the provisions of the bankruptcy code." See also *In re Harris*, 297

B.R. 61, 70 (Bankr.N.D.Miss.2003) ("[Section] 105 provides a bankruptcy court with statutory contempt powers, in addition to whatever inherent contempt powers the court may have.").

The Fifth Circuit has also held that, "[j]udicial sanctions in civil contempt proceedings may, in a proper case, be employed for either or both of two purposes: to coerce the defendant into compliance with the court's order, and to compensate the complainant for losses sustained." *American Airlines, Inc. v. Allied Pilots Ass'n*, 228 F.3d 574, 585 (5th Cir.2000) (quoting *United States v. United Mine Workers of America*, 330 U.S. 258, 303-04, 67 S.Ct. 677, 91 L.Ed. 884 (1947)). An automatic stay is a self-executing injunction which constitutes an order of the bankruptcy court for contempt purposes. *In re San Angelo Pro Hockey Club, Inc.*, 292 B.R. 118, 124 (Bankr.N.D.Tex.2003). Additionally, a debtor's plan is confirmed by an order of the bankruptcy court. See *Eubanks v. F.D.I.C.*, 977 F.2d 166, 170 (5th Cir.1992).

*5 In this case, the Court entered its Confirmation Order on October 31, 2005. The Court also entered the Order Deeming Current on November 4, 2008. Pursuant to the case law cited herein, the Court has the authority to impose sanctions under § 105(a) for contempt of the self-executing automatic stay, an order confirming a plan, and an order declaring a debt current and defaults cured.

2. Violation of the Automatic Stay Claims

EMC additionally argues that the Debtor's allegations regarding the misapplication of payments received from the Trustee under the Debtor's Plan do not state a claim for a violation of the automatic stay under § 362. It maintains that the allegedly improper payment allocations do not violate the automatic stay because once the payments were made to EMC, neither the Debtor nor the estate had any continuing interest in those plan payments. EMC also asserts that any improper posting of corporate advances to the Debtor's mortgage account does not constitute an attempt to collect those fees or violate the stay. This Court disagrees.

Though the Complaint does not specify the subsection of § 362 that EMC allegedly violated, EMC's alleged actions conceivably could violate §§

Slip Copy, 2010 WL 364336 (Bkrtcy.N.D.Miss.)
(Cite as: 2010 WL 364336 (Bkrtcy.N.D.Miss.))

[362\(a\)\(3\)](#), (4), (5), or (6). Under [§ 362\(a\)](#), the filing of a bankruptcy petition stays:

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case ...;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case....

[§ 362\(a\)](#). See also [Myles v. Wells Fargo Bank, N.A. \(in re Myles \)](#), 395 B.R. 599, 606 (M.D.La.2008). While the Fifth Circuit has not yet considered whether a mortgage creditor's actions after confirmation of a chapter 13 plan violates the automatic stay, three courts in the circuit have done so.

In [In re Jones](#), 366 B.R. 584, 599 (Bankr.E.D.La.2007), [aff'd](#) 391 B.R. 577 (E.D.La.2007), the bankruptcy court in Louisiana held that a creditor violates the automatic stay when it "applies any portion of [the] Debtor's earnings to undisclosed fees and charges, rather than the installments owed under the note and payable under the plan [because] it reduces [the] Debtor's ability to pay either the reasonable and necessary costs of his support or the amounts due under [the] plan." In that case, the court held that the creditor's misapplication of the plan payments was a taking of estate property prohibited by [§ 362\(a\)\(3\)](#). *Id.*

A bankruptcy court in Texas held similarly in [In re Sanchez](#), 372 B.R. at 313. In *Sanchez*, the mortgage creditor had assessed post-petition attorney's fees, costs, and property inspection fees to the debtor's account and then applied mortgage payments it received from the trustee to those charges without advising the debtor. *Id.* The court held that the misapplication of the plan payments amounted to taking estate property in violation of the automatic stay. *Id.*

*6 In [In re Myles](#), 395 B.R. at 599, the mortgage creditor misapplied portions of the plan payments to unspecified and undisclosed charges on the debtor's mortgage account. In determining whether to dismiss the adversary proceeding for failure to state a claim, the *Myles* court in Louisiana held that the allegations stated a claim for violation of the automatic stay. *Id.* at 607.

Bankruptcy courts from other circuits agree with this line of reasoning. In [In re McCormack](#), 203 B.R. 521, 525-26 (Bankr.D.N.H.1996), the bankruptcy court sanctioned a mortgage creditor for violation of the automatic stay by failing to adjust computer records to reflect that the chapter 13 plan had been confirmed, which caused the addition of improper fees and charges to debtor's account. In [In re Payne](#), 387 B.R. 614, 638-39 (Bankr.D.Kan.2008), the bankruptcy court held that the loan servicer's application of plan payments received from the trustee to disallowed pre-petition late fees, rather than the allowed pre-petition claim, violated [§ 362\(a\)\(6\)](#).

This Court finds this line of cases persuasive. In the case at bar, the Debtor makes various allegations against EMC and the charges it made to the Debtor's mortgage account. See *supra* ¶ 12 at 3. Taking these allegations as true, as the Court must in making a 12(b)(6) determination, the Court finds that these allegations state a viable claim for violation of the automatic stay under [§ 362](#).

Conclusion

For the reasons stated herein, the Court finds that EMC's Motion should be denied. A separate final judgment consistent with this Order will be entered by this Court in accordance with Bankruptcy Rules 7054 and 9021.

Bkrtcy.N.D.Miss.,2010.

In re Galloway

Slip Copy, 2010 WL 364336 (Bkrtcy.N.D.Miss.)

END OF DOCUMENT

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
WILKESBORO DIVISION**

IN THE MATTER OF:

NAME:

**CHAPTER 13 CASE NO.
OUR FILE NO.**

ADDRESS:

SSN:

DEBTORS.

Debtor and wife ,

Adv. Proc. No. 08- _____

Plaintiffs,

versus

**SELECT PORTFOLIO SERVICING, INC.
F/K/A FAIRBANKS CAPITAL CORPORATION,
THE BANK OF NEW YORK AS TRUSTEE
UNDER EQCC TRUST 2001-2 and
EQCC TRUST 2001-2,**

Defendants.

**COMPLAINT FOR IMPROPER AND UNAUTHORIZED FEES
LACK OF STANDING AND FEE SHARING**

Introduction

1. This is an action for actual and punitive damages filed by the debtors pursuant to Sections 105(a), 362(a), 362(k)(1), 501, 502(j), 503 and 506(b) of the Bankruptcy Code, and Rules 2016(a) and 3001(e) of the Bankruptcy Rules.

2. This action is also filed to enforce the Order of Confirmation duly entered in this Chapter 13 case and to enforce and to implement other Bankruptcy Code provisions and Rules related thereto.

Jurisdiction and Venue

3. Jurisdiction is conferred on this Court pursuant to the provisions of Section 1334 of Title 28 of the United States Code in that this proceeding arises in and is related to the above-captioned Chapter 13 case under Title 11 and concerns property of the Debtors in that case.

4. This Court has both personal and subject matter jurisdiction to hear this case pursuant to Section 1334 of Title 28 of the United States Code, Section 157(b)(2) of Title 28 of the United States Code, and pursuant to the Order entered by the Judges of the United States District Court for the Western District of North Carolina on July 30, 1984 (the Referral Order), which Order was entered in accordance with the Bankruptcy Amendments and Federal Judgeship Act of 1984.

5. This matter is a core proceeding and therefore the Bankruptcy Court has jurisdiction to enter a final order. However, in the unlikely event this case is determined to be a non-core proceeding then and in that event the Plaintiffs consent to the entry of a final order by the Bankruptcy Judge.

6. Venue lies in this District pursuant to Section 1391(b) of Title 28 of the United States Code.

Parties

7. The Plaintiffs in this case were and are debtors under Chapter 13 of Title 11 of the United States Code in case number _____, which case is presently pending before this court. The Plaintiffs are hereinafter referred to as the Plaintiffs or the debtors.

8. The Defendant, Select Portfolio Servicing, Inc. f/k/a Fairbanks Capital Corporation ("SPS") is a corporation organized and existing under the laws of the State of Utah with a principal office address of 3815 South West Temple, Salt Lake City, UT 84115.

9. The Defendant, The Bank of New York, is a National Bank organized under the laws of the State of New York with its primary office and principal place of business at One Wall Street, New York, NY 10286 (hereinafter BONY). BONY is named as a Defendant here in its capacity as the named Trustee for the mortgage-backed securitized Trust identified as EQCC Trust 2001-2. The Plaintiffs allege that all of the actions of SPS as alleged herein were conducted with the consent and approval of BONY and in course and scope of the agency relationship between SPS and BONY.

10. The Defendant, EQCC Trust 2001-2 ("the Trust"), is a mortgage-backed securitized common law trust organized pursuant to the laws of the State of New York and is the alleged owner and holder of the mortgage note executed by the Plaintiffs and secured by the Deed of Trust on their residence. The Plaintiffs allege that all of the actions of SPS as alleged herein were conducted with the consent and approval of the Trust and in the course and scope of the agency relationship between SPS and the Trust.

Factual Allegations

11. The Chapter 13 case of the Plaintiffs was commenced by the filing of a petition with the Clerk of this Court on _____.

12. The 341(a) meeting of creditors was held in Wilkesboro, North Carolina on _____.

13. The Chapter 13 plan of the Plaintiffs was subsequently confirmed by order of this Court dated _____.

14. The Chapter 13 plan as confirmed included a debt to SPS in the gross amount of \$90,435.00, which was listed on Schedule D as a claim secured by a first deed of trust on the residential real estate of the Plaintiffs located at _____.

15. The Plaintiffs' Chapter 13 plan provided for the cure of pre-petition arrears to SPS in the amount of \$40,712.00 through _____, with the Plaintiffs to resume direct mortgage payments in _____.

16. SPS filed a sworn proof of claim for the pre-petition arrears in the amount of \$52,475.71 and for the first deed of trust in the amount of \$134,003.78.

17. The Plaintiffs allege therefore that SPS received notice of the bankruptcy filing and of the Order of Confirmation entered in this case.

18. The claim of SPS for the first deed of trust is identified on the records of the Trustee as claim number 4 and the claim for the pre-petition arrears is identified as claim number 22.

19. By March 1, 2008, the Trustee's office had disbursed the total sum of \$26,966.64 to SPS on the principal arrearage claim, plus 8% interest.

20. On or about March 19, 2007, SPS, by and through Theodore A. Nodell, Jr. filed a Motion for Relief from the Automatic Stay in this case as to the first deed of trust, alleging that the Plaintiffs were in default of their mortgage payments from August of 2006 to March of 2007 in the total sum of \$10,178.24 including late charges.

21. SPS alleged in the Motion for Relief from the Automatic Stay that "Petitioner holds a certain Promissory Note executed by Debtors on or about January 26, 1998. This said note was secured by a certain Deed of Trust of the same date which was subsequently recorded in Book _____ Page _____, Register of Deeds, Iredell County, North Carolina." The Plaintiffs are informed and believe and therefore allege that this allegation was false and fraudulent to the extent that SPS was not in fact the "Holder" of the said promissory note but in fact and in law was only the "Servicer" for the Trust, the alleged owner and holder.

22. Attached to the Motion for Relief from the Automatic Stay as Exhibits were documents intended to establish "proof" of SPS's secured claim and that it "holds a certain Promissory Note executed by Debtors." The Plaintiffs are informed and believe and therefore allege that the said documents were fatally defective as hereinafter set-forth.

23. Attached to the Motion for Relief from the Automatic Stay as Exhibits were the following documents:

(a). A copy of a document purporting to be a Note dated January 26, 1998 in the amount of \$98,459.98 in favor of Nationscredit Financial Services, Corp.;

(b). A copy of a document purporting to be a Deed of Trust dated August 30, 1990 in the amount of \$65,000.00 in favor of First Union National Bank of North Carolina marked "Paid and Satisfied in Full" on April 8, 1998, and recorded at Book _____, Page _____; and

(c). A copy of a document purporting to be a Deed of Trust dated July 26, 1995 in the amount of \$50,000.00 in favor of Nationscredit Financial Services, Corp. marked "Cancelled" on March 11, 1998, and recorded at Book _____, Page _____.

24. None of the Exhibits attached to the Motion for Relief established that SPS had a valid and enforceable security interest in the debtors' residential real estate or that SPS was the lawful "assignee" and "holder" of the original mortgage note.

25. The Plaintiffs are informed and believe and therefore allege that SPS was guilty of fraudulent conduct, of misrepresentation, and of misconduct designed to mislead this Court and the attorney for the Debtors in the Chapter 13 case by the use of the Exhibits attached to the Motion for Relief from the Automatic Stay and for the allegations in the said Motion.

26. On or about March 20, 2007, the Plaintiffs' attorney filed an objection to the motion for relief from stay and requested the matter be set for a preliminary hearing before this Court.

27. The Plaintiffs allege that at the time he filed the objection and at all subsequent times thereafter (including the entry of the Agreed Order) their Chapter 13 attorney acted and relied upon the false and misleading allegations and documents filed by SPS.

28. The Motion for Relief from the Automatic Stay was subsequently resolved prior to the hearing by the entry of an Agreed Order. The Agreed Order, entered by the Court on March 26, 2007, also referenced the Deed of Trust recorded in Book _____, Page _____, Register of

Deeds, Iredell County, North Carolina, which had been marked "Paid and Satisfied in Full."

29. The Agreed Order provided that the debtors were behind on their monthly mortgage payments to SPS since the bankruptcy filing in the sum of \$10,178.24. This was the amount allegedly owed through March of 2007. The order directed the debtors, beginning in April of 2007 to make the regular payment plus an additional payment of \$1,696.37 per month for 6 months. SPS was granted automatic relief from the debtors' Chapter 13 case upon any default. The Plaintiffs did not see or approve of this Agreed Order and did not sign the same. Rather, the Plaintiffs were only made aware of the said Order after it was entered and were advised by an employee of their Chapter 13 attorney that this was the best deal they could work out with SPS and that the Plaintiffs had no choice but to pay the amounts provided for in the Order if they wanted to save their home.

30. The Agreed Order also specifically provided for the payment of SPS's legal fees and expenses in the amount of \$600.00. This amount was to be paid for through the Chapter 13 plan. These fees and expenses were specifically requested and applied for by SPS in the Motion for Relief from the Automatic Stay and were approved by this Court upon entry of the Agreed Order.

31. SPS's post-confirmation claim for legal fees and expenses in the amount of \$600.00 is identified on the records of the Trustee as claim number 26. As of March 1, 2008, the Trustee had disbursed the sum of \$152.04 to SPS on this claim.

32. SPS alleged that the debtors defaulted under the terms of the Agreed Order and therefore SPS took the position that it was automatically released from the case to pursue a state foreclosure action.

33. SPS filed a foreclosure procedure in Iredell County, North Carolina in approximately November of 2007, which is presently pending as case number 07-SP-1036.

34. On February 25, 2008, the Debtors filed a Motion for Relief from the Agreed Order and Motion for Order to Stay Foreclosure Action which is presently scheduled for hearing before this Court on April 11, 2008 in the base Chapter 13 case.

35. Even though SPS has taken the position that it is released from the bankruptcy case to pursue the foreclosure action, SPS has accepted Trustee disbursement checks on the arrearage claim since filing the foreclosure action as follows:

Date	Check #	Payee	Amount
2/28/2008	750114	SELECT PORTFOLIO SERVICING INC	\$0.01
1/31/2008	747247	SELECT PORTFOLIO SERVICING INC	\$262.95
1/31/2008	747247	SELECT PORTFOLIO SERVICING INC	\$175.11
12/28/2007	744294	SELECT PORTFOLIO SERVICING INC	\$706.51
12/28/2007	744294	SELECT PORTFOLIO SERVICING INC	\$179.91
11/29/2007	741790	SELECT PORTFOLIO SERVICING INC	\$1,928.71
11/29/2007	741790	SELECT PORTFOLIO SERVICING INC	\$566.59

36. Even though SPS has taken the position that it is released from the bankruptcy case to pursue the foreclosure action, SPS has accepted Trustee disbursement checks on the claim for legal fees since filing the foreclosure action as follows:

Date	Check #	Payee	Amount
1/31/2008	747247	SELECT PORTFOLIO SERVICING INC	\$7.69
12/28/2007	744294	SELECT PORTFOLIO SERVICING INC	\$15.67
11/29/2007	741790	SELECT PORTFOLIO SERVICING INC	\$37.66

37. The Plaintiffs allege that by accepting the payments referred to in paragraphs 35 and 36 herein SPS has waived the alleged default, is estopped from pursuing the foreclosure, and

is guilty of taking and keeping property of this estate when it claimed no right to the same as evidenced by the foreclosure proceeding. The Plaintiffs also believe and therefore allege that in the documents and papers filed in the state court foreclosure proceeding SPS has failed to disclose or account for any of these payments.

38. The Plaintiffs allege that in addition to improperly collecting and retaining Trustee Disbursement checks SPS has improperly assessed the Plaintiffs' mortgage loan with improper, unauthorized, unlawful, illegal and unreasonable fees and charges. The Plaintiffs allege that these fees and charges have been added to their loan account by SPS in an attempt to collect and unlawfully increase the SPS mortgage servicing revenues from this case. To the extent these fees and charges were not applied for and approved by this Court, the Plaintiffs allege that they are per se unreasonable and unlawful.

39. A loan transactional history provided to the Plaintiffs by SPS in this case and dated February 5, 2008 specifically listed and identified the following "corporate advance" fees and "charges" against the Plaintiffs' mortgage loan, which fees and charges have not been applied for or approved by this Court or otherwise noticed out in this case:

<u>Date</u>	<u>Fee Description</u>	<u>Amount</u>
July 5, 2005	Broker's Price Opinion	\$85.00
July 6, 2005	Bankruptcy Attorney Fees	\$125.00
July 6, 2005	Foreclosure Legal Costs	\$149.28
July 29, 2005	Foreclosure Attorney Fee	\$545.00
August 18, 2005	Litigation Fee	\$125.00
September 14, 2005	Bankruptcy Attorney Fees	\$125.00
January 6, 2006	Broker's Price Opinion	\$85.00
July 13, 2006	Broker's Price Opinion	\$85.00
May 30, 2007	Bankruptcy Attorney Fees	\$50.00
June 25, 2007	Bankruptcy Attorney Fees	\$50.00
August 29, 2007	Bankruptcy Attorney Fees	\$50.00
September 19, 2007	Broker's Price Opinion	\$85.00

40. The loan transactional history also indicates the "Corporate Advance Balance" prior to the Plaintiffs' bankruptcy filing was \$2045.96. On February 5, 2008 the "Corporate Advance Balance" was \$4,205.74, revealing an increase of \$2,159.78 in sums SPS charged to the Plaintiffs post-petition without taking into account the amount of these "corporate advances" that were paid down by SPS from funds received from the Chapter 13 Trustee and the Plaintiffs during the course of the Chapter 13 case.

41. The Plaintiffs received a monthly mortgage statement and demand for payment from SPS, approximately two months after the foreclosure action was commenced, said statement being dated January 16, 2008. The said statement includes the sum of \$4,205.74 identified as "Expenses paid by Servicer" and included in the breakdown of the "Total Amount Due." The said amount was followed by a footnote which reads, *"If there is a balance under Expenses Paid By Servicer, it means that we have paid certain expenses on your behalf due to the delinquent status of your account. You are responsible to reimburse us for these amounts plus interest, which may be billed at the note rate."*

42. The Plaintiffs furthermore allege that the three Broker's Price Opinion Fees identified herein are unauthorized and unapproved by the Court, and are therefore illegal and are otherwise excessive and unreasonable as a matter of law. The Plaintiffs also allege that since SPS has never applied to the Court for the approval of these fees and charges all of the same are unreasonable per se.

43. The loan transactional history provided to the Plaintiffs by SPS in this case and dated February 5, 2008 also indicates a negative Escrow Advance Balance in the amount of \$7131.44 when the debtors filed their Chapter 13 case. On February 5, 2008, however, this same document indicated that the Escrow Account had a negative balance of \$11,289.78.

44. The Plaintiffs allege that at all times relevant herein their regular and monthly contractual payment to SPS was \$1272.28 and that the same is reflected in their monthly mortgage statements from SPS. The Plaintiffs allege that SPS never provided them with an annual escrow analysis statement or with any notice of an increase in their mortgage payment in order to provide for any escrow for taxes and insurance.

45. The Plaintiffs have been seriously and permanently damaged by the actions of SPS, as agent for the other Defendants, and that as a result of such actions they have been and continue to be forced to expend their time and expenses toward the defense of this contested matter to enforce their rights and have incurred substantial and significant legal fees and expenses in connection therewith. The Plaintiffs have feared and do fear losing their home.

**First Claim for Relief
(Declaratory Judgment as to Agreed Order)**

46. The allegations in paragraphs 1 through 45 of this complaint are realleged and incorporated herein by this reference.

47. The Plaintiffs allege that the Agreed Order entered in this case was procured by the fraud, misrepresentations and misconduct of SPS as alleged herein.

48. The Plaintiffs allege that the said Order was entered within one (1) year of the date of the filing of this Adversary Proceeding and the pending Motion in the base case.

49. The Plaintiffs allege that as a result of the allegations herein the said Order should be declared void and set-aside pursuant to the provisions of Rule 9024 of the Bankruptcy Rules and Rules 60(b)(1), 60(b)(2) and 60(b)(3) of the Federal Rules of Civil Procedure.

50. The Plaintiffs also allege that since the Order is subject to avoidance under Bankruptcy Rule 9024 this Court should enter an Order enjoining the state court foreclosure action until this adversary proceeding is concluded.

**Second Claim for Relief
(Reconsideration of the Proof of Claim)**

51. The allegations in paragraphs 1 through 50 of this complaint are realleged and incorporated herein by this reference.

52. The Plaintiffs are informed and believe and therefore allege that the principal balance of the mortgage note and the arrearage balance as set forth in the Proof of Claim filed in this case by SPS were both over-stated and incorrect.

53. The Plaintiffs allege that at the time the said Proof of Claim was filed the Chapter 13 attorney had no reason to believe or suspect that the said claim was not accurate.

54. As a result of the allegations herein, the Plaintiffs allege that good cause has been established for this Court to reconsider the said Proof of Claim.

55. Section 502(j) of the Bankruptcy Code provides that "a claim that has been allowed or disallowed may be reconsidered for cause." This Section of the Code further provides that "a reconsidered claim may be allowed or disallowed according to equities of the case."

56. The Plaintiffs allege that the "equities" of this case require this court to permit and indeed order the reconsideration of the SPS Proof of Claim

**Third Claim for Relief
(Lack of Standing)**

57. The allegations in paragraphs 1 through 56 of this complaint are realleged and incorporated herein by this reference.

58. The Plaintiffs are informed and believe and therefore allege that at no time relevant to the allegations herein was SPS the actual "holder" and the lawful "assignee" of the mortgage note originally signed by the Plaintiffs.

59. The Plaintiffs are also informed and believe and therefore allege that at no time relevant to the allegations herein was BONY or the Trust the actual "holder" and the lawful "assignee" of the mortgage note originally signed by the Plaintiffs.

60. The Plaintiffs allege that as a result thereof the Defendant had no constitutional standing to file the sworn Proof of Claim, the Motion for Relief from Stay, or to otherwise participate in this Chapter 13 proceeding.

61. The Plaintiffs allege that as a result thereof the Defendants should be ordered to pay back to the Chapter 13 Trustee all funds received on the arrearage claim and all funds received from the Plaintiffs in the form of direct mortgage payments.

Fourth Claim for Relief (Violation of the Automatic Stay)

62. The allegations in paragraphs 1 through 61 of this complaint are realleged and incorporated herein by this reference.

63. The actions of the Defendants in imposing improper, unauthorized and unapproved fees and charges to the Plaintiffs' mortgage loan account constitute a gross and willful violation of the automatic stay as set forth in 11 U.S.C. Section 362(a)(3).

64. The imposition of the said unapproved Broker's Price Opinion fees constitutes unlawful and illegal bankruptcy fees in violation of the automatic stay and inconsistent with the decision of this court in *In re Stark*, 242 B.R. 866 (W.D.N.C. 1999).

65. As a result of the above violations of 11 U.S.C. Section 362(a), the Defendants are liable to the Plaintiffs for actual damages, punitive damages and legal fees under Section 362(k)(1) of the Bankruptcy Code.

66. These acts of the Defendants are also violations of the North Carolina Consumer Protection Act. Under the provision of Section 75-52 of the North Carolina General Statutes the Defendant was and is prohibited from engaging in any conduct the natural consequences of which is to oppress, harass or abuse any person. The actions and conduct of the Defendants were oppressive and abusive in violation of the applicable provisions of Article 2 of Chapter 75 of the North Carolina General Statutes. Such violations of state law further support imposing punitive damages for the automatic stay violations identified herein.

67. All actions of the Defendants as described in this Complaint were done in bad faith and as such were violations of the covenant of good faith and fair dealing contained and implied in the Deed of Trust and mortgage note. Such bad faith conduct and unfair dealing further supports imposing punitive damages for the stay violations.

68. The Plaintiffs are therefore moving this court to award them substantial actual and punitive damages and their reasonable legal fees as a result of the allegations herein.

Fifth Claim for Relief (Failure to Disclose Sharing of Fees)

69. The allegations in paragraphs 1 through 68 of this complaint are realleged and incorporated herein by this reference.

70. The Plaintiffs are informed and believe and therefore allege that SPS has entered into an agreement with a third-party who is not a Defendant in this case for the sharing of compensation received or to be received by SPS from the corporate advance fees and charges that SPS has added to the Plaintiffs' mortgage loan as alleged herein.

71. The Plaintiffs allege that SPS has willfully failed to advise the Chapter 13 Trustee or this court of the existence of such agreement or of the detailed terms and conditions of such agreement.

72. The Plaintiffs are informed and believe and therefore allege that SPS has in fact shared and disbursed to the said third-party some of the funds it has collected from the Chapter 13 Trustee and from the Plaintiffs with respect to the unlawful, illegal and unreasonable fees and charges as set forth in this complaint.

73. The Plaintiffs allege that such undisclosed sharing of compensation constitutes a clear violation of the applicable provisions of Rule 2016(a) of the Federal Rules of Bankruptcy Procedure.

74. The Plaintiffs are informed and believe and therefore allege that in the Motion for Relief from the Automatic Stay filed in this case SPS specifically asked this court to approve fees and expenses as an allowed administrative expense under Section 503 of the Bankruptcy Code.

75. The Plaintiffs allege that SPS shared or agreed to share some of the \$600.00 in administrative claims approved by this court with a non-disclosed third-party provider.

76. The Plaintiffs allege that Section 504 of the Code provides that any person or entity receiving compensation under Section 503 of the Code "may not share or agree to share any such compensation or reimbursement with any person or any compensation or reimbursement received by another person under such sections" without full and complete disclosure.

77. The Plaintiffs allege that SPS willfully and intentionally violated these mandatory rules and statutory provisions by the sharing of some of the \$600.00 in compensation approved as an administrative claim by this court.

**Sixth Claim for Relief
(Sections 105 and 506 of Title 11 of the United States Code)**

78. The allegations in paragraphs 1 through 77 of this complaint are realleged and incorporated herein by this reference.

79. The actions of the Defendants in charging post-petition fees and expenses as alleged herein without any prior notice to or approval by this Court constitute willful, intentional, gross and flagrant violations of the provisions of Sections 105(a) and 506(b) of Title 11 of the United States Code and Rule 2016(a) of the Federal Rules of Bankruptcy Procedure. Rule 2016(a) provides, in pertinent part, that: "An entity seeking interim or final compensation for services, or reimbursement of necessary expenses, from the estate shall file an application setting forth a detailed statement of (1) the services rendered, time expended and expenses incurred, and (2) the amounts requested."

80. As a result of the above violations, the Defendant is liable to the Plaintiffs for actual damages, punitive damages and legal fees.

**Seventh Claim for Relief
(Improper and Unauthorized Fees)**

81. The allegations in paragraphs 1 through 80 of this complaint are realleged and incorporated herein by this reference.

82. The actions alleged herein are acts in violation of Sections 362(a)(3) and 506(b) of

Title 11 of the United States Code and Rule 3001(e) of the Bankruptcy Rules as the said claims of the Iredell County Tax Collector have been used to form the basis for a purported negative escrow account balance when in fact and in law the acquisitions of such claims by payment granted to the Defendants no greater rights than would have been held by the said Tax Collector.

83. The Plaintiffs allege that the collection and the attempt to collect said taxes by SPS violate the provisions of 362(a)(3) and 506(b) of the Code and Rule 3001(e) of the Bankruptcy Rules.

84. The Plaintiffs further allege that the misconduct of the Defendants is aggravated by their failure to file the mandatory notice of transfer or assignment of a proof of claim for the said taxes as required by Rule 3001(e)(1) of the Bankruptcy Rules.

85. The Plaintiffs are informed and believe and therefore allege that the Defendants have attempted to accelerate the collection of the tax claim by adding the same to the escrow feature of the mortgage loan in this case and that such action has been prejudicial to the other creditors in this case and has caused substantial damages to the Plaintiffs.

86. The Plaintiffs are also informed and believe and therefore allege that said fees are also in violation of the ruling of this Court in Smith v. TMS Mortgage (Case No. 00-31220) and the Order in Aid of Case Administration entered by this Court on April 6, 2001.

87. As a result of the above violations, the Defendants are liable to the Plaintiffs for actual damages, punitive damages and reasonable legal fees.

Eighth Claim for Relief (Contempt of Court Orders)

88. The allegations in paragraphs 1 through 87 are realleged and incorporated herein by this reference.

89. The Plaintiffs allege that the conduct of the Defendants in charging and assigning legal fees and expenses to their mortgage loan "before" such fees were approved by this Court and in an amount "in excess" of the fees and expenses typically approved by this Court constitutes actions in contempt and in violation of the Order entered by this Court on or about March 26, 2007. The Plaintiffs also allege that such conduct also is in direct violation of the Order Confirming the Chapter 13 Plan entered in this case on _____.

90. The Plaintiffs allege that this Court has authority under Section 105(a) of Title 11 of the United States Code this Court has authority to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title."

91. The Plaintiffs allege that this Court should impose serious and severe sanctions against the Defendant for assessing and charging the Plaintiffs' loan account with legal fees and charges in excess of the amounts requested and actually approved by this court.

Ninth Claim for Relief (Breach of Contract)

92. The allegations in paragraphs 1 through 91 of this complaint are realleged and incorporated herein by this reference.

93. The Plaintiffs allege that to the extent that portions of the Order entered by this Court on March 26, 2007, were valid, which validity is denied, then such terms were the result of a negotiated settlement between the Plaintiffs' Chapter 13 attorney and the attorney for SPS.

95. The Plaintiffs allege that as consideration for the acceptance of the terms of the said settlement their Chapter 13 attorney agreed that SPS would charge and that the Plaintiffs would repay legal fees and expenses of exactly \$600.00.

96. The Plaintiffs allege that their Chapter 13 attorney relied upon the promises and representations of SPS in agreeing to the terms and conditions of the Agreed Order.

97. The Plaintiffs are informed and believe and therefore allege that at the time these negotiations were active between the parties SPS already knew that it had charged fees and expenses to the Plaintiffs' loan in excess of the amounts represented to the Plaintiffs' Chapter 13 attorney, the Chapter 13 Trustee, and this Court.

98. The Plaintiffs allege that such conduct constituted an anticipatory breach of the settlement agreement between the parties.

99. The Plaintiffs allege that such conduct lead to an actual breach of the settlement agreement by the collection and payment of some or all of the additional fees.

100. The Plaintiffs are informed and believe and therefore allege that the terms and conditions of their Chapter 13 Plan specifically provided that the Defendant could not charge any fees or expenses to the mortgage loan without proper notice, the right to a hearing, and the entry of an Order approving the same.

101. The Plaintiffs allege that the Confirmation of the Plan created a new and binding contract between the Plaintiffs and Defendant.

102. The Plaintiffs allege that the conduct of the Defendants as alleged herein is consistent with a breach of the terms of the Confirmed Plan.

103. The Plaintiffs allege that the conduct of the Defendants in this matter was in bad faith, was fraudulent, and was otherwise improper.

104. The Plaintiffs allege that as a result of such conduct they are entitled to the award of damages, costs and reasonable legal fees from the Defendants.

105. The Plaintiffs are informed and believe and therefore allege that this Court should impose punitive damages in order to deter the Defendants from such future conduct in this case and in other cases before this Court.

Tenth Claim for Relief (Secured Status of the Trust)

106. The allegations in paragraphs 1 through 105 of this complaint are realleged and incorporated herein by this reference.

107. The Plaintiffs are informed and believe that as of the date of the filing of this Chapter 13 case neither SPS, BONY or the Trust was the lawful "holder" and the due "assignee" of the mortgage note executed by the Plaintiffs.

108. The Plaintiffs are informed and believe that as a result of the allegations herein none of the Defendants had the legal right under applicable North Carolina law to claim a secured status in this case.

109. The Plaintiffs believe and therefore allege that as of the date of the filing of this case the actual and original mortgage note had been assigned in blank and therefore constituted a "bearer" instrument as that term is defined by Article 3 of the North Carolina Uniform Commercial Code.

110. The Plaintiffs allege that under applicable North Carolina law the only party who has standing to enforce a "bearer instrument" is the lawful holder and assignee thereof.

111. The Plaintiffs allege that none of the Defendants held the mortgage note under the

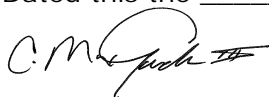
conditions and pursuant to the allegations herein as of the date of the filing of this petition.

112. The Plaintiffs therefore allege that none of the Defendants had the right under applicable law to claim a secured status in this case and to the extent they attempted to create such status post-petition said acts were and are prohibited by the automatic stay.

WHEREFORE, the Plaintiffs having set forth their claims for relief against the Defendant respectfully pray of the Court as follows:

- A. That the Plaintiffs have and recover against the Defendant a sum to be determined by the Court in the form of actual damages;
- B. That the Plaintiffs have and recover against the Defendant a sum to be determined by the Court in the form of statutory damages;
- C. That the Plaintiffs have and recover against the Defendant a sum to be determined by the Court in the form of punitive damages;
- D. That the Plaintiffs have and recover against the Defendant all reasonable legal fees and expenses incurred by their attorney;
- E. That the Plaintiffs be granted all of the Declaratory Relief as requested in the claims asserted in this complaint;
- F. That this verified complaint be treated as an affidavit in support of the Plaintiffs' Request for a Preliminary Injunction enjoining the foreclosure proceeding;
- G. That this verified complaint be treated as a Motion pursuant to Rule 7065 of the Bankruptcy Rules and Rule 65 of the Federal Rules of Civil Procedure for a Preliminary Injunction that stays the pending state court foreclosure until a final judgment is entered in this case; and
- H. That the Plaintiffs have such other and further relief as the Court may deem just and proper.

Dated this the _____ day of March, 2008.



O. Max Gardner III
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**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
WILKESBORO DIVISION**

IN THE MATTER OF:

NAME:

**CHAPTER 13 CASE NO.
OUR FILE NO.**

ADDRESS:

SSN:

DEBTORS.

DEBTOR AND WIFE,

Adv. Proc. No.

Plaintiffs,

versus

**SELECT PORTFOLIO SERVICING, INC.
F/K/A FAIRBANKS CAPITAL CORPORATION,
THE BANK OF NEW YORK AS TRUSTEE
UNDER EQCC TRUST 2001-2 and
EQCC TRUST 2001-2,**

Defendants.

MOTION FOR APPROVAL OF SETTLEMENT

COME NOW the above-named debtors, by and through their attorney of record, and respectfully move the Court pursuant to Section 1329 of Title 11 of the United States Code, Rule 9019 of the Rules of Bankruptcy Procedure, and Rule 9013-1 of the Local Bankruptcy Rules for the entry of an order approving the settlement agreement in this contested matter and in support hereof allege and say that:

A. The Plaintiffs ("Claimants") filed this adversary proceeding against the Defendants on _____ for various alleged acts of improper mortgage servicing, improper fees and stay violations.

B. The Defendants were served with the Summons and Complaint.

C. Defendants have not yet filed an answer in this proceeding but _____ and _____ have appeared as counsel of record for the Defendants.

D. The parties have reached an agreement to resolve the issues between them and to settle the pending complaint.

E. The obligations of the parties as set forth in the settlement are as follows:

1) The Mortgage Servicer will agree to enter into a loan modification with the Plaintiffs for the entire mortgage, to reduce the payoff to \$____,000.00, including all pre- and post-petition arrears, fees and charges, with sum repayable at 0% interest, with a monthly

payment of \$_____ each month for _____ months and with a balloon payment due on the 37th month. The Plaintiffs will refinance the balloon portion of the loan on or before the 37th month. The loan modification as contemplated herein must be signed by both the Plaintiffs. The Deed of Trust securing this obligation will remain in full force and effect until the obligation is paid in full as provided for in this agreement and the Williams hereby waive any and all defenses to the validity of the said Deed of Trust subsequent to the execution of this agreement. To that extent, the claim of the Mortgage Servicer shall be at all times deemed a secured claim until and unless this agreement is fully performed by the Debtors.

2) All monthly payments are due on the 25th day of the month. Plaintiffs will make all payments directly to SPS and not through their Chapter 13 plan. If payments are not received on the 25th day of the month, then a default will occur. SPS will send written notice of the default to the Plaintiffs with a copy to O. Max Gardner III. SPS will request a delivery receipt from the post office or other delivery service. The notice will be deemed received when mailed. The Plaintiffs will have 18 days from the mailing date to tender the past due payment to SPS. If the Plaintiffs fail to do so, then the automatic stay will lift and SPS will be released from the Chapter 13 Bankruptcy Case to proceed with a foreclosure of the Property without further order of the court. The initial payment date will be due during the first month that falls 45 days from the date of the execution of this Agreement. By way of example, if this Agreement is signed by all of the parties on October 10 of 2008 then the first monthly payment provided for herein shall be due during the month of November of 2008 and no later than the 25th day of that month. On the other hand, if this Agreement is not signed by all of the parties until October 25, 2008, then the first monthly payment provided for herein shall be due during the month of December of 2008 and no later than the 25th day of that month. The parties agree that this Agreement shall be fully executed by all parties no later than the 31st day of October of 2008.

3) The Plaintiffs will be required to keep real estate taxes current and insurance in force at all times during the pendency of this Agreement. If taxes and/or insurance lapse, Plaintiffs understand and agree that this lapse will trigger the default remedies as set forth in paragraph 2. In conjunction herewith, Plaintiffs must provide in their new Chapter 13 plan (see paragraph number 14) for the repayment of all real estate taxes on the Property and furthermore must provide The Mortgage Servicer with proof of insurance on or before execution of the loan modification agreement.

4) No additional fees or charges will be assessed for any matter related to the execution, closing and recording of the loan modification. No additional fees or expenses will be added to the loan for any other matter or thing related to or arising out of this case or the present Chapter 13 case. No additional fees or charges of any type will be assessed to or charged against this loan in the future without strict compliance with Rule 2016(a) of the Federal Rules of Bankruptcy Procedure either during the pendency of the present and future Chapter 13 case or at any time after discharge to the extent the services were performed during the case. The Mortgage Servicer reserves the right upon notice to the Plaintiffs and the right to object to seek any fees authorized by the loan instruments for any services that are rendered after the execution of this Agreement and that are not discharged by the terms herein.

5) The Plaintiffs and the Mortgage Servicer agree that the arrearage claims identified on the online records of the Trustee as claims numbered 22 and 26 in favor of Nationscredit Financial Corporation will not be reasserted in the new Chapter 13 case as said claims are deemed to be included in the agreed amount owed.

6) The Plaintiffs and the Mortgage Servicer agree that the balance of the debt over and above the \$_____,000.00 loan balance stated herein will be discharged in the new Chapter

13 Case, provided that the Plaintiffs make all of the required payments to the Mortgage Servicer included herein. The Mortgage Servicer will not file any objection to the Chapter 13 Plan in the new case to be filed by the Debtors unless it is not consistent with this agreement. However, the terms of this agreement are contingent on the Debtors filing a new Chapter 13 case no later than December 1, 2008 and obtaining an Order of Confirmation in that case.

7) Upon payment of the \$_____,000.00 loan balance in full, SPS will report the loan as "paid in full" to all three of the national credit reporting agencies. SPS agrees that subsequent to the execution of this Agreement SPS will report to the three national credit reporting agencies that the total amount of the indebtedness is \$_____,000.00 and furthermore will report the status of the monthly payments as provided for in this Agreement and as actually made by the Plaintiffs. By way of example, if the first monthly payment is due in December of 2008 and is received prior to the 25th day of that month then and in that event the Mortgage Servicer shall report the monthly payments as current to the three national consumer reporting agencies (Equifax, Experian and Trans Union). Contemporaneously with the execution of this Agreement the Mortgage Servicer shall submit a Uniform Data Report (a UDR) to the said creditor reporting agencies that will provide for the removal of any negative trade-line information inconsistent with the terms of this Agreement.

8) SPS will pay \$5,000.00 to Plaintiffs' counsel as legal fees and will return to the Plaintiffs the \$6,821.00 currently being held in an escrow account. Both of these checks shall be made payable to O. Max Gardner III, Trust Account. The funds in the amount of \$6,821.00 are unapplied funds received from the Chapter 13 Case Trustee in the form of claim disbursements. SPS has been holding these funds in a Suspense Account. Plaintiffs' Counsel will make arrangements to obtain these funds on behalf of the Plaintiffs to apply to his outstanding legal fees and expense and to the legal fees and expenses incurred by co-counsel, P. Wayne Sigmon of the Sigmon Law Firm in Gastonia, North Carolina. SPS shall release these funds to O. Max Gardner III within 5 days of the date of the execution of this Agreement.

9) The funds identified in Section 8 above will be deemed the property of the Plaintiffs and the Servicer will release all claims thereto. The parties also agree that any funds held in the Trust Account of O. Max Gardner III for the benefit of the Plaintiffs shall be deemed the sole and separate property of the Plaintiffs and SPS hereby releases any claims to any of the said Trust funds.

10) The Plaintiffs will prepare and file a Motion for Approval of this settlement with notice of opportunity for hearing to be served case-wide in the Chapter 13 Case on all parties in interest.

11) The Adversary Proceeding will be dismissed with prejudice within 10 days after the Settlement Agreement is executed by all parties and the loan modification instruments are fully executed.

12) SPS will dismiss the state foreclosure action, pending as case number _____ in _____ County, and the motion for relief from stay filed in the Chapter 13 Case within the same time period as set forth in paragraph 11. Both actions will be dismissed without prejudice.

13) The Relief from Stay Agreed Order filed in the pending Chapter 13 Case on _____ will be vacated and set aside. The Plaintiffs will file a motion to vacate the said order promptly after the execution of this Agreement.

14) Within 30 days of full compliance with the matters set forth herein, the Plaintiffs shall file a voluntary dismissal without prejudice of their pending Chapter 13 case and

simultaneously therewith shall file a new Chapter 13 case for a term of at least 36 months. The claim of SPS shall be scheduled as secured claim in that case in the sum of \$_____,000.00 repayable without interest as provided for herein.

15) The loan modification shall not be conditioned on the entry of a discharge order in the new Chapter 13 case. If the contractual amount is paid before the Chapter 13 case is discharged, then all of the obligations shall be extinguished.

16) The Plaintiffs agree to keep the terms and provisions of this Agreement confidential and shall not divulge the contents to third-parties outside of their immediate family members, tax preparers, accountants, and attorneys, except as necessary in seeking approval from the Bankruptcy Court, to enforce this Agreement or to comply with any laws or regulations of the United States or any state thereof, other than to disclose that the Adversary Proceeding has been resolved.

17) The parties will agree to waive arbitration as to any future disputes related in any way to this loan and the servicing thereof or to any matter or thing arising out of the relationship of the parties.

18) Williams, on behalf of themselves, their heirs, successors and assigns, hereby remise, release, acquit, and forever discharge the Defendants, as well as their officers, directors, employees, agents, assigns, affiliates, predecessors in interest, and successors in interest, and any holder of the Note and Deed of Trust for which The Servicer provides servicing, including without limitation the Trustee, the Trust, and Nationscredit Financial Services Corporation of and from any and all liability, obligation, claims, actions, causes of action, demands, damages, punitive damages, treble damages, statutory penalties, stay violations, costs, attorney's fees, and/or expenses whatsoever arising out of or relating to the Note or the Deed of Trust, whether such claims or causes of action are known or unknown, including but not limited to all claims alleged in the Adversary Proceeding.

19) Except as provided herein, the Servicer, on behalf itself and its successors and assigns, hereby remises, releases, acquits, and forever discharges Williams and their heirs and successors, of and from any and all liability, obligation, claims, actions, causes of action, demands, damages, punitive damages, treble damages, statutory penalties, costs, attorney's fees, and/or expenses whatsoever arising out of or relating to the Note or the Deed of Trust, whether such claims or causes of action are known or unknown; provided, however, nothing in this Agreement shall release or impair the right of the Servicer or its successors or assigns to pursue foreclosure, acquire title to the Property through foreclosure, or receive foreclosure or insurance proceeds in connection with the Property as provided for herein and in the Loan Modification Agreement.

20) The parties agree that this Agreement constitutes settlement of doubtful and disputed claims, and that nothing stated herein shall constitute an admission of liability on the part of either party, such liability being expressly denied by the same.

21) This Agreement constitutes the entire agreement between the parties hereto, and shall inure to the benefit of the predecessors, successors and assigns of each. The parties hereto further state that they have carefully read the foregoing, understand the contents thereof, and each have been independently represented by counsel in entering this Agreement.

22) This Agreement may be executed in one or more counterparts, each of which shall be deemed to be an original and all of which shall constitute one and the same instrument.

F. The debtors are therefore requesting the Court approve this settlement as set forth herein, and to allow the parties to enter into and execute the same in full settlement of this contested matter.

G. The debtors are also moving the court for such other and additional relief as to the court may seem just and proper.

WHEREFORE, the debtors respectfully pray of the Court as follows:

A. That the debtors' motion for approval of the Settlement Agreement, be granted and approved, for the parties to enter into and execute the same in full settlement of this contested matter;

B. That the attorney fees and expenses as set forth herein be approved; and

C. That the debtors have such other and further relief as to the Court may seem just and proper.

Dated this the _____ day of _____, 2009.



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(704) 487-0616 / FAX (704) 487-0619
maxgardner@maxgardner.com

Wayne Sigmon
The Sigmon Law Firm

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME:

**CHAPTER 13 CASE NO.
OUR FILE NO.**

ADDRESS:

SSN:

DEBTORS.

Adversary Proc. No. _____

Plaintiffs,

versus

Defendant.

**REQUEST FOR PRODUCTION
OF DOCUMENTS FROM THE PLAINTIFFS TO DEFENDANT
(Improper Fees Case)**

COME NOW the above-named Plaintiffs a, by and through their attorney of record, and herewith serve upon the DEFENDANT(S) in this case the following request for the production and inspection of documents pursuant to Rules 9014 and 7034 of the Rules of Bankruptcy Procedure and Rule 34 of the Federal Rules of Civil Procedure as provided for and set forth in the foregoing rules.

DEFINITIONS AND INSTRUCTIONS

A. The term "Document" means all writings of any kind, including the originals and all other non-identical copies, whether different from the originals by reason of any notation made on such copies or otherwise, including but not limited to correspondence, memoranda, notes, diaries, desk or other calendars, statistics, letters, telegrams, minutes, business records, personal records, accountants' statements, account statements, contracts, reports, credit reports, studies, checks, statements, receipts, invoices, bills, return checks, summaries, pamphlets, books, inter-office and intra-office communications, notations of any sort of conversations or meetings, telephone call meetings or other communications, written agreements, bulletins, printed matter, computer printouts, teletypes, telefaxes, invoices, worksheets, all drafts, alterations, modifications, changes and amendments of any kind with respect to any of the foregoing, graphic or oral records or representations of any kind (including, without limitation, tapes, cassettes, discs, recordings, electronic mail records, computer memory records such as hard disk drives and master back-up tapes, diskettes, or other devices such as zip drive records).

B. The term "act" as used herein includes acts of every kind and description.

C. The term "identify" or "describe" when used in reference to a "document" means to state:

- a. The type of document (e.g., letter, memorandum, report, electronic mail records, notes, etc.);
- b. The date of the document;
- c. The name of the parties or parties who originated the document, their past or present position with the respondents, their general duties and responsibilities, their current physical location with the company, and their e-mail, telephone number and telephone extension;
- d. The name and address of the current custodian of the document;
- e. The name and current address of each signatory thereon;
- f. The reason, in detail, for the preparation of the document;
- g. The subject or subjects covered by the document;
- h. The names, business addresses and titles of the persons to whom the document writing was directed; and
- i. The name and address and title of each person who originated, read or received the document.

D. The term "identify" as used herein in connection with a "person" or "persons" means to state the names, titles, the present employer of such "person" or "persons," the relationship of such person or persons to any of the respondents, and such person's current business address and business telephone number.

E. The term "identify" as used herein with respect to or in connection with an "act" means to:

- a. Furnish the date and place of the act;
- b. Identify the person acting, the person for whom the act was performed, and the person against whom the act was directed; and
- c. Describe in detail the act.

F. The terms "describe" or "state" as used herein mean:

- a. Describe or state fully by reference to underlying facts rather than by ultimate facts or conclusions of law;
- b. Particularize as to the:
 - i. Time;
 - ii. Date;
 - iii. Manner; and
 - iv. Place.

G. The term "oral communication" as used herein means and includes any face-to-face conversation, meeting, conference, telephone conversation, cell-phone conversation, computer conversation with voice mail, or any one for more of these or related devices.

H. The term "person" or "persons" as used herein means and includes all natural persons, public and private corporations, associates, wholly owned affiliates or subsidiary corporations or any other form of a business association, and any other type of entity and the agents, employees, officers, deputies and representatives thereof.

I. The terms "you" or "your" as used herein shall refer to any one or all of the named DEFENDANTS and any related or affiliated companies associated in any way therewith.

J. All requests shall be deemed to include any documents made by, held by, or maintained in the files of any predecessor, successor, employee, agent or assignee of either one or all of the respondents.

K. The term "the transaction" or "the transactions" or "account" or "accounts" when used herein without qualification means the transactions and accounts between or among the Plaintiffs and the named DEFENDANTS and all related activities and agents or assigns of either party.

L. Each of the following requests for production of documents is intended to be a continuing request to produce and answer. As a result, the Plaintiffs hereby demand that, in the event that at any later date you obtain any additional facts, or form any conclusions, opinions or contentions different from those set forth in your responses herein, then you shall amend your answers to such responses and document production promptly and sufficiently in advance of any trial date, to fully set forth such differences and to produce any documents in connection therewith.

REQUEST FOR PRODUCTION OF DOCUMENTS

1. Provide copies of all property preservation or inspection reports prepared since the filing of the Chapter 13 case and within 12 months before the filing date. Please also attach copies of all digital photographs related thereto.

RESPONSE:

2. Provide a statement of the name and address of all companies or individuals providing such property preservation or inspection services.

RESPONSE:

3. Please state the amount of the fees charged and the fees paid for such property preservation or inspection services and attach copies of the front and back of all checks issued in payment thereof.

RESPONSE:

4. Provide copies of all current guidelines for any mortgage servicing charges issued by the National Association of Mortgage Field Services, Inc., by the Trustee for the securitized trust that currently owns this loan, or by any investor who provides such instructions to you.

RESPONSE:

5. Provide a complete and accurate itemized payoff statement for the subject loan in accordance with Sections 45-36.4(11) and 45-36.7 of the North Carolina General Statutes.

RESPONSE:

6. Please state the date on which the payoff statement was prepared and the payoff amount as of that date, including the amount by type of each fee, charge, or other sum included within the payoff amount and the name or names and addresses and titles of the parties producing the statement.

RESPONSE:

7. Please attach copies of all documents or data used in connection with the calculation of the payoff statement. You should also attach copies of all invoices and checks evidencing the payment of any fees or charges arising out of or in any way related to the subject loan

and all collection notes, memos, emails, electronic messages, or any other similar records related thereto.

RESPONSE:

8. Provide attach a copy of all rules, regulations and written procedures and protocols used in connection with the preparation of a payoff statement for a consumer who is also a debtor or who has been a debtor in a case under Title 11 of the United States Code.

RESPONSE:

9. Provide copies of all Broker Price Opinions for the subject property since the petition date and at any time within 12 months of the petition date. Also, produce copies of all digital photographs related to any such Opinions.

RESPONSE:

10. Provide copies of all Broker Price Opinion statements, bills and invoices and the front and back of all checks issued in payment thereof.

RESPONSE:

11. Provide copies of all internal quality control rules and guidelines used to rate the appraisers preparing the Broker Price Opinions.

RESPONSE:

12. Provide a statement of all fees and expenses paid or advanced to the mortgage loan for such Broker Price Opinions since the petition and for 12 months before the petition date.

RESPONSE:

13. Provide copies of all collection notes, records or documents related to the servicing of this loan for the period beginning 12 months before the petition date and ending on the date you submit your responses to this discovery.

RESPONSE:

14. Please produce a complete life of loan transaction history for the subject mortgage with all transaction codes, with a master list of all such codes, and with a definitional description in plain English for each such code.

RESPONSE:

15. Provide a printout of all data entries for tracking property preservations, property inspections, and Broker Price Opinions for timeliness and for consistency of data. Also, please attach the standard time-lines or benchmarks that have been designated as applicable to your servicing of this loan and attach copies of all time reports that you have produced and filed with any third party.

RESPONSE:

16. Provide copies of all operational guidelines for any software program or programs that you use in connection with the servicing of this loan.

RESPONSE:

17. Provide copies of all communications on NewTrak, NewImage or NewInvoice or any other similar software program arising out of or related to the servicing of this loan at all times since you received the first notice of the bankruptcy filing.

RESPONSE:

18. Provide copies of all documents and data related to the electronic payment of invoices for property preservations, property inspections, Broker Price opinions and legal fees.

RESPONSE:

19. Provide copies of any documents related to any communications with any Third Party Providers of any mortgage-related services since the filing of this bankruptcy case.

RESPONSE:

20. Provide copies of all data entries in the communication and comment reporting system related to any loss mitigation procedures related to this mortgage. Also, produce copies of all approved Investor Loss Mitigation Options and the Loss Mitigation Rules.

RESPONSE:

21. Provide copies of all assignments of the mortgage loan from the originator of the loan to the current holder. Also, state the name and address of the current party who has physical possession of the original mortgage note. Finally, state whether or not you contend that the mortgage note in this case is a negotiable instrument under the Uniform Commercial Code and state your specific reasons for your response.

RESPONSE:

22. Provide copies of all data entries in the NewInvoice data system related to this mortgage. Also, please attach copies of all invoices issued to and checks received from any third-parties with respect to any type of charge or expense advanced or tracked against this loan.

RESPONSE:

23. Provide copies of all data entries for any restricted corporate advance accounts or files related to this mortgage. Please explain the basis for each such restricted corporate advance and if any such advances have been recovered from a third party then state the name of the party, the amount of the recovery, the date of the recovery, and produce all documents related thereto.

RESPONSE:

24. Provide copies of all applications for employment submitted by any Vendor who has performed any services related to this mortgage. Also, please attach any documents related to any type of fee or charge that you have paid or received or that you have knowledge of related to the release of information to any attorney for any bankruptcy-related service involved in the bankruptcy case.

RESPONSE:

25. Provide copies of all documents related to any legal services provided or rendered with respect to this mortgage since the petition date, including bills, statements, payment invoices, time and expense records, and the front and back of all checks in payment thereof.

RESPONSE:

26. Provide copies of any statement, invoice, or bill containing the name and address of each and every attorney and/or law firm providing such services.

RESPONSE:

27. Provide copies of any data regarding the amount of money paid for legal fees and expenses to any attorney and/or law firm since the petition date including the amount and date of each payment. This question includes any type of document release or document acquisition fee. In addition, if any legal fees have been shared between or among lawyers or law firms then attach copies thereof and of all agreements or written understandings with respect thereto.

RESPONSE:

28. Provide copies of any transactional history (i.e., showing the date and amount of payment) related to the source of funds used to pay for property preservation services, property inspection services, Broker Price Opinions, and legal services and expenses. Also, attach copies of any documents that have been created in any spread-sheet format that provide cumulative totals of the balances in all of the accounts related to this particular mortgage loan.

RESPONSE:

29. Provide copies of any transactional history indicating how the payments identified in the documents produced in number 28 above relate to the subject mortgage loan. Also, state whether or not you treat a corporate advance as a liability or as a receivable on your books and records.

RESPONSE:

30. Provide copies of any guidelines related to any type of bankruptcy tracking system used with respect to the subject mortgage. Also, if you keep a separate set of records with respect to the mortgage loan in a bankruptcy case then produce all documents related to such records including a complete copy of the transactional history related thereto.

RESPONSE:

31. Provide copies of all payment records related to the receipt of pre-petition mortgage payments from the Chapter 13 Trustee. Also, if such payments are placed in any type of suspense account then identify the amount and date of each such transaction and identify by date and amount of all funds removed from such account and state exactly how the removed funds were applied.

RESPONSE:

32. Provide copies of all payment records related to the receipt of the post-petition mortgage payments from the debtor.

RESPONSE:

33. Provide copies of all documents in any physical file related to this bankruptcy case.

RESPONSE:

34. Provide copies of all delinquency or status reports provided on a monthly basis or otherwise to FannieMae, FreddieMac, HUD, VA, FHA, or the Trustee for any securitized trust that may own this mortgage loan.

RESPONSE:

35. Provide a list of all approved national, regional and local attorneys when you retain your own bankruptcy counsel. Also, produce your standard or fixed fee chart for the performance of standard consumer bankruptcy services by these law firms.

RESPONSE:

36. Provide a list of all attorneys used by FannieMae and FreddieMac with respect to any conventional mortgage held in their respective portfolios or one which is in a special servicing option or shared risked pool for any loan for which you provide servicing rights.

RESPONSE:

37. Provide a copy of the Pooling and Servicing Agreement for the subject mortgage.

RESPONSE:

38. Provide a complete life of loan transactional history for the subject mortgage beginning with the origination date and ending with the date of production. This document must include all debits and credits of any nature made at any time with respect to the subject mortgage loan, whether or not such transactions resulted in additions to the outstanding principal balance and whether or not such entries were made for tracking purposes.

RESPONSE:

39. Provide copies of all documents included in the initial bankruptcy referral package to the attorney in this case and state whether or not a fee had to be paid to any party for this package. If such a fee had to be paid, then state the amount of the fee, the name of the payee, and the date of the payment.

RESPONSE:

40. Provide copies of any documents related to any type of review of Schedules A and B in this case.

RESPONSE:

42. Provide copies of any documents related to any type of review of Schedules D, E and F in this case.

RESPONSE:

43. Provide copies of any documents related to any type of review of Schedules 22C and I & J in this case.

RESPONSE:

44. Provide copies of any documents related to any fees or charges related to the preparation and filing of the proof of claim in this case. Also, please state the name and address of the party or entity that actually prepared the proof of claim, how it was prepared, and the per claim fee paid to said party or entity. Finally, identify by name, title, position and location any of your employees who have provided any type of services with respect to this loan since you received notice of the bankruptcy filing. Identify the name of the Supervisor of your Bankruptcy Mortgage Servicing Department and where such party is located.

RESPONSE:

45. Provide copies of any documents related to any fees or charges related to the review of the bankruptcy plan in this case.

RESPONSE:

46. Provide copies of any documents related to any rating reviews of your mortgage servicing operations by Fitch, Standard & Poor's and Moody's at any time since the filing of this bankruptcy case.

RESPONSE:

47. Provide copies of any documents related to any Best Practices for mortgage servicing that you have published at any time since the filing of this bankruptcy case.

RESPONSE:

48. Provide copies of all monthly reports received from your bankruptcy lawyer or lawyers regarding the loss management efforts pursued during the pendency of this Chapter 13 case.

RESPONSE:

49. Provide copies of all rules or guidelines related to the amount of the post-petition contractual default that must occur before referring the file to a bankruptcy attorney for filing a motion for relief from stay.

RESPONSE:

50. Provide copies of all rules, procedures, guidelines or policies that apply to the settlement options available for a motion for relief from stay.

RESPONSE:

51. Provide copies of any documents related to the preparation of affidavits and pleadings used by any attorney retained by you in connection with any documents filed or to be filed with the Bankruptcy Court.

RESPONSE:

52. Provide the full name and address of the Trust that owns this mortgage loan, the full name and address of the sponsor and depositor for the Trust, the SEC SIN number for the depositor, and all officers related to any such parties.

RESPONSE:

53. Provide copies of any documents related to any pool buy-out requirements, repurchase obligations, recourse agreements or other similar contractual obligations related to the subject mortgage loan or to any limitations on loan modification options imposed by any of the securitization instruments.

RESPONSE:

54. Provide copies of any and all servicing guides related to the amount of approved legal fees for any post-petition legal service.

RESPONSE:

55. Provide copies of any and all servicing guides related to the source of funding for the payment of post-petition legal fees. And, state whether or not you enter a credit on the debtor's account upon the payment of such fees by any third party.

RESPONSE:

56. Provide copies of all cash disbursement request forms in this case related to the payment of post-petition legal fees.

RESPONSE:

57. Provide copies of any and all documents related to any standard rules or procedures that provides for the payment of a legal fee to a lawyer or lawyers for post-petition services in a Chapter 13 bankruptcy case.

RESPONSE:

58. Provide copies of any and all documents that describe the legal services that are to be provided for the legal fee.

RESPONSE:

59. Provide copies of any and all documents related to any additional legal fees that may be paid post-petition for a lawyer filing a notice of appearance in the bankruptcy case or for sending a default letter to the debtor's bankruptcy counsel that results in a cure of a post-plan confirmation delinquency.

RESPONSE:

60. Provide copies of any and all documents related to how legal fees are charged to, advanced against, or assessed to the subject mortgage.

RESPONSE:

61. Provide copies of any and all documents related to the procedures to be used in Chapter 13 bankruptcy cases for court approval of the legal fees.

RESPONSE:

62. Provide copies of any and all documents related to written notices to be provided to the debtor or debtor's counsel in a Chapter 13 bankruptcy case with respect to legal fees.

RESPONSE:

63. Provide copies of any and all guidelines or policies related to the application of court approved legal fees in Chapter 13 bankruptcy cases that are less than \$1,000.00.

RESPONSE:

64. Provide copies of any and all accounting rules and procedures related to the receipt of post-petition legal fees included in a Chapter 13 plan (either pre or post-confirmation) and the relation of such fees to the legal fee or any other type of fixed fee paid to a bankruptcy lawyer.

RESPONSE:

65. Provide copies of any and all guidelines related to the retention of a local bankruptcy attorney by your general bankruptcy attorney, including the amount and procedures for the payment of and accounting for fees and expenses paid to the said local bankruptcy counsel and explain who the decision-making process works as between general bankruptcy attorney, the local attorney and you.

RESPONSE:

Dated this the _____ day of _____ 2008.

O. Max Gardner III
Law Offices of O. Max Gardner III, PC
Attorney for Plaintiffs
403 South Washington Street
PO Box 1000
Shelby NC 28151-1000
704.487.0616
maxgardner@maxgardner.com

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME:

**CHAPTER 13 CASE NO.
OUR FILE NO.**

ADDRESS:

SSN:

DEBTORS.

Adversary Proc. No. _____

Plaintiffs,

versus

CITIFINANCIAL MORTGAGE COMPANY, INC.

Defendant.

**FIRST INTERROGATORIES AND REQUEST FOR PRODUCTION
OF DOCUMENTS FROM THE PLAINTIFFS TO THE DEFENDANTS
(Improper Fees Case)**

COME NOW the above-named debtors and Plaintiffs herein, by and through their attorney of record, and herewith serve upon the DEFENDANT(S) in this case the following written interrogatories pursuant to the provisions of Rule 7033 of the Rules of Bankruptcy Procedure and Rule 33 of the Federal Rules of Civil Procedure and the following request for the production and inspection of documents pursuant to Rule 7034 of the Rules of Bankruptcy Procedure and Rule 34 of the Federal Rules of Civil Procedure as provided for and set forth in the foregoing rules. Answers to these Interrogatories and Request for Production of Documents must be furnished within forty-five (45) days of the service of the Summons and Complaint or within thirty (30) days of the service of these Interrogatories, whichever is later.

DEFINITIONS AND INSTRUCTIONS

A. If there is insufficient space after each interrogatory for you to provide a full and complete answer, then you should state your full and complete answer on a separate page, identify the page, and attach the page to your response as a properly identified and marked exhibit thereto.

B. The term "Document" means all writings of any kind, including the originals and all other non-identical copies, whether different from the originals by reason of any notation

made on such copies or otherwise, including but not limited to correspondence, memoranda, notes, diaries, desk or other calendars, statistics, letters, telegrams, minutes, business records, personal records, accountants' statements, account statements, contracts, reports, credit reports, studies, checks, statements, receipts, invoices, bills, return checks, summaries, pamphlets, books, inter-office and intra-office communications, notations of any sort of conversations or meetings, telephone call meetings or other communications, written agreements, bulletins, printed matter, computer printouts, teletypes, telefaxes, invoices, worksheets, all drafts, alterations, modifications, changes and amendments of any kind with respect to any of the foregoing, graphic or oral records or representations of any kind (including, without limitation, tapes, cassettes, discs, recordings, electronic mail records, computer memory records such as hard disk drives and master back-up tapes, diskettes, or other devices such as zip drive records).

C. The term "act" as used herein includes acts of every kind and description.

D. The term "identify" or "describe" when used in reference to a "document" means to state:

- a. The type of document (e.g., letter, memorandum, report, electronic mail records, notes, etc.);
- b. The date of the document;
- c. The name of the parties or parties who originated the document, their past or present position with the defendants, their general duties and responsibilities, their current physical location with the company, and their e-mail, telephone number and telephone extension;
- d. The name and address of the current custodian of the document;
- e. The name and current address of each signatory thereon;
- f. The reason, in detail, for the preparation of the document;
- g. The subject or subjects covered by the document;
- h. The names, business addresses and titles of the persons to whom the document writing was directed; and
- i. The name and address and title of each person who originated, read or received the document.

E. The term "identify" as used herein in connection with a "person" or "persons" means to state the names, titles, the present employer of such "person" or "persons," the relationship of such person or persons to any of the defendants, and such person's current business address and business telephone number.

F. The term "identify" as used herein with respect to or in connection with an "act" means to:

- a. Furnish the date and place of the act;
- b. Identify the person acting, the person for whom the act was performed, and the person against whom the act was directed; and
- c. Describe in detail the act.

G. The terms "describe" or "state" as used herein mean:

- a. Describe or state fully by reference to underlying facts rather than by ultimate facts or conclusions of law;
- b. Particularize as to the:
 - i. Time;
 - ii. Date;

- iii. Manner; and
- iv. Place.

H. The term "oral communication" as used herein means and includes any face-to-face conversation, meeting, conference, telephone conversation, cell-phone conversation, computer conversation with voice mail, or any one for more of these or related devices.

I. The term "person" or "persons" as used herein means and includes all natural persons, public and private corporations, associates, wholly owned affiliates or subsidiary corporations or any other form of a business association, and any other type of entity and the agents, employees, officers, deputies and representatives thereof.

J. The terms "you" or "your" as used herein shall refer to any one or all of the named defendants and any related or affiliated companies associated in any way therewith.

K. All requests shall be deemed to include any documents made by, held by, or maintained in the files of any predecessor, successor, employee, agent or assignee of either one or all of the defendants.

L. The term "the transaction" or "the transactions" or "account" or "accounts" when used herein without qualification means the transactions and accounts between or among the debtors and the named defendants and all related activities and agents or assigns of either party.

M. The term "accepted servicing practices" with respect to any Mortgage Loan, when used herein means those mortgage servicing practices (including collection procedures) of prudent mortgage banking institutions which service mortgage loans of the same type as such Mortgage Loan in the jurisdiction where the related Mortgaged Property is located, and which are in accordance with FNMA servicing practices and procedures, for MBS pool mortgages, as defined in the FNMA Guidelines including future updates.

N. The term "adjustable rate mortgage loan" when used herein means any Mortgage Loan purchased pursuant to this Agreement as to which the related Mortgage Note contains a provision whereby the Mortgage Interest Rate is adjusted from time to time in accordance with the terms of such Mortgage Note.

O. The term "agreement" when used herein means This Mortgage Loan Purchase and Servicing Agreement and all amendments hereof and supplements hereto.

P. The term "ALTA" when used herein means "The American Land Title Association", its successors and assigns.

Q. The term "appraised value" when used herein with respect to any mortgage loan, means the value of the related Mortgaged Property based upon the lesser of (i) the appraisal made for the originator at the time of origination of the Mortgage Loan and (ii) the purchase price of the Mortgaged Property at the time of origination of the Mortgage Loan, provided, however, that in the case of a Refinanced Mortgage Loan, such value is based solely upon the appraisal made at the time of origination of such Refinanced Mortgage Loan and further provided, however, in the case of a Mortgage Loan originated under the Seller's streamlined documentation program, such value may be based upon a prior appraisal that satisfies the requirements of the Seller's streamlined documentation program.

R. The term "assignment of mortgage" when used herein means an assignment of the

Mortgage, notice of transfer or equivalent instrument in recordable form, sufficient under the laws of the jurisdiction wherein the related Mortgaged Property is located to reflect the sale of the Mortgage to the Purchaser.

S. The term “balloon mortgage loan” when used herein means any individual Mortgage Loan purchased pursuant to this Agreement wherein the Mortgage Note matures after seven years requiring a final and accelerated payment of the outstanding principal prior to full amortization.

T. The term “balloon payment” when used herein means a payment of the unamortized principal balance of a Balloon Mortgage Loan in a single payment at the maturity of such Mortgage Loan that is substantially greater than the preceding Monthly Payment.

U. The term “BIF” when used herein means “The Bank Insurance Fund”, or any successor thereto.

V. The term “business day” when used herein means any day other than (i) a Saturday or Sunday, or (ii) a day on which banking and savings and loan institutions, in the States of California, Texas or New York or the state in which the Servicer’s servicing operations are located, are authorized or obligated by law or executive order to be closed.

W. The term “cash liquidation” when used herein means recovery of all cash proceeds by the Servicer with respect to the termination of any defaulted Mortgage Loan other than a Mortgage Loan which became an REO Property, including all Primary Mortgage Insurance Proceeds, Other Insurance Proceeds, Liquidation Proceeds, Condemnation Proceeds and other payments or recoveries whether made at one time or over a period of time which the Servicer deems to be finally recoverable, in connection with the sale or assignment of such Mortgage Loan, trustee’s sale, foreclosure sale or otherwise.

X. The term “CD mortgage loan” when used herein means Any individual Mortgage Loan purchased pursuant to this Agreement which contains a provision whereby the interest rate on such Mortgage Loan is adjusted semi-annually based upon the weekly average yield on certificates of deposit.

Y. The term “closing date” when used herein means the date this Agreement is executed and delivered and the date or dates on which the Purchaser from time to time shall purchase, and the Seller from time to time shall sell, the Mortgage Loans listed on the related Mortgage Loan Schedule with respect to the related Mortgage Loan Package.

Z. The term “condemnation proceeds” when used herein means all awards or settlements in respect of a taking of an entire Mortgaged Property by exercise of the power of eminent domain or condemnation.

AA. The term “consumer personal information” when used herein means any information, including, but not limited to, all personal information about a Mortgagor that is disclosed to any of the Seller, the Servicer or the Purchaser by or on behalf of a Mortgagor.

BB. The term “convertible mortgage loan” when used herein means any individual Adjustable Rate Mortgage Loan purchased pursuant to this Agreement which contains a provision whereby the Mortgagor is permitted to convert the Mortgage Loan to a Fixed Rate Mortgage Loan in accordance with the terms of the related Mortgage Note.

CC. The term "custodial account" when used herein means the separate account or accounts created and maintained pursuant to this Agreement, which shall be entitled "Countrywide Home Loans Servicing LP, in trust for the Purchaser and various Mortgagors, Conventional Mortgage Loans."

DD. The term "custodial agreement" when used herein means the agreement between the Purchaser and the Custodian governing the retention of the Mortgage Files.

EE. The term "custodian" when used herein means the custodian under the Custodial Agreement, or its successor in interest or assigns, or any successor to the Custodian under the Custodial Agreement, as therein provided.

FF. The term "cut-off" date when used herein means the first day of the month in which the related Closing Date occurs.

GG. The term "deleted mortgage loan" when used herein means a Mortgage Loan repurchased or replaced or to be replaced with a Qualified Substitute Mortgage Loan.

HH. The term "determination date" when used herein means the 15th day of the month of the related Remittance Date or if such 15th day is not a Business Day, the Business Day immediately following such 15th day.

II. The term "due date" when used herein means the day of the month on which the Monthly Payment is due on a Mortgage Loan, exclusive of any days of grace.

JJ. The term "due period" when used herein means With respect to each Remittance Date, the period commencing on the second day of the month preceding the month of the Remittance Date and ending on the first day of the month of the Remittance Date.

KK. The term "eligible account" when used herein means An account or accounts (i) maintained with a depository institution the short term debt obligations of which are rated by Standard & Poor's at least A-1+, by Fitch at least F-1, and by Moody's at least P-1 at the time of any deposit therein, (ii) the deposits of which are fully insured by the FDIC, (iii) maintained in a parent, affiliate or subsidiary of the Seller provided that such account satisfies the requirements of (i) or (ii) above or (iv) maintained with a trust account or accounts maintained with a federal or state chartered depository institution or trust company acting in its fiduciary capacity.

LL. The term "equity take-out refinanced mortgage loan" when used herein means A Mortgage Loan used to refinance an existing mortgage loan, the proceeds of which were in excess of the sum of (i) the unpaid principal balance of the existing mortgage loan; and (ii) the lesser of (A) two percent (2%) of the unpaid principal balance of the existing mortgage loan or (B) \$2000.

MM. The term "escrow account" when used herein means the separate trust account or accounts created and maintained pursuant to this Agreement which shall be entitled "Countrywide Home Loans Servicing LP, in trust for the Purchaser and various Mortgagors, Conventional Mortgage Loans."

NN. The term "event of default" when used herein means the amounts constituting ground rents, taxes, assessments, water rates, mortgage insurance premiums, fire and hazard insurance premiums and other payments required to be escrowed by the Mortgagor with the mortgagee pursuant to any Mortgage Loan.

OO. The term "fair market value" when used herein means with respect to any Mortgage Loan, the market value of the related Mortgaged Property as mutually agreed upon by the Servicer and the Purchaser. In the event the Servicer and the Purchaser disagree as to such Fair Market Value, the Servicer shall have the option to select an appraiser from a list of three independent appraisers selected by the Purchaser, each of whom meets the minimum FNMA or FHLMC requisite qualifications for appraisers. Such appraiser shall determine the Fair Market Value of the Mortgaged Property in accordance with the then current guidelines for the Seller's "full documentation program". Such appraisal shall be in a form acceptable to FNMA or FHLMC and shall be conclusive for the purposes of determining the Fair Market Value of the Mortgaged Property. The fee for such appraisal shall be paid by the Servicer, except in the event such fee is incurred in connection with calculating the Termination Fee in which case the Purchaser shall pay the fee for such appraisal.

PP. The term "FDIC" when used herein means the Federal Deposit Insurance Corporation, or any successor thereto.

QQ. The term "FHLMC" when used herein means Freddie Mac, formerly known as The Federal Home Loan Mortgage Corporation, or any successor organization.

RR. The term "fidelity bond" when used herein means a fidelity bond to be maintained by the Servicer pursuant to Subsection 11.12.

SS. The term "FIRREA" when used herein means the Financial Institutions Reform, Recovery, and Enforcement Act of 1989.

TT. The term "Fitch" when used herein means Fitch Investors Services, Inc.

UU. The term "fixed rate mortgage loan" when used herein means any individual Mortgage Loan purchased pursuant to this Agreement wherein the Mortgage Interest Rate set forth in the Mortgage Note is fixed for the term of such Mortgage Loan, including any Balloon Mortgage Loan.

VV. The term "FNMA" when used herein means Fannie Mae, formerly known as The Federal National Mortgage Association, or any successor organization.

WW. The term "FNMA Guidelines" when used herein means the Fannie Mae Sellers' Guide and the Fannie Mae Servicers' Guide and all amendments or additions thereto, including, but not limited to, future updates thereof.

XX. The term "funding deadline" when used herein means with respect to each Closing Date, one o'clock p.m. (1:00 p.m.) New York time, or such other time mutually agreed to by the Purchaser and the Seller.

YY. The term "gross margin" when used herein means with respect to each Adjustable Rate Mortgage Loan, the fixed percentage amount set forth in the related Mortgage Note which amount is added to the Index in accordance with the terms of the related Mortgage Note to determine on each Interest Adjustment Date, the Mortgage Interest Rate for such Adjustable Rate Mortgage Loan.

ZZ. The term "HUD" when used herein means The Department of Housing and Urban Development or any federal agency or office thereof which may from time to time succeed to the functions thereof.

AAA. The term “index” when used herein means with respect to any Adjustable Rate Mortgage Loan, the index identified on the Mortgage Loan Schedule and set forth in the related Mortgage Note for the purpose of calculating the Mortgage Interest Rate thereon.

BBB. The term “information diskette” when used herein means a diskette or electronic file delivered by the Seller to the Purchaser, or an electronic data transfer from the Seller to the Purchaser, in respect of each Mortgage Loan Package which shall contain: (i) the information necessary for the Mortgage Loan Schedule and (ii) the date the last Monthly Payment was actually applied to the unpaid principal balance.

CCC. The term “insurance proceeds” when used herein means with respect to each Mortgage Loan, proceeds of insurance policies insuring the Mortgage Loan or the related Mortgaged Property.

DDD. The term “interest adjustment date” when used herein means with respect to an Adjustable Rate Mortgage Loan, the date on which an adjustment to the Mortgage Interest Rate on a Mortgage Note becomes effective.

EEE. The term “interest only mortgage loan” when used herein means a Mortgage Loan which requires only payments of interest (and not principal) for a period of time specified in the related Mortgage Note.

FFF. The term “late collections” when used herein means with respect to any Mortgage Loan, all amounts received during any Due Period, whether as late payments of Monthly Payments or as Liquidation Proceeds, Condemnation Proceeds, Primary Mortgage Insurance Proceeds, Other Insurance Proceeds, proceeds of any REO Disposition or otherwise, which represent late payments or collections of Monthly Payments due but delinquent for a previous Due Period and not previously recovered.

GGG. The term “lender PMI mortgage loan” when used herein means any individual Mortgage Loan subject to an LPMI Policy.

HHH. The term “LIBOR mortgage loan” when used herein means any individual Mortgage Loan purchased pursuant to this Agreement which contains a provision whereby the interest rate on such Mortgage Loan is adjusted semi-annually or annually based upon the rate per annum equal to the average of interbank offered rates for six-month or one year, as applicable, U.S. Dollar denominated deposits in the London Market as published in The Wall Street Journal.

III. The term “lifetime mortgage interest rate cap” when used herein means with respect to each Adjustable Rate Mortgage Loan, the absolute maximum Mortgage Interest Rate payable, above which the Mortgage Interest Rate cannot be adjusted.

JJJ. The term “liquidation proceeds” when used herein means amounts, other than Primary Mortgage Insurance Proceeds, Condemnation Proceeds and Other Insurance Proceeds, received by the Servicer in connection with the liquidation of a defaulted Mortgage Loan through trustee’s sale, foreclosure sale or otherwise, other than amounts received following the acquisition of an REO Property pursuant to Subsection 11.13.

KKK. The term “Loan-to-Value Ratio or LTV” when used herein means with respect to any Mortgage Loan, the ratio of the outstanding principal amount of the Mortgage Loan as of the date of determination to the Appraised Value of the related Mortgaged Property.

LLL. The term "LPMI Fee" when used herein means with respect to each Lender PMI Mortgage Loan, the portion of the Mortgage Interest Rate as set forth on the related Mortgage Loan Schedule (which shall be payable solely from the interest portion of Monthly Payments, Insurance Proceeds, Condemnation Proceeds or Liquidation Proceeds), which, during such period prior to the required cancellation of the LPMI Policy, shall be used to pay the premium due on the related LPMI Policy.

MMM. The term "LPMI Policy" when used herein means with respect to a Lender PMI Mortgage Loan, a policy of primary mortgage guaranty insurance issued by a Qualified Insurer pursuant to which the related premium is to be paid by the Servicer from payments of interest made by the Mortgagor in an amount as is set forth in the related Mortgage Loan Schedule.

NNN. The term "MERS" when used herein means Mortgage Electronic Registration Systems, Inc., a corporation organized and existing under the laws of the State of Delaware, or any successor thereto.

OOO. The term "MERS Mortgage Loan" when used herein means any Mortgage Loan registered with MERS on the MERS System.

PPP. The term "MERS System" when used herein means the system of recording transfers of mortgages electronically maintained by MERS.

QQQ. The term "MIN" when used herein means the Mortgage Identification Number for any MERS Mortgage Loan.

RRR. The term "MOM Loan" when used herein means any Mortgage Loan as to which MERS is acting as mortgagee, solely as nominee for the originator of such Mortgage Loan and its successors and assigns.

SSS. The term "monthly advance" when used herein means the aggregate of the advances made by the Servicer on any Remittance Date pursuant to Subsection 11.19.

TTT. The term "monthly payment" when used herein means the scheduled monthly payment of principal and interest on a Mortgage Loan.

UUU. The term "Moody's" when used herein means Moody's Investors Service, Inc.

VVV. The term "mortgage" when used herein means the mortgage, deed of trust or other instrument securing a Mortgage Note, which creates a first lien on an unsubordinated estate in fee simple in real property securing the Mortgage Note; except that with respect to real property located in the state of Hawaii, the mortgage, deed of trust or other instrument securing the Mortgage Note may secure and create a first lien upon a leasehold estate of the Mortgagor.

WWW. The term "mortgage file" when used herein means with respect to each Mortgage Loan, the documents pertaining thereto specified in Exhibit 5 and any additional documents required to be added to the Mortgage File pursuant to this Agreement.

XXX. The term "mortgage impairment insurance policy" when used herein means a mortgage impairment or blanket hazard insurance policy as required by Subsection 11.11.

YYY. The term "mortgage interest rate" when used herein means the annual rate at which interest accrues on any Mortgage Loan, exclusive of any primary mortgage insurance premium and, with respect to an Adjustable Rate Mortgage Loan, as adjusted from time to time in accordance with the provisions of the related Mortgage Note and in compliance with the related Lifetime Mortgage Interest Rate Cap, Periodic Rate Cap and negative amortization features, if any, of the related Mortgage Note.

ZZZ. The term "mortgage loan" when used herein means an individual Mortgage Loan which is the subject of this Agreement, each Mortgage Loan originally sold and subject to this Agreement being identified on the related Mortgage Loan Schedule, which Mortgage Loan includes without limitation the Mortgage File, the Monthly Payments, Principal Prepayments, Liquidation Proceeds, Condemnation Proceeds, Insurance Proceeds, REO Disposition proceeds, and all other rights, benefits, proceeds and obligations arising from or in connection with such Mortgage Loan.

A1. The term "mortgage loan documents" when used herein means the documents contained in the Mortgage File.

B1. The term "mortgage loan package" when used herein means the pool of Mortgage Loans sold to the Purchaser on the related Closing Date.

C1. The term "mortgage loan remittance rate" when used herein means with respect to each Mortgage Loan, the interest rate payable to the Purchaser on each Remittance Date which shall equal the Mortgage Interest Rate less the Servicing Fee and any pool insurance policy premiums (including, without limitation, LPMI Fees), if applicable.

D1. The term "mortgage loan schedule" when used herein means the schedule of Mortgage Loans to be prepared by the Seller or Purchaser (at Seller's option) from information contained on an Information Diskette and other information delivered by the Seller to the Purchaser in respect of each Mortgage Loan Package, setting forth the following information with respect to each Mortgage Loan: (1) the Seller's Mortgage Loan identifying number; (2) the Mortgagor's name; (3) the street address of the Mortgaged Property including the city, state and zip code; (4) a code indicating whether the Mortgaged Property is the Mortgagor's primary residence, secondary residence or an investor property; (5) the type of residential units constituting the Mortgaged Property (i.e., detached single family, two-to-four-family, condominium units, etc.); (6) the original months to maturity or the remaining months to maturity from the Cut-off Date, in any case based on the original amortization schedule and, if different, the maturity expressed in the same manner but based on the actual amortization schedule; (7) the Appraised Value (including the purchase price of the Mortgaged Property, if applicable) of the Mortgaged Property and the Loan-to-Value Ratio at origination; (8) the Mortgage Interest Rate at origination; (9) the date on which the initial Monthly Payment was due on the Mortgage Loan; (10) the stated maturity date; (11) the amount of the Monthly Payment as of the Cut-off Date; (12) the original principal amount of the Mortgage Loan; (13) the principal balance of the Mortgage Loan as of the close of business on the Cut-off Date, after deduction of payments of principal due on or before the Cut-off Date whether or not collected; (14) with respect to an Adjustable Rate Mortgage Loan, the first Interest Adjustment Date after each of the related origination date and related Cut-Off Date; (15) with respect to an Adjustable Rate Mortgage Loan, the Gross Margin; (16) a code indicating the purpose of the loan (i.e., purchase, rate and term refinance, equity take-out refinance); (17) with respect to an Adjustable Rate Mortgage Loan, the Lifetime Mortgage Interest Rate Cap under the terms of the Mortgage Note; (18) with respect to an Adjustable Rate Mortgage Loan other than a NegAm Mortgage Loan, the Periodic Rate Cap; (19) the Servicing Fee Rate; (20) a code indicating the documentation

style (i.e., full, alternative, reduced or streamlined); (21) a code indicating whether the Mortgage Loan is Convertible or Non-Convertible, (22) a code indicating whether the Mortgage Loan is a Balloon, Interest Only, LIBOR, NegAm, CD, Fixed, 3/1 ARM, 5/1 ARM, 7/1 ARM, 10/1 ARM or Treasury Mortgage Loan; (23) with respect to a Fixed Rate Mortgage Loan, a code indicating whether the Mortgage Loan contains a temporary "buydown" provision and, if so, the term and type of buydown; (24) the Primary Mortgage Insurance Policy number, if any, which number (or an additional code) shall identify the applicable Primary Mortgage Insurance Policy provider and the coverage amount; (25) with respect to a NegAm Mortgage Loan, the first Payment Adjustment Date; (26) a code indicating whether the Mortgage Loan is a MERS Mortgage Loan and, if so, the corresponding MIN; (27) a code indicating whether the Mortgage Loan is a Lender PMI Mortgage Loan and, in the case of any Lender PMI Mortgage Loan, the LPMI Fee; (28) the Mortgage Interest Rate as of the Cut-off Date; (29) with respect to an Adjustable Rate Mortgage Loan, the related initial Periodic Rate Cap; (30) the date on which the Mortgage Loan was originated; (31) a code indicating whether the Mortgage Loan is subject to a prepayment penalty and if so, the terms of such prepayment penalty; (32) the Mortgagor's credit score at the time of origination of the Mortgage Loan; (33) the paid through date; (34) with respect to each Mortgage Loan originated more than six months prior to the related Closing Date, the number of times in the previous twelve month period preceding the related Closing Date that any Monthly Payment has been received thirty or more days after its Due Date; and (35) any other information to be listed as agreed to between the Seller and the Purchaser. With respect to the Mortgage Loans in the aggregate, the Mortgage Loan Schedule shall set forth the following information, as of the related Cut-off Date: (1) the number of Mortgage Loans; (2) the current principal balance of the Mortgage Loans; and (3) the weighted average Mortgage Interest Rate of the Mortgage Loans. Such schedule may be delivered in magnetic tape or hard copy form.

E1. The term "mortgage note" when used herein means the note or other evidence of the indebtedness of a Mortgagor secured by a Mortgage.

F1. The term "mortgaged property" when used herein means the real property (or leasehold estate, if applicable, in the case of a Mortgage Loan in the state of Hawaii) securing repayment of the debt evidenced by a Mortgage Note.

G1. The term "mortgagor" when used herein means the obligor on a Mortgage Note.

H1. The term "NegAm mortgage loan" when used herein means any individual Mortgage Loan purchased pursuant to this Agreement which permits negative amortization and which contains a provision whereby the interest rate on such Mortgage Loan is adjusted monthly.

I1. The term "negative amortization cap" when used herein means with respect to each NegAm Mortgage Loan, the provision of each Mortgage Note which provides for an absolute maximum percentage of the original principal amount of such Mortgage Loan that the outstanding principal amount of the Mortgage Loan may reach as a result of negative amortization which shall percentage shall not be greater than permitted under applicable state law.

J1. The term "non-convertible mortgage loan" when used herein means any individual Adjustable Rate Mortgage Loan purchased pursuant to this Agreement which does not contain a provision whereby the Mortgagor may convert the Mortgage Loan to a fixed-rate mortgage loan.

K1. The term “nonrecoverable advance” when used herein means any Monthly Advance or Servicing Advance previously made or proposed to be made in respect of a Mortgage Loan which, in the good faith judgment of the Servicer using Accepted Servicing Practices, will not or, in the case of a proposed advance, would not, be ultimately recoverable from related Late Collections, Insurance Proceeds, Other Insurance Proceeds, Liquidation Proceeds or otherwise from such Mortgage Loan.

LI. The term “officer’s certificate” when used herein means a certificate signed by the Chairman of the Board or the Vice Chairman of the Board or a President or a Vice President and by the Treasurer or the Secretary or one of the Assistant Treasurers or Assistant Secretaries of the Seller or the Servicer, as applicable, and delivered to the Purchaser.

M1. The term “opinion of counsel” when used herein means a written opinion of counsel, who may be an employee of the party on behalf of whom the opinion is being given, reasonably acceptable to the Purchaser.

N1. The term “other insurance proceeds” when used herein means proceeds of any title policy, hazard policy, pool policy or other insurance policy covering a Mortgage Loan, other than the Primary Mortgage Insurance Policy, if any, to the extent such proceeds are not to be applied to the restoration of the related Mortgaged Property or released to the Mortgagor in accordance with the procedures that the Servicer would follow in servicing mortgage loans held for its own account.

O1. The term “OTS” when used herein means the Office of Thrift Supervision, its successors and assigns.

P1. The term “pass-through transfer” when used herein means the sale or transfer of some or all of the Mortgage Loans to a trust to be formed as part of a publicly or privately traded pass-through transaction retaining the Seller as “servicer” thereunder.

Q1. The term “payment adjustment date” when used herein means with respect to each Adjustable Rate Mortgage Loan, the date on which an adjustment to the Monthly Payment pursuant to the related Mortgage Note becomes effective.

R1. The term “periodic payment cap” when used herein means with respect to each NegAm Mortgage Loan, the provision of each Mortgage Note which permits limiting any change in the amount of the adjusted Monthly Payment due on any Payment Adjustment Date to an amount not greater than a certain percentage (set forth in the Mortgage Note) of the amount of the Monthly Payment due on the preceding Due Date. The Periodic Payment Cap for a NegAm Mortgage Loan shall not exceed the limits imposed by applicable state law.

S1. The term “periodic rate cap” when used herein means with respect to each Adjustable Rate Mortgage Loan other than a NegAm Mortgage Loan, the provision of each Mortgage Note which provides for an absolute maximum amount by which the Mortgage Interest Rate therein may increase or decrease on an Interest Adjustment Date above the Mortgage Interest Rate previously in effect, equal to the rate set forth on the Mortgage Loan Schedule per adjustment.

T1. The term “person” when used herein means any individual, corporation, partnership, joint venture, association, joint-stock company, limited liability company, trust, unincorporated organization or government or any agency or political subdivision thereof.

U1. The term “prepayment interest shortfall amount” when used herein means with respect to any Mortgage Loan that was subject to a Principal Prepayment in full or in part during any Due Period, which Principal Prepayment was applied to such Mortgage Loan prior to such Mortgage Loan’s Due Date in such Due Period, the amount of interest (net of the related Servicing Fee) that would have accrued on the amount of such Principal Prepayment during the period commencing on the date as of which such Principal Prepayment was applied to such Mortgage Loan and ending on the day immediately preceding such Due Date, inclusive.

V1. The term “primary mortgage insurance policy” when used herein means a policy of primary mortgage guaranty insurance issued by a Qualified Insurer which conforms in all respects to the description set forth in Subsection 7.02(xxxi) herein.

W1. The term “primary mortgage insurance proceeds” when used herein means proceeds of any Primary Mortgage Insurance Policy.

X1. The term “principal payment” when used herein means any payment or other recovery of principal on a Mortgage Loan which is received in advance of its scheduled Due Date which is not accompanied by an amount of interest representing scheduled interest due on any date or dates in any month or months subsequent to the month of prepayment.

Y1. The term “principal prepayment period” when used herein means as to any Remittance Date, period commencing on the 2nd day of the calendar month preceding the month in which such Remittance Date occurs and ending on the 1st day of the month in which such Remittance Date occurs, both inclusive.

Z1. The term “purchase price” when used herein means the price paid on the related Closing Date by the Purchaser to the Seller in exchange for the Mortgage Loans purchased on such Closing Date as calculated in Section 4 of this Agreement.

A2. The term “purchase price and term letters” when used herein means those certain letter agreements executed on or after the date hereof setting forth the general terms and conditions of each transaction contemplated herein and identifying the loan characteristics of the Mortgage Loans to be purchased from time to time hereunder, by and between the Seller and the Purchaser. All of the individual Purchase Price and Terms Letters shall collectively be referred to as the “Purchase Price and Terms Letter”.

B2. The term “purchaser” when used herein means DLJ Mortgage Capital, Inc. or its successor in interest or any successor to or assignee of the Purchaser under this Agreement as herein provided.

C2. The term “qualified insurer” when used herein means an insurance company duly qualified as such under the laws of the states in which the Mortgaged Properties are located, duly authorized and licensed in such states to transact the applicable insurance business and to write the insurance provided, approved as an insurer by FNMA and FHLMC and whose claims paying ability is rated in one of the two highest rating categories by the Standard & Poor’s or Moody’s with respect to primary mortgage insurance and in one of the two highest rating categories by A.M. Best Company, Inc. with respect to hazard and flood insurance.

D2. The term “qualified substitute mortgage loan” when used herein means a mortgage loan eligible to be substituted by the Seller for a Deleted Mortgage Loan which must, on the date of such substitution, (i) have an unpaid principal balance, after deduction of all

scheduled payments due in the month of substitution (or in the case of a substitution of more than one (1) mortgage loan for a Deleted Mortgage Loan, an aggregate principal balance), not in excess of the unpaid principal balance of the Deleted Mortgage Loan (the amount of any shortfall will be deposited in the Custodial Account by the Seller in the month of substitution); (ii) have a Mortgage Interest Rate not less than, and not more than 1% greater than, the Mortgage Interest Rate of the Deleted Mortgage Loan; (iii) have a remaining term to maturity not later than, and not more than one year earlier than, the maturity date of the Deleted Mortgage Loan; (iv) comply with each representation and warranty (respecting individual Mortgage Loans) set forth in Subsection 7.02 hereof; and (v) be the same type of Mortgage Loan as the Deleted Mortgage Loan.

E2. The term “reconstitution agreements” when used herein means the agreement or agreements entered into by the Servicer and the Purchaser and/or certain third parties on the Reconstitution Date or Dates with respect to any or all of the Mortgage Loans serviced hereunder, in connection with a Whole Loan Transfer or a Pass-Through Transfer as set forth in Section 12. Such agreement or agreements shall prescribe the rights and obligations of the Seller in servicing the related Mortgage Loans.

F2. The term “reconstitution date” when used herein means the date or dates on which any or all of the Mortgage Loans serviced under this Agreement shall be removed from this Agreement and reconstituted as part of a Whole Loan Transfer or Pass-Through Transfer pursuant to Section 12 hereof.

G2. The term “record date” when used herein means the close of business of the last Business Day of the month preceding the month of the related Remittance Date.

H2. The term “refinanced mortgage loan” when used herein means a Mortgage Loan which was made to a Mortgagor who owned the Mortgaged Property prior to the origination of such Mortgage Loan and the proceeds of which were used in whole or part to satisfy an existing mortgage.

I2. The term “relief act” when used herein means the Service members Civil Relief Act, or any similar state or local law.

J2. The term “relief act interest shortfall” when used herein means with respect to any Remittance Date, for any Mortgage Loan with respect to which there has been a reduction in the amount of interest collectable thereon for the most recently ended Due Period as a result of the application of the Relief Act, the amount by which (i) interest collectable on such Mortgage Loan during such Due Period is less than (ii) one month’s interest on the Stated Principal Balance of such Mortgage Loan at the related Mortgage Interest Rate before giving effect to the application of the Relief Act.

K2. The term “REMIC” when used herein means a “real estate mortgage investment conduit” within the meaning of Section 860D of the Internal Revenue Code.

L2. The term “remittance date” when used herein means the eighteenth (18th) day of any month, beginning with the First Remittance Date, or if such eighteenth (18th) day is not a Business Day, the first Business Day immediately following.

M2. The term “REO account” when used herein means the account created and maintained pursuant to Subsection 11.13, which account shall be an Eligible Account.

N2. The term "REO disposition" when used herein means the final sale by the Seller of any REO Property.

O2. The term "REO property" when used herein means a Mortgaged Property acquired by the Servicer on behalf of the Purchaser as described in Subsection 11.13.

P2. The term "Repurchase Price" when used herein means with respect to any Mortgage Loan, a price equal to (i) the Stated Principal Balance of the Mortgage Loan plus (ii) interest on such Stated Principal Balance at the Mortgage Loan Remittance Rate from the last date through which interest has been paid and distributed to the Purchaser to the date of repurchase, less amounts received or advanced in respect of such repurchased Mortgage Loan which are being held in the Custodial Account for distribution in the month of repurchase plus (iii) with respect to any Mortgage Loan included in a Pass-Through Transfer, any costs incurred by the related trust in connection with the breach of any predatory and abusive lending law by such Mortgage Loan.

Q2. The term "SAIF" when used herein means the Savings Association Insurance Fund, or any successor thereto.

R2. The term "seller" when used herein means the loan originator or any successor to the Seller under this Agreement as provided herein.

S2. The term "servicer" when used herein means master servicer or primary servicer under the Pooling and Servicing Agreement or any successor to or assignee of the Servicer under this Agreement as provided herein.

T2. The term "servicing advances" when used herein means all customary, reasonable and necessary "out of pocket" costs and expenses incurred in the performance by the Servicer of its servicing obligations, including, but not limited to, the cost of (i) the preservation, restoration and protection of the Mortgaged Property, (ii) any enforcement or judicial proceedings, including foreclosures, (iii) the management and liquidation of the REO Property and (iv) compliance with the obligations under Subsection 11.08.

U2. The term "servicing fee" when used herein means with respect to each Mortgage Loan, the amount of the annual fee the Purchaser shall pay to the Servicer, which shall, for a period of one full month, be equal to one-twelfth of the product of (a) the Servicing Fee Rate and (b) the Stated Principal Balance of such Mortgage Loan. Such fee shall be payable monthly, computed on the basis of the same principal amount and period respecting which any related interest payment on a Mortgage Loan is computed. The obligation of the Purchaser to pay the Servicing Fee is limited to, and the Servicing Fee is payable solely from, the interest portion of such Monthly Payment collected by the Servicer, or as otherwise provided under Subsection 11.24 hereof. With respect to REO Property, the Servicing Fee shall be payable to the Servicer through REO Disposition in accordance with Subsection 11.13, which Servicing Fee payable in respect of any REO Property shall be based upon the Stated Principal Balance of the related Mortgage Loan at the time of foreclosure, as reduced by any income or proceeds received by Purchaser in respect of such REO Property and applied to reduce the outstanding principal balance of the foreclosed Mortgage Loan.

V2. The term "servicing fee rate" when used herein means with respect to each transaction contemplated herein, the per annum rate set forth as such in the related Purchase Price and Terms Letter.

W2. The term "servicing file" when used herein means with respect to each Mortgage Loan, the documents pertaining to such Mortgage Loan retained by the Servicer, consisting of copies or microfilmed copies, as the case may be, of each of the documents in the Mortgage File and originals of each of the other documents set forth in Exhibit 6 hereto. Such documents may be maintained on microfilm (provided that the Servicer shall deliver to the Purchaser an electronic copy of the Servicing File upon the Purchaser's request).

X2. The term "servicing officer" when used herein means any officer of the Servicer involved in, or responsible for, the administration and servicing of the Mortgage Loans whose name appears on a list of servicing officers furnished by the Servicer to the Purchaser upon request, as such list may from time to time be amended.

Y2. The term "Standard & Poor's" when used herein means Standard & Poor's Ratings Services, a division of the McGraw-Hill Companies, Inc.

Z2. The term "stated principal balance" when used herein means with respect to each Mortgage Loan as of the date of such determination: (i) the unpaid principal balance of the Mortgage Loan as of the Cut-off Date after giving effect to payments of principal due on or before such date, whether or not received, and without giving effect to payments received on or before such date in respect of payments due after such date for application on the scheduled Due Date, minus (ii) all amounts previously distributed to the Purchaser with respect to the related Mortgage Loan representing payments or recoveries of principal or advances in lieu thereof.

A3. The term "termination fee" when used herein means the amount paid to the Servicer by the Purchaser in the event of the Servicer's termination without cause, as servicer. Such fee shall equal 2% of (a) the then current unpaid principal balance of the Mortgage Loans, and (b) in the case of REO Property, the lesser of (i) 100% of the Stated Principal Balance of the Mortgage Loan encumbering the Mortgaged Property at the time such Mortgaged Property was acquired and became REO Property or (ii) the Fair Market Value of the REO Property at the time of termination.

B3. The term "treasury mortgage loan" when used herein means any individual Adjustable Rate Mortgage Loan purchased pursuant to this Agreement which contains a provision whereby the interest rate on such Mortgage Loan is adjusted annually based upon the weekly average yield on U.S. Treasury securities.

C3. The term "updated loan-to-value ratio" when used herein means with respect to any Mortgage Loan, the outstanding principal balance of such Mortgage Loan as of the date of determination divided by the Value of the related Mortgaged Property as determined by the appraisal made for the originator at the time of origination of the Mortgage Loan or in the event that an appraisal was made since the origination of the Mortgage Loan then the latest appraisal of the Mortgaged Property. Such appraisal shall (i) be in a form acceptable to FNMA and FHLMC and (ii) meet the then current guidelines for the Seller's so called "full documentation" program.

D3. The term "whole loan agreement" when used herein means any Reconstitution Agreement in respect of a Whole Loan Transfer.

E3. The term "whole loan transfer" when used herein means the sale or transfer by Purchaser of some or all of the Mortgage Loans in a whole loan or participation certificate format pursuant to a Reconstitution Agreement retaining the Servicer as "servicer" thereunder.

INSTRUCTIONS

F3. If the space provided below each interrogatory is not sufficient for your answer, then use additional sheets, numbered consecutively after each such interrogatory, and inserted in the proper order of all copies filed and served. For example, in the case of Interrogatory number 1, any additional sheets for your answers would be numbered as 1-A, 1-B, 1-C, etc.

G3. Each of the following requests for production of documents and interrogatories is intended to be a continuing request to produce and answer. As a result, the Plaintiffs hereby demand that, in the event that at any later date you obtain any additional facts, or form any conclusions, opinions or contentions different from those set forth in your responses herein, then you shall amend your answers to such responses and document production promptly and sufficiently in advance of any trial date, to fully set forth such differences and to produce and documents in connection therewith.

INTERROGATORIES AND REQUEST FOR PRODUCTION OF DOCUMENTS

1. Please provide a complete and itemized statement of the loan history from the date of the loan to the date of these interrogatories and request for production of documents including, but not limited to, all receipts by way of payment or otherwise and all charges to the loan in whatever form. This history should include the date of each and every debit and credit to any account related to this loan, the nature and purpose of each such debit and credit, and the name and address of the payee of any type of disbursement related to this account.

ANSWER:

2. Please provide a statement of the past due scheduled principal payments, together with interest thereon at the contract rate, past due taxes, hazard insurance, mortgage insurance premiums, lawfully imposed late fees, homeowners association dues, and any other assessments.

ANSWER:

3. Please provide an itemized statement of all of the filing fees, service fees, postage, advertising and publication expenses and reasonable attorney fees actually incurred with respect to any pre-petition foreclosure proceeding. Such attorney time records should be itemized by the date and nature of the service and the time devoted to each service. You should also produce the front and back of each and every canceled check in payment of each invoice for the charges described herein along with a copy of each respective bill, statement and invoice.

ANSWER:

4. Please provide a statement of the actual amount, duly itemized, necessary to reinstate this loan under G.S. 45-21.20A.

ANSWER:

5. Please attach a complete transaction history of the mortgage loan and set forth the amount alleged to be in default. This transaction history shall include "any and all" accounts associated with or related to the mortgage loan and shall document all debits and credits to the accounting during this period of time, including the application and disbursement of payments received from or for the benefit of the mortgagor.

ANSWER:

6. Please attach a list of all digital and numerical codes associated with the loan transaction history along with all definitions associated with each such code so as to make the history legible and understandable. Also, state the name of the software system you use, the version, and the name and address of the software provider.

ANSWER:

7. Please attach a statement that indicates the total amount owed by the debtor and itemize the amount and basis for the following fees, if applicable:

- a. The past due scheduled principal payments.
- b. The interest due.
- c. The past due taxes.
- d. The hazard insurance due.
- e. The mortgage insurance premiums.
- f. All late fees.
- g. Any homeowners' association dues or assessments.
- h. All court filing fees.
- i. All service of process fees.
- j. All postage fees.
- k. All advertising of any public sale.
- l. All publication expenses.
- m. All Federal Express or courier fees.
- n. All fax fees.
- o. All property inspection fees.
- p. All property preservation fees.
- q. All broker price opinion fees.
- r. All legal fees.
- s. All corporate advance fees.
- t. All recoverable corporate advance fees.
- u. All non-recoverable corporate advance fees.
- v. All document release fees.
- w. All fees paid to any provider of outsource services.
- x. All fees paid for the transfer of any documents to any national, regional or local attorneys.
- y. All bills, statements or invoices received from any attorneys.
- z. All ratings of any attorneys involved in this case along with the rating schedule, the benchmarks used for such rating, and the method of computation.

ANSWER:

8. Please provide an itemized statement of all attorneys fees incurred at any time since the origination of the loan and describe the date and nature of all such services, attaching copies of all bills and invoices, and attach all canceled checks in payment thereof. Also, please attach all emails or electronic messages using NewTrak or any similar communication system regarding such fees and charges.

ANSWER:

9. Please provide copies of all written property inspection reports and property preservation reports related to the mortgage property, including all photographs.

ANSWER:

10. Please provide copies of all bills and invoices for property inspections and copies of the front and back of all checks in payment thereof.

ANSWER:

11. Please provide copies of all written Broker Price Opinions released to the mortgaged property, including photographs.

ANSWER:

12. Please provide copies of all bills and invoices from or related to such Broker Price Opinions and attach copies of the front and back of all checks in payment thereof.

ANSWER:

13. Please provide a complete and itemized statement of all advances or charges against this loan for any purpose that are not reflected on the loan history transaction statement provided in answer to question #1. This request includes but is not limited to "restricted corporate advances."

ANSWER:

14. Please provide a complete and itemized statement of the escrow account of the loan, if any, from the date of the loan to the date of these interrogatories and request to produce, including, but not limited to, any receipts or disbursements with respect to real estate property taxes, fire or hazard insurance, flood insurance, mortgage insurance, credit insurance, or any other insurance products, along with copies of the front and back of all checks issued in payment of such escrow obligations. Also, please provide a Rule 7007.1 statement of the relationship of any insurance provider to the servicer or any entity related to the servicer.

ANSWER:

15. State whether or not you hold escrow funds in a separate account at an FDIC insured institution.

ANSWER:

16. State the name of the institution identified in number 15 above and please state exactly how the interest earned by such an account is applied or used.

ANSWER:

17. State whether or not any "suspense accounts" have been used in connection with this mortgage?

ANSWER:

18. If the answer to number 17 is yes, then state how the interest earned on such suspense accounts is used or applied.

ANSWER:

19. Please provide a complete and itemized payoff for this loan as required by Section 45-36.7 of the North Carolina General Statutes.

ANSWER:

20. Please provide a complete and itemized statement from the date of the loan to the date of these interrogatories and request to produce of any forced-placed insurance and expenses related thereto and in any way to this loan.

ANSWER:

21. Please provide a complete and itemized statement from the date of the loan to the date of these interrogatories and request to produce of any suspense account entries related in any way to this loan.

ANSWER:

22. Please provide a complete and itemized statement from the date of the loan to the date of these interrogatories and request to produce of any property inspection fees, property preservation fees, broker opinion fees, appraisal fees, bankruptcy monitoring fees, or other similar fees or expenses related in any way to this loan.

ANSWER:

23. Identify the provision under the Deed of Trust and/or note that authorizes charging each and every such fee against the loan of the debtors. Also, please state whether or not any such corporate advances become part of the underlying mortgage debt subject to interest due under the mortgage instruments.

ANSWER:

24. Please attach copies of all communications related to the subject loan produced any outsource provider such as Fidelity National Foreclosure, FANDO, etc.

ANSWER:

25. Please attach any reports indicating any charges for any "add on products" sold to the debtors in connection with this loan from the date of the loan to the date of this letter.

ANSWER:

26. Please provide a complete and itemized statement of any and all post-petition arrears including each month in which the default occurred, and the amount of each monthly default.

ANSWER:

27. Please provide a complete and itemized statement of any late charges to this loan from the date of this loan to the date of these interrogatories and request to produce.

ANSWER:

28. Please provide the amount, if applicable, of any "satisfaction fees."

ANSWER:

29. Please provide a complete and itemized statement from the date of the loan to the date of these interrogatories and request to produce of any fees incurred to modify, extend, or amend the loan or to defer any payment due under the terms of the loan.

ANSWER:

30. State the full name, title and address of the person who actually prepared the proof of claim filed with the court in this case.

ANSWER:

31. Please provide a full and complete copy of all collection notes, reports, memos, statements, entries, or other documents generated in connection with the servicing of this loan.

ANSWER:

32. Please provide a complete and itemized statement of any funds deposited in any post-petition suspension account(s) or corporate advance account(s), including, but not limited to, the balance in any such account or accounts and the nature, source and date of any and all funds deposited in such account or accounts.

ANSWER:

33. Please provide a complete and itemized statement from the date of this loan to the date of these interrogatories and request to produce of the amount, payment date, purpose and recipient of all foreclosure expenses, NSF check charges, legal fees, attorney fees, professional fees and other expenses and costs that have been charged against or assessed to this mortgage.

ANSWER:

34. Provide a complete and itemized statement of the amount, payment date, purpose and recipient of all fees for the preparation and filing of the original proof of claim, any amended proofs of claim, or any supplemental proofs of claim in this case.

ANSWER:

35. Does the Defendant own the obligation underlying this action or is it servicing the obligation for another entity?

ANSWER:

36. List each entity who now has or has ever had any interest in the underlying LOAN NOTE, including but not limited to, any broker, table-funder, co-defendant lender, originator, lender, warehouse lender, trustee, investor, trustee under a pooling and servicing agreement, master servicer, primary servicer, subservicer, default service,

specialty servicer, or any other similar party. Identify that party's name, address and telephone number, describe that party's interest in the transaction, state the date it obtained that interest, the date it relinquished that interest, and the identify of the entity to which it relinquished that interest, and state the nature and amount of all consideration it received or disbursed in connection with obtaining or relinquishing that interest.

ANSWER:

37. List each entity who now has or has ever had any interest in the underlying MORTGAGE, including but not limited to, any broker, table-funder, co-defendant lender, originator, lender, warehouse lender, trustee, investor, trustee under a pooling and servicing agreement, servicer, or any other similar party. Identify that party's name, address and telephone number, describe that party's interest in the transaction, state the date it obtained that interest, the date it relinquished that interest, and the identify of the entity to which it relinquished that interest, and state the nature and amount of all consideration it received or disbursed in connection with obtaining or relinquishing that interest.

ANSWER:

38. If the Mortgage underlying this case is owned by an investor other than the Defendant, describe the contractual arrangement for allocating payments received between the Defendant and the investor.

ANSWER:

39. Provide the full name, address and phone number of the current holder of this debt including the name, address and phone number of any trustee or other fiduciary.

ANSWER:

40. Provide the name, address and phone number of any master servicers, servicers, sub-servicers, contingency servicers, back-up servicers or special servicers for the underlying mortgage debt.

ANSWER:

41. Provide a copy of any mortgage Pooling and Servicing Agreement and all Disclosure Statements provided to any Investors with respect to any mortgage-backed security trust or other special purpose vehicle related to the said Agreement and any and all Amendments and Supplements thereto.

ANSWER:

42. If a copy of the Pooling and Servicing Agreement has been filed with the SEC, provide a copy of SEC Form 8k and the Prospectus Supplement, SEC Form 424b5, and of the free-writing prospectus.

ANSWER:

43. Provide the name, address and phone number of any Trustee under any pooling or servicing agreement related to this loan.

ANSWER:

44. Provide a copy of the Prospectus Supplement offered to investors in the trust.

ANSWER:

45. Please provide copies of all servicing, master servicing, sub-servicing, contingency servicing, special servicing, or back-up servicing agreements with respect to this account.

ANSWER:

46. Provide a copy of all written loss-mitigation rules and work-out procedures related to any defaults regarding this loan and similar loans.

ANSWER:

47. Please provide the procedural manual used with respect to the servicing or sub-servicing of this loan.

ANSWER:

48. Provide a summary of all fixed or standard legal fees approved for any form of legal services rendered in connection with this account. Also, if you use any of the Fannie Mae or Freddie Mac Single or Multi-Family Servicing Guidelines for bankruptcy cases, then please attach the same.

ANSWER:

49. Is this loan subject to any Electronic Tracking Agreement? If the answer is yes, then state the full name and address of the Electronic Agent and the full name and address of the Mortgage Electronic Registration System.

ANSWER:

50. Is the servicing of this loan provided pursuant to any type of mortgage electronic registration system? If the answer is yes, then attach a copy of the mortgage electronic registration system procedures manual.

ANSWER:

55. Is this mortgage part of a Whole Loan Sale Agreement? If the answer is yes, then state the name and address of the Purchaser, the Custodian, the Trustee, the Electronic Agent and any Servicer or Sub-Servicers.

ANSWER:

56. Please state the name, title and address of all servicing agents or servicing offers involved in the servicing of the subject loan.

ANSWER:

57. Please produce copies of your recent rating reports from Fitch, Moody's and Standard & Poor's.

ANSWER:

58. Please attach copies of any agreements you have signed with any member or members of the United States Congress with respect to the implementation of Loss Mitigation Rules and Policies for any type of mortgage product.

ANSWER:

59. Please attach any published "Best Policies" guides or books or statements that you have issued with respect to your servicing of residential mortgage loans.

ANSWER:

60. Please produce copies of all civil actions, adversary proceedings, or administrative proceedings that have been filed against you at any time in the past 60 months for any alleged misconduct related to mortgage servicing.

ANSWER:

61. Please state the total number of disputes that you have received from consumers in the past 60 months related to any alleged misconduct arising out of your servicing of their residential mortgage loans.

ANSWER:

62. If you have a consumer dispute department, then produce copies of all consumer complaints filed with that department at any time within the past 60 months related to your servicing of residential mortgage loans.

ANSWER:

63. Please attach a copy of the time completion deadlines applied to your attorneys in this case for the completion of all stages of the process of securing an order on a motion for relief from the stay.

ANSWER:

64. Please list and describe all obligations you have with the holder of this loan to repurchase the loan and state whether or not you have been requested to repurchase the same.

ANSWER:

65. If you in fact have repurchased this loan, then state the date of the repurchase, the amount paid, and the name of the payee.

ANSWER:

66. State whether or not you are obligated to submit monthly payments in any amount to the holder of the mortgage loan in this case and if so then state the amount, date, and the name of the payee with respect to each such payment.

ANSWER:

67. State whether or not you treat corporate advances made in this case as receivables on your books and records.

ANSWER:

68. State whether or not you treat funds held in any type of suspense account as liabilities on your books and records.

ANSWER:

69. Please describe in detail all actions you have taken in order to comply with the provisions of Section 524(i) of Title 11 of the United States Code and attach all documents associated therewith.

ANSWER:

70. Attach copies of any and all communications you have received from the debtors or have provided to the debtors at any time during which you have serviced this loan.

ANSWER:

71. Provide a copy of the Key Loan Transaction history spreadsheet.

ANSWER:

72. Produce a copy of the MERS Milestone report.

ANSWER:

73. Produce the original note and all transfer instruments.

ANSWER:

Dated this the _____ day of _____, 2008.



O. Max Gardner III
Law Offices of O. Max Gardner III
Attorney for Plaintiffs
403 South Washington Street
PO Box 1000
Shelby NC 28151-1000
PH 704.487.0616
maxgardner@maxgardner.com

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

**NAME: BROWNER, JR., JOHNNY CLAUDE CHAPTER 13 NO. 05-41427
 BROWNER, ANNIE HUNT OUR FILE NO. 11603**

**ADDRESS: 1820 GREEN VALLEY DRIVE
 SHELBY, NC 28152**

SSN: --- -- 6133 & --- -- 7719

Debtors

**JOHNNY CLAUDE BROWNER, JR. and wife,
ANNIE HUNT BROWNER**

Adversary Proc. No. 06-4049

Plaintiffs,

versus

CITIFINANCIAL MORTGAGE COMPANY, INC.

Defendant

**FIRST REQUEST FOR ADMISSIONS OF FACT
FROM THE PLAINTIFFS TO THE DEFENDANT
(Improper Fees Case)**

COME NOW the above-named Plaintiffs, by and through their attorney of record, and herewith serve upon the above named Defendant in this case the following request for admissions of fact. This request is being made pursuant to the provisions of Rules 7001 and 7036 of the Rules of Bankruptcy Procedure, Rule 36 of the Federal Rules of Civil Procedure, and Rules 7016-1, 7026-1 and 7030-1 of the Local Bankruptcy Rules for the United States Bankruptcy Court for the Western District of North Carolina, and the Bankruptcy Practice Guide for the United States Bankruptcy Court for the Western District of North Carolina.

The Defendant is requested by way of a proper officer to admit for the purpose of this action only the following facts. Please note that under the provisions of the applicable court rules each and every matter set forth below will be deemed admitted unless, within thirty (30) days after service of this request, the Defendant serves upon the Plaintiffs a written answer or objection addressed to the matter, signed by the Defendant or their attorney.

REQUEST FOR ADMISSIONS

1. Defendant received actual notice of the bankruptcy filing from the Debtor.

RESPONSE:

2. Defendant received actual notice of the bankruptcy filing from the Bankruptcy Noticing Center.

RESPONSE:

3. Defendant received actual notice of the bankruptcy filing from the Chapter 13 Trustee.

RESPONSE:

4. Defendant filed a sworn proof of claim in the Chapter 13 case of the debtors.

RESPONSE:

5. The Chapter 13 plan as confirmed included a debt to Defendant or its predecessor in interest for pre-petition mortgage arrears.

RESPONSE:

6. The debt was secured by a lien, mortgage or deed of trust on the debtors' residential real estate.

RESPONSE:

7. The Chapter 13 plan as confirmed included a debt to Defendant or its predecessor in interest for the current monthly mortgage payment secured by the debtors' residential real estate.

RESPONSE:

8. Defendant received a copy of the Chapter 13 plan prior to the entry of the Order of Confirmation.

RESPONSE:

9. Defendant received a copy of the Court Order confirming the debtors' Chapter 13 Plan, the "Confirmation Order."

RESPONSE:

10. Defendant did not file any objection to the Chapter 13 plan or to any terms of the plan or to confirmation of the plan.

RESPONSE:

11. Defendant retained an attorney to review and file the proof of claim.

RESPONSE:

12. Defendant retained an attorney to review the Chapter 13 plan.

RESPONSE:

13. Defendant has not filed any motion or application for the court approval of any post petition legal fees in this case.

RESPONSE:

14. Defendant has not filed any motion or application for the court approval of post petition expenses in this case.

RESPONSE:

15. Defendant has not filed any motion or application for approval of any broker price opinion fees in this case.

RESPONSE:

16. Defendant has not filed any motion or application to retain the services of a real estate appraiser in this case.

RESPONSE:

17. Defendant has not filed any motion or application for approval of any inspections of the residential real estate of the Debtors in this case.

RESPONSE:

18. Defendant has not filed any motion or application for approval of the payment of any fees to any third-party (some party other than the Defendant or a lawyer retained by the Defendant) in this case.

RESPONSE:

19. Defendant has paid fees in this case to such third-party providers of one or more bankruptcy-related services.

RESPONSE:

20. Defendant has paid fees in this case to such a third-party provider or providers for one or more than one mortgage-related services.

RESPONSE:

21. The attorney for Defendant has paid fees in this case to such a third-party provider or providers for one or more than one bankruptcy-related services.

RESPONSE:

22. The fees described in Numbers 19, 20 and 21 include what the third-party providers refer to as document release fees.

RESPONSE:

23. Defendant has deposited funds of the debtor or the trustee in one or more "suspense accounts" or some other type account used for maintaining unapplied funds.

RESPONSE:

24. The mortgage instruments signed by the debtors do not provide for the use of any "suspense" accounts.

RESPONSE:

25. The mortgage instruments signed by the debtors do provide that payments must first be applied to interest and principal before they are applied to approved legal fees or other expenses.

RESPONSE:

26. Defendant has deposited funds received from the Trustee in a "suspense" or other type of account used for maintenance of unapplied funds.

RESPONSE:

27. The deposit of the Trustee's payments in a "suspense" account results in no application of the money to interest and principal.

RESPONSE:

28. Defendant has used some of the funds placed in either the debtor "suspense" or the Trustee "suspense" accounts to pay one or more of the legal fees or expenses assessed or charged to the mortgage loan of the debtors.

RESPONSE:

29. Defendant has invested the funds held in the "suspense" accounts in certain instruments that have provided an investment return to Defendant in the form of interest.

RESPONSE:

30. Defendant also has invested the monthly payments received from the Debtors in certain instruments that have provided an investment return to Defendant in the form of interest.

RESPONSE:

31. The Defendant refers to the interest earned on these investments as interest earned on the "float."

RESPONSE:

32. Defendant has not applied any of the interest earned on the "suspense" account investments to the loan obligations of the Debtors.

RESPONSE:

33. The Defendant has not applied any of the interest earned on the investment of the monthly payments of the Debtors to the loan obligations of the debtors.

RESPONSE:

34. The loan instruments in this case do not authorize the Defendant to use debtors' money for the purpose of earning investment interest for the Defendant.

RESPONSE:

35. The loan instruments in this case do not authorize the Defendant to use the Trustee's money for the purpose of earning investment interest for the Defendant.

RESPONSE:

36. Defendant has aggregated the legal fees and expenses incurred in this case in an account called a "corporate advance account."

RESPONSE:

37. Defendant, for accounting purposes, treats the "corporate advance account" as a receivable.

RESPONSE:

38. Defendant treats all "receivables" as assets on its accounting records.

RESPONSE:

39. Defendant has pooled and securitized all of its corporate advances with a third-party trustee/investor.

RESPONSE:

40. Defendant has therefore received cash payments on the corporate advances from said third-party trustee/investor.

RESPONSE:

41. As a result of the pooling and securitization of the its corporate advances, the Defendant is no longer the lawful owner of these receivables.

RESPONSE:

42. Defendant has income in the form of payments on the securitization of the "corporate advances."

RESPONSE:

43. Defendant has not applied any of the fees earned on the "corporate advances" as a credit against such advances.

RESPONSE:

44. Defendant did not provide notice to the debtors prior to performing property inspections on their residential real estate.

RESPONSE:

44. Defendant did not provide notice to the debtors prior to performing any type of appraisal of their property.

RESPONSE:

45. Defendant did not file any type of motion with the Court for a Rule 7034 entry upon and inspection of land of the debtors.

RESPONSE:

46. Defendant received a copy of the Trustee's motion for approval of his final report and for entry of the Order of Discharge.

RESPONSE:

47. Defendant retained an attorney to review the Trustee's final report and accounting.

RESPONSE:

48. Defendant reviewed the Trustee's final report and accounting.

RESPONSE:

49. The proof of claim filed by the Defendant was paid in full by the Chapter 13 Trustee.

RESPONSE:

50. Defendant did not file an objection to the Trustee's motion for the entry of final discharge order or to the approval of the final accounting.

RESPONSE:

51. The Court entered an Order declaring the long term debt current and arrears cured.

RESPONSE:

52. Defendant did not file an objection to the said Order.

RESPONSE:

53. Defendant has not filed a motion for relief from said order.

RESPONSE:

54. Defendant did not send debtors any notice of any outstanding legal fees before the entry of the discharge order.

RESPONSE:

55. Defendant did not send debtors any notice of any outstanding property inspection fees before the entry of the discharge order.

RESPONSE:

56. Defendant did not send debtors any notice of any outstanding broker price opinion or appraisal fees before the entry of the discharge order.

RESPONSE:

57. Defendant did not send debtors any notice of any outstanding late fees or similar charges before the entry of the discharge order.

RESPONSE:

58. The debtors Chapter 13 case was completed and an Order of Discharge was entered by the Bankruptcy Court on _____.

RESPONSE:

59. Defendant received a copy of the Order of Discharge entered in this case within 7 days of the date of entry.

RESPONSE:

60. Defendant is the servicer of a "federally related mortgage loan" as that term is defined in Section 2602(1) of Title 12 of the United States Code.

RESPONSE:

61. Debtors caused a Qualified Written Request to be mailed to Defendant on or about _____.

RESPONSE:

62. The Qualified Written Request was received by Defendant on or about _____.

RESPONSE:

63. The Qualified Written Request was not acknowledged within twenty days of receipt.

RESPONSE:

64. Defendant did not provide the information requested in the Qualified Written Request sent on behalf of the Plaintiff within sixty days of receipt.

RESPONSE:

65. Defendant has still not responded to the Qualified Written Request.

RESPONSE:

66. Defendant sent the attached bill, statement or notice to the debtors.

RESPONSE:

67. The attached document (Exhibit A) is a true, complete, accurate and genuine copy of the bill, statement or notice issued to debtors by the Defendant.

RESPONSE:

68. Exhibit A was generated by Defendant in the normal course of business.

RESPONSE:

69. Exhibit A includes the sum of \$_____ in corporate advances and other fees.

RESPONSE:

70. None of the fees or charges identified in number 69 were ever applied for or approved by the Bankruptcy Court.

RESPONSE:

71. Exhibit A states that it is an attempt to collect a debt and that any information secured from the debtors will be used for that purpose.

RESPONSE:

72. Defendant never provided the debtors with notice of the fees and charges identified in number 66 prior to the entry of the Discharge Order.

RESPONSE:

73. Defendant is subject to the provisions of Rule 2016 of the Bankruptcy Rules.

RESPONSE:

74. Defendant based on its review of the plan was aware of the provision regarding the proper application of mortgage payments received from the debtors and the Chapter 13 Trustee.

RESPONSE:

75. Defendant failed to apply such payments in this case as provided for by the Chapter 13 plan.

RESPONSE:

76. The misapplication of the mortgage payments in this case is not consistent with the manner of application required by the terms of the confirmed plan.

RESPONSE:

77. The misapplication of such payments has resulted in more than \$100.00 in additional fees and charges to the debtors.

RESPONSE:

78. The document identified as Exhibit A was a demand to collect a debt from the debtors.

RESPONSE:

79. Exhibit A included the so-called g notice provided for by the Fair Debt Collection Practices Act.

RESPONSE:

80. Defendant stated in Exhibit A that it was in fact a debt collector.

RESPONSE:

81. The Order confirming the plan in this case was never revoked prior to discharge.

RESPONSE:

82. Defendant received all payments required to be received under the confirmed plan.

RESPONSE:

83. Defendant has failed to properly credit all amounts received under the plan.

RESPONSE:

84. Defendant has failed to properly credit all amounts received from the debtors.

RESPONSE:

85. Defendant has applied funds received from the Trustee to fund "corporate advances" prior to applying all of such funds to interest and principal.

RESPONSE:

86. Defendant has applied funds received from the debtors to fund "corporate advances" prior to applying all of such funds to interest and principal.

RESPONSE:

87. To the extent any legal fees incurred by Defendant have been approved by the Bankruptcy Court, Defendant has failed to credit payments received from the Trustee and/or the debtors against such fees.

RESPONSE:

Dated this the _____ day of _____, 2008



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NORTH CAROLINA
CLEVELAND COUNTY

RELEASE AND SETTLEMENT
AGREEMENT

THIS RELEASE AND SETTLEMENT AGREEMENT ("Agreement"), made and executed effective on this ____ day of _____, 2008, between J.P. Morgan Chase & Co. and Chase Manhattan Mortgage ("Chase") and their heirs, agents and assigns and John Q. Public and Mary E. Public ("Public") (with their heirs, agents, administrators, executors, trustees and assigns) is intended to extinguish all liabilities, causes of action, or damages either past or present, known or unknown, if any, which the Publics may be entitled to pursue against Chase.

RECITALS:

The Publics have alleged that Chase committed acts which may constitute bankruptcy violations related to a bankruptcy case filed in the Western District of North Carolina, identified as Case Number _____ ("Bankruptcy Case").

The mutual desire of the parties is to resolve these matters to avoid litigation.

Chase agrees to tender to the Publics and the Publics' attorney the sum of \$5,000.00 in damages, costs and legal fees, in satisfaction of all claims the Publics, and/or anyone deriving rights from the Publics, may have against Chase; and the Publics have agreed not to pursue litigation or further claims against Chase.

Chase agrees to remove all improper fees, charges and expenses from the mortgage account of the debtors or any account related thereto.

Chase agrees to vacate and set-aside all prior default orders in the Bankruptcy Case of the debtors.

Chase agrees not to charge, apply, assess or advance any future legal fees against the debtors' mortgage account without filing a proper motion with the Bankruptcy Court, with a notice of hearing.

NOW, THEREFORE, in consideration of the above recitals and the value set out above and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, and intending to be legally bound, Chase and the Publics covenant and agree as follows:

1. The Publics hereby release and forever discharge Chase of and from all claims, causes of actions, suits, debts, agreements, damages, judgments, executions, and demands whatsoever ("Claims"), in law or in equity, which the Publics may have or ever had or have now, known or unknown, which arise from, are based upon, or are related to any action committed related to the Publics' Bankruptcy Case by Chase.

2. The Publics hereby covenant that, they will now and forevermore forbear and refrain from the institution or prosecution of any Claims, court proceedings or causes of action whatsoever arising at any time prior to the effective date of this Agreement against Chase. This

covenant may be pleaded as an absolute defense to any court pleading or action brought against Chase by the Publics as of the date of this Agreement.

3. This Agreement releases any and all Claims based on any action or inaction of Chase which occurred on or prior to the date of this Agreement.

4. This Agreement shall be construed under and in accordance with the laws of the State of North Carolina.

5. This settlement is made for the express purpose of avoiding the expense of litigation and to resolve the dispute among the parties and is not, nor shall it be construed as, an admission of liability on the part of Chase. The parties, and their attorneys agree that none of them will publish, communicate or otherwise disclose, in any manner whatsoever, the terms of this Agreement or the related acts leading up to the Agreement unless ordered or compelled to do so by a court of competent jurisdiction after reasonable notice to all parties under this agreement.

6. The Publics acknowledge that they have (i) read this Agreement in its entirety and fully understand its tenor and effect, (ii) have discussed this Agreement with counsel, (iii) agree that this Agreement constitutes the entire agreement between the parties, and (iv) by their signatures represent that there have been no other promises or inducements made to them in connection with the execution of this Agreement other than the consideration set forth above.

IN WITNESS WHEREOF, Gerald Thomas Publics and Gloria Glover Publics have hereby executed this RELEASE AND SETTLEMENT AGREEMENT effective on the day and year written above.

Date

John Q. Public

Date

Mary E. Public

I HEREBY APPROVE THE TERMS AND CONDITIONS OF THE FOREGOING
RELEASE AND SETTLEMENT AGREEMENT.

O. Max Gardner, III
Counsel for Plaintiffs

I HEREBY APPROVE THE TERMS AND CONDITIONS OF THE FOREGOING
RELEASE AND SETTLEMENT AGREEMENT.

Dewey Cheatham
Counsel for Defendants

SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and Release (“Agreement”) is entered into by and between Big Bad Lender and Mr. and Mrs. Doe (the “Parties”) as of June __, 2009, with reference to the following facts:

RECITALS

WHEREAS, BIG BAD LENDER is the sole holder of a Note dated February 23, 2001, in the principal amount of \$144,000.00 (the “Loan”) and secured by a Mortgage on the real estate commonly known as Happy Home, East St. Louis, IL (the “Property”).

WHEREAS, BIG BAD LENDER filed a foreclosure action against Mr. and Mrs. Doe in connection with the Property in the General Court of Justice, Superior Court Division, Cleveland County, North Carolina, on or about February 2, 2009, said case known as SP-09-40234.

WHEREAS, the Does filed a petition for relief under Chapter 13 of the Bankruptcy Code on March 3, 2009, before the United States Bankruptcy Court for the Western District of North Carolina, Shelby Division, said case known as Sh-B-09-40987.

WHEREAS, BIG BAD LENDER filed a sworn proof of claim in the Chapter 13 case identified herein whereupon the Does filed an Adversary Proceeding identified as case number 09-045 against BIG BAD LENDER and other named parties for various bankruptcy and non-bankruptcy claims, all as set forth in the complaint filed in the proceeding (the lawsuit).

WHEREAS, while expressly denying and disclaiming any wrongdoing or liability of any kind whatsoever, the parties agree to enter into this Agreement in order to avoid further expense, inconvenience, and the distraction of litigation and to put to rest all claims among parties hereto relating to the real estate that were or might have been alleged in the pending lawsuit. The

dispute between the parties covers the actual liquidated amount of the debt. Mr. and Mrs. Doe do not admit that any amount of the Loan was ever valid.

WHEREAS, each party to this Agreement is fully apprised of the facts set forth in these Recitals and of the facts and contentions at issue, and in all other aspects of the dispute between or among the parties.

WHEREAS, the parties desire to settle all disputes and claims which exist or which may exist between and among them arising out of the facts, matters, and events set forth above.

NOW THEREFORE, for good and valuable consideration, including the mutual covenants herein contained, it is agreed as follows:

AGREEMENT

The parties to this Agreement, for and in consideration of the mutual covenants, promises, and conditions set forth herein and subject to the terms and provisions hereof, agree to the following terms:

1. Payment to the Does: BIG BAD LENDER agrees to tender to the Does \$25,000.00, payable to Gardner & Gardner PLLC, Trust Account, simultaneously with its execution of this Agreement. This payment reflects a settlement of the damages Does could have obtained in her claims asserted in the Lawsuit against BIG BAD LENDER, which consist of (a) Count VI (RESPA against BIG BAD LENDER) in the amount of \$3,000 for statutory treble damages, (b) Count VIII (TILA against BIG BAD LENDER) in the amount of \$17,000, including \$2,000 for statutory damages and \$5,000 for actual damages caused by the alleged failure to provide correct disclosures, \$5,000 in punitive damages for the alleged willful violations of the North Carolina Consumer Fraud and

Deceptive Business Practices Act, and \$1,000.00 in damages for violations of the Federal Fair Debt Collection Practices Act. This settlement does not include any damages, whether statutory, actual or punitive available against any of the remaining defendants in the Lawsuit, including Does' claims against the remaining defendants for (i) actual damages sustained on account of the overvaluation of the home, (ii) misrepresentation as to the repairs or condition of the home, (iii) other consequential economic damages sustained by Does as a result of the alleged actions of the remaining defendants, (iv) actual or statutory damages sustained by Does on account of the yield spread premium paid to Bogus Broker, (v) damages sustained as a result of alleged fraud, (vi) emotional distress damages, or (vii) punitive damages.

2. Release of Mortgage: BIG BAD LENDER further agrees to mail, simultaneously with its execution of this Agreement, a release of the mortgage recorded at Book 3528 Page 886 of the Cleveland County, North Carolina, Public Registry, together with funds sufficient for recording the release. A copy of the mailing to the Cleveland County Register of Deeds shall be provided to the Does' counsel at the time of mailing.
3. Satisfaction of Note: The Note is fully satisfied. BIG BAD LENDER agrees the Does are not obligated to make any additional payments to BIG BAD LENDER, its successors, assigns, former and present directors, members, agents, servicers, principals, attorneys, shareholders, predecessors, subsidiaries, affiliates or parents pursuant to the Note. The Note shall be deemed a debt discharged in connection with the pending Chapter 13 case of the Does and therefore shall not be considered taxable income to the Does and BIG BAD LENDER agrees that no 1099 or other tax forms will be issued in connection with this settlement.

4. Dismissal of Lawsuit: Within 7 days from the date that this Agreement is executed by both the Does and BIG BAD LENDER the parties agree to do all things necessary to tender to the court an Agreed Order, in substantially the same form as the attached, dismissing, with prejudice, BIG BAD LENDER's Adversary Proceeding and Mr. and Mrs. Doe's Affirmative Defenses and Counterclaims against BIG BAD LENDER and requiring the release of the mortgage lien.
5. Release and Discharge of BIG BAD LENDER: For good and valuable consideration, including but not limited to, BIG BAD LENDER's tender of \$15,000.00 to the Does as well as its release of the mortgage as set forth above, Mr. and Mrs. Doe, for themselves, their heirs, executors, and assigns, covenant with BIG BAD LENDER, its successors, assigns, agents, principals, former and present directors, members, attorneys, shareholders, predecessors, subsidiaries, affiliates or parents that they shall cease and desist from suing or prosecuting any claim or demand for damages against BIG BAD LENDER arising out of or relating to the Loan, the servicing of the Loan, or this Lawsuit, including, but not limited to, any claims asserted or any claims that could have been asserted in the Lawsuit.

This release does not apply to and has no effect on any claim accruing after the effective date of this release, including but not limited to the failure of any party to the settlement agreement and release to comply with their obligations under same.

Nothing contained herein shall be construed in any way to limit the Does' recovery from or claims asserted against the other third party defendants, namely Slimy Seller, Avaricious Appraiser, Bogus Broker, and Thieving Title Company.

6. Release and Discharge of the Does: In consideration of the above-described covenants by the Does, BIG BAD LENDER, its successors, assigns, former and present directors,

members, agents, servicers, principals, attorneys, shareholders, predecessors, subsidiaries, affiliates or parents, covenants with the Does, their successors, assigns, agents and attorneys, that it shall cease and desist from suing or prosecuting any claim or demand for damages arising from the Loan, the servicing of the Loan, or this Lawsuit, including, but not limited to, any claims asserted or any claims that could have been asserted in the Lawsuit, any legal fees and expenses incurred in connection with the lawsuit, and any fees or expenses incurred or damages or fees paid in connection with the lawsuit.

7. Reporting of Disputed Legal Claims: It is understood and agreed by the Parties that this Settlement Agreement reflects settlement of disputed legal claims, including the liquidated value of the debt and that the release of all claims herein shall be deemed and is in fact a discharge of debt in the pending Bankruptcy case of the Does.
8. Credit Reporting: BIG BAD LENDER will require all credit reporting agencies to delete all negative references made by it or its agents or principals, including servicers, assignors, or assignees, to the loan, including any mention of delinquency of the Loan or default in payments of any kind, whether late, slow, or missing, from the Does' credit reports, and that it will report the loan as having been paid at all times as agreed and now as paid in full, as agreed. BIG BAD LENDER further agrees that it will provide the Does' counsel with a copy of the transmittal to the credit bureaus no later than two weeks from the execution of this agreement. BIG BAD LENDER agrees to take all steps necessary to ensure that no credit report or credit reference that is unfavorable or that may be construed unfavorably to the Does shall be made by it, its heirs, successors, predecessors, assigns, servicers, agents, affiliates, subsidiaries, and parents, or by any consumer reporting agency with regard to any debts or claims between BIG BAD

LENDER and the Does, including but not limited to adjusting its internal records to reflect this settlement. BIG BAD LENDER agrees that neither it nor its heirs, predecessors, successors, assigns, servicers, agents, subsidiaries, affiliates, or parents will verify a delinquency if they receive a reinvestigation request from a reporting agency or that they will ever attempt to sell, transfer or assign this loan account to any third-party at any time and for any reason or for any consideration or for no consideration.

9. Confidentiality: The dollar amount of the Settlement Agreement is to remain confidential. Does and Does' counsel may disclose the terms of the Agreement to (1) the United States Bankruptcy Court; (2) the United States Trustee; (3) the United States Department of Justice; (4) the Chapter 13 Trustee; (5) All parties in interest in the Bankruptcy case of the Does by way of a motion to approve this settlement and all terms thereof; and (5) any other parties as required by the Bankruptcy Court, the Bankruptcy Code, the Federal Bankruptcy Rules, or the Local Bankruptcy Rules. The Parties may also disclose the terms of the Settlement Agreement to legal and tax professionals solely for the purpose of assisting the Parties with any tax issues or disputes resulting from this agreement. The Parties are in no way limited, by this agreement, as to statements regarding any other defendants to the Lawsuit not included within the scope of this Settlement Agreement.
10. No Solicitation: BIG BAD LENDER and all of subsidiaries, affiliates, parent, and agents shall not solicit the Does for any financial services products, whether by mail, telephone, in person, or otherwise. BIG BAD LENDER and its affiliates will place the Does on its "do not contact" lists.
11. Denial of Liability/ Compromise of Disputed Claims: The parties to this Agreement hereby agree and expressly acknowledge that the settlement of this proceeding and the

covenants contained herein, do not constitute, and shall not be construed as an admission of liability or fault by any of the parties to the agreement but rather are to be construed strictly as a compromise and settlement of disputed claims between the parties, solely for the purpose of avoiding further controversy, litigation and expenses. The parties to this Agreement further expressly acknowledge that each of the parties hereto has denied and continues to deny all claims or allegations of liability or fault. Further, this Agreement is acknowledged to be a final and binding disposition of any and all claims between these parties hereto in the Lawsuit.

12. Attorneys' Fees: Each party shall bear their own attorneys' fees and costs incurred, other than as ordered by the Court. The Parties understand and agree that if either party fails to comply with any of the terms of this Settlement Agreement, either party may enforce the Settlement Agreement as a breach of contract, including the right to collect any damages sustained as a result of the breach, administrative fees, costs and attorney fees incurred in pursuing any breach of contract claim.
13. Waiver of Construction Against Drafter: Each of the parties to this Agreement acknowledges that this Agreement has been negotiated at arms length between persons knowledgeable in the matters dealt with herein, and each party participated in its drafting. Accordingly, any rule of law, statute, legal decision or common law principle that would require the interpretation of any ambiguities in this Agreement against the drafter thereof is of no application and is expressly waived. The provisions of this Agreement shall be interpreted in a reasonable manner to effectuate the intentions of the parties hereto.
14. Severability: If any of the provisions of this Agreement are held to be unenforceable or invalid by any court of competent jurisdiction, the validity and enforceability of the remaining provisions shall not be affected thereby.

15. Governing Law: This Settlement Agreement shall be construed and enforced in accordance with the laws of the State of North Carolina.
16. Binding Effect: This Agreement shall be binding on, and shall inure to the benefit of, the Parties hereto and their respective administrators, representatives, successors, and assigns.
17. Further Assurances: The Parties agree to do all acts and things and to make, execute, acknowledge and deliver such written documents, instructions and/or instruments in such form as shall from time to time be reasonably required to carry out the terms and provisions of this Agreement, including but not limited to, the execution, filing or recording of any reporting documents, affidavits, releases, deeds or agreements. The Parties further agree to give reasonable cooperation and assistance to any other party or parties hereto in order to enable such other Party or Parties to secure the intended benefits of this Agreement.
18. Counterparts: This Agreement may be executed by the Parties in any number of counterparts, including by way of facsimile, and each of which shall be deemed to be an original and all of which, collectively, shall be deemed to be one and the same instrument.
19. Integration Clause: This Agreement contains the entire agreement between and among the Parties hereto, and supercedes all prior and contemporaneous discussions, negotiations, understandings and agreements, whether oral or written, express or implied, between or among them relating to the subject matter of this Agreement. This Agreement may not be amended orally, nor shall any purported oral amendment (even if accompanied by partial or complete performance in accordance therewith) be of any legal

force or effect or constitute an amendment of this Agreement, but rather this Agreement may be amended only by an agreement in writing signed by the parties.

20. Time Is of The Essence: Time is of the essence with respect to the performance of any and all provisions of this Agreement.

21. Capacity: All Parties agree that no Party hereto is an infant or incompetent person for whom a committee or Guardian has been appointed and that each party has the power and authority to bind itself and all of its predecessors, successors, assigns, and agents. BIG BAD LENDER specifically warrants that it is the current holder of the Note and assignee of the Mortgage at issue in this case.

22. Effective Date: This Agreement shall be deemed to be effective on the Date that it is signed by all parties hereto.

IN WITNESS WHEREOF, each of the Parties hereto has executed this Agreement on the date set forth opposite his, their or its name below.

The undersigned hereby certify that they have read and fully understand all of the terms, provisions, and conditions of this Agreement and have executed this Agreement voluntarily.

BIG BAD LENDER

By: _____

Its: _____

Date: _____

JANE DOE

DATE

ROBERT DOE

DATE

E – FAILURE TO PERFECT VEHICLE LIEN

U.S. Structured Finance Newsletter

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STATE REGULATION DRIVING AUTO LOAN ABS AWAY?

The New York State Assembly has proposed a new bill called the Vehicle Lienholder Accountability Act which may limit auto loan ABS issuers from including receivables originated in New York state in auto loan securitizations. This act requires lienholders to provide notice to the owner of a vehicle when the lienholder assigns his or her security interest. It also requires the lienholder to execute a release of his or her security interest within 10 days of this assignment. The Assembly proposed a civil fine not to exceed \$1,000 for failure to comply with this law. Although this may not seem to be very burdensome on the face of it, this legislation may make it difficult, or at the very least expensive and administratively burdensome to securitize auto loan receivables originated in New York.

The justification for the legislation is that vehicle lienholders often assign their security interest without generating a lien release to the owner, and the new lienholder often fails to properly register the lien with the Department of Motor Vehicles in order to avoid the fees due. As a result, many vehicle owners do not know who has a security interest in their vehicle, and are unable to obtain a clean certificate of title when they have paid off their vehicle loan. As a result, the original lienholder should be required to release his or her security interest in the vehicle once the lien has been assigned.

The issue with the legislation for auto loan securitizations is that an auto loan may be transferred several times during the life of an auto loan. An originator may initially purchase an auto loan onto its balance sheet and then transfer it to a warehouse facility prior to funding the loan in a term securitization. After an originator has built sufficient loan volume to fund the loans in a term securitization, it will again transfer the loans but may include several transfers depending upon the structure of the securitization. In each case, there would be a requirement to release the lien of the original lienholder and also the vehicle certificate would need to be re-titled in order to reflect the new lienholder.

This is similar to decision made by a bankruptcy court in San Antonio Texas in 2008 that required a secured lender to have their name placed on the certificate of title in order to have a perfected security interest in the vehicle. Prior to this decision, parties to securitizations had relied on Texas' Certificate of Title Act and Chapter 9 of the Texas Business and Commerce Code which indicated that re-titling was not necessary in order for the perfected security interest to reside in assignees of lenders or future assignees. As a result of the bankruptcy court decision, parties in securitizations were unsure of whether they would be perfected without applying for new certificates of title following each transfer. The American Securitization Forum (ASF) along with other parties lobbied the Texas legislature to clarify the requirements in Texas in order to eliminate any ambiguity. In June 2009, the Governor of Texas signed new legislation which clarified the existing law and explicitly states that certificates of title do not need to be reissued reflecting the names of the lienholder in order to have a perfected security interest in the vehicles.

In the case of New York, the New York Uniform Commercial Code provides that no additional steps are required to perfect an assignee's security interest. However, this bill may call into question the validity of a lienholder's security interest if the assignor fails to provide notice or a release of the lien to the owner of the vehicle. It also imposes a potential civil fine of up to \$1,000 for failure to comply with this legislation.

The ASF is currently drafting a response to this proposed legislation which is currently with the Committee on Codes. DBRS will continue to monitor the progress of this legislation and will consider the implications of the final legislation on securitizations of auto loan receivables from New York.

For questions or comments, please contact Rosemary Kelley at rkelly@dbrs.com

**IN THE UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION**

In re:)	
)	
	)	Chapter 11
	)	Case No.
)	
)	
)	
)	
as Debtors in Possession.)	
)	
Plaintiffs,)	
v.)	
	)	Adv. Proc. No.
Ford Motor Credit Company, LLC,)	
d/b/a Land Rover Capital Group)	
)	
Defendant.)	

**COMPLAINT FOR DECLARATORY JUDGMENT AVOIDING LIEN AND FOR
DAMAGES AND SANCTIONS**

Introduction

1. This is an action brought by Plaintiffs _____ in their capacity as debtors in possession (together “Debtors” or “Debtors in Possession,” as appropriate) in Chapter 11 cases _____ and _____, respectively (together “Chapter 11 Cases”) which are jointly administered, for a Declaratory Judgment avoiding the lien of Ford Motor Credit Company, LLC d/b/a Land Rover Capital Group (“FMC”) pursuant to 11 U.S.C. §544(a)(1). This is also an action to 105(a), 502(b) and 506 of the Bankruptcy Code and Amended Rule 3007 of the Bankruptcy Rules.

2. The Plaintiffs also seek the recovery of actual and punitive damages from the Defendant pursuant to Section 105(a) of Title 11 of the United States Code, as amended, and commonly referred to as the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (hereinafter the “Bankruptcy Code”).

3. The Plaintiffs also seek the recovery of actual and punitive damages from the Defendant pursuant to 11 U.S.C. §362(a)(3) for a violation of the automatic stay.

4. This is also an action seeking monetary relief based on Defendants' violations of the North Carolina Unfair and Deceptive Acts and Practices Laws, for the failure of Defendant to release its lien on the title to a motor vehicle in compliance with applicable

North Carolina law and for the adverse impact such State law violations have had on the applicable provisions of Title 11 of the United States Code.

5. This is also an action seeking redress for the Defendant's filing of a false and fraudulent Proof of Claim.

JURISDICTION

6. This is a core proceeding as that term is defined by Section 157(b)(2) of Title 28 of the United States Code in that it concerns claims and matters arising out of the administration of this bankruptcy case and rights duly established under Title 11 of the United States Code and other applicable federal law. In the unlikely event this Court determines that this is not a core proceeding, the Plaintiffs consent to the entry of a final order by the Bankruptcy Court.
7. This Court has both personal and subject matter jurisdiction to hear this case pursuant to Section 1334 of Title 28 of the United States Code and Section 157(b)(2) of Title 28 of the United States Code.
8. This Court has supplemental jurisdiction to hear all state law claims pursuant to Section 1367 of Title 28 of the United States Code.
9. This Court also has jurisdiction pursuant to Section 1331 of Title 28 of the United States Code.
10. This matter is primarily a core proceeding and therefore the Bankruptcy Court has jurisdiction to enter a final order. However, in the event this case is determined to be a non-core proceeding then and in that event the Plaintiff consents to the entry of a final order by the Bankruptcy Judge.
11. Venue lies in this District pursuant to Section 1391(b) of Title 28 of the United States Code.

PARTIES AND THE BASE CASE

12. Plaintiffs _____ are the debtors in possession in the Chapter 11 Cases commenced by the filing of petitions with the clerk of this Court by Debtors on April 5, 2010.
13. FMC is a foreign limited liability company doing business in the State of North Carolina, with its principal business location at One American Road, Dearborn, Michigan 48126. FMC has a designated agent for service in the State of North Carolina, registered with the North Carolina Secretary of State's Office as CT Corporation System, 150 Fayetteville Street, Box 1011, Raleigh, NC 27601.
14. The petition and schedules filed in the Chapter 11 Cases indicate the Debtors have an

ownership interest in a 2008 Land Rover Range Rover, bearing Vehicle Identification Number # _____ (“Vehicle”), with an alleged secured debt owing to FMC in the amount of \$69,462.71.

15. FMC, by its attorney, filed a Motion for Relief from Stay on May 25, 2010 (docket no. ____ – case ____). The Motion for Relief states that FMC is a creditor of Debtors _____ by virtue of a retail installment contract entered into on October 4, 2008 (“Contract”). The Motion further alleges that FMC holds a validly perfected, security interest in the Vehicle as noted on the Certificate of Title issued by the State of North Carolina on October 23, 2008 (“Title”). A copy of the Contract and Title is attached to the Motion for Relief from Stay, and the Title shows “Land Rover Capital Group” as first lienholder. The Plaintiffs allege that by filing the Contract and Title with the motion the FMC has made a judicial representation to this Court that it is the lawful “holder” of the Contract, and that it is the lawful beneficiary and owner of the first lien on the Title.
16. Debtors filed a response to the Motion for Relief from Stay on June 28, 2010, denying that FMC holds a validly perfected security interest in the Vehicle.
17. The Plaintiffs are informed and believe and therefore allege that the FMC is engaged in the business of providing financing to vehicle purchasers through duly licensed franchised dealers of Ford Motor Company which at times relevant to this action sold vehicles to the public under the trade name “Land Rover”, which financing allows purchasers to purchase new and used motor vehicles from the Land Rover dealers. Such financing is arranged by the agreement of the FMC to purchase certain designated Retail Installment Sales Agreements (“RISAs”) from the respective dealers after their execution by purchasers. In connection with these transactions, the Plaintiffs believe and therefore allege that the respective Land Rover dealers are required to file proper documentation with their respective State Divisions of Motor Vehicles so as to reflect on the vehicle certificates of title that the FMC holds a first lien position with respect to the financed vehicles.
18. The Plaintiffs allege upon information and belief that the FMC, in the ordinary course of business, sells all or a significant portion of its automotive finances receivables (e.g., the RISAs) to trusts and third-party entities as asset-backed securitizations and as whole loan sales. The Plaintiffs also believe and therefore allege that these asset-backed securitizations involve the “true sale” of the RISAs from the FMC to the depositor and from the depositor to the trusts and to other third parties. The trusts and third parties purchase these assets with cash raised through the issuance of beneficial interests (usually bonds, debt instruments, etc.) to third-party investors.
19. The Plaintiffs believe that after the sale of the RISAs, the respective trusts and third-party entities become the legal and beneficial owners of the financial instruments.
20. The Plaintiffs believe and therefore allege that in many of these transactions the FMC retains a residual beneficial interest in the cash flow from the receivables, but that such a residual interest is subordinated to the rights of the owners of the trusts to the income

streams. To that extent, the residual interest is a credit enhancement to the investors in the respective trusts designed to absorb substantially all credit defaults, prepayments of loans, and interest-rate risks of the receivables transferred to the trusts. The Plaintiffs further allege on information and belief that the retention of these “residual” rights does not provide the FMC with any direct interest in any of the underlying assets of the respective trusts such as RISAs purchased by the trusts.

21. The Plaintiffs believe and therefore allege that in a smaller number of transactions the FMC transfers the automotive finance receivables (i.e., the RISAs) to various third-parties, including securitized trusts, in transactions wherein it does not retain any residual interest in the trusts and therefore bears no risk of loss related to the receivables. The Plaintiffs allege that the FMC refers to these transactions as “whole loan sales.”
22. The Plaintiffs allege that these trusts are considered Qualifying Special Purpose Entities (“QSPEs”) under the Generally Accepted Accounting Standards (SFAS 140) and are therefore are not considered to be a “consolidated group” with FMC. The Plaintiffs also believe that these trusts are considered to be variable interest entities (“VIEs”) under applicable Federal law and regulations.
23. Since most of the trusts are QSPEs, they are also multi-seller and multi-collateralized bank conduits subject to regulation by the Office of Thrift Supervision and the Comptroller of the Currency as well as the Securities and Exchange Commission.
24. The Plaintiffs allege that the bonds or investment certificates issued by the trusts are subject to specific registration requirements as provided for by the Securities and Exchange Commission Act. Under the Act, the trusts are required to file and register with the SEC a Prospectus and Prospectus Supplement for the benefit of the potential third-party investors. The Plaintiffs allege that the purpose of these required filings is to, among other things, apprise the public of all known risks associated with the investments.
25. Upon information and belief, the Plaintiffs aver that the true owner and holder of the security interest in the Vehicle is “Ford Credit Auto Owner Trust 2009-A” (“Trust”), or a subsequent trust agreement between FMC and Ford Credit Auto Receivables Two, LLC, (“Depositor”). Plaintiffs cannot determine with certainty at this point in which trust the Contract in this case was placed in because the schedules of receivables have been omitted from the receivables purchase agreements of the Trust and subsequent trusts established by FMC and the Depositor. However, the purchase agreements state that the schedules are kept on file at the offices of the seller, purchaser, and indenture trustee. Plaintiffs believe that the schedule of receivables evidencing the trust that owns the contract at issue herein can be obtained through discovery. A copy of the Prospectus and Prospectus Supplement for the Trust is attached hereto as Exhibit “A” and made a part hereof. The Prospectus and Prospectus Supplement are attached hereto for purposes of demonstration, and Plaintiffs believe that if the vehicle in question is not part of the Trust, that the vehicle is in a trust governed in all material respects by substantially similar or virtually identical documents.

26. Upon information and belief, the Plaintiffs aver that upon origination of the Contract and security interest on October 4, 2008, the contract and security interest were subsequently bundled with other such contracts and security interests, sold to Ford Credit Auto Receivables Two, LLC as Depositor, and then re-sold to the Trust. A copy of the Purchase Agreement between FMC as “Sponsor” and Depositor as “Depositor”, documenting a precursor transaction in the process of creating the Trust, (“Purchase Agreement”) is attached hereto as Exhibit “B” and made a part hereof. The Purchase Agreement is attached hereto for purposes of demonstration, and Plaintiff believes that if the vehicle in question is not part of the Trust, that the vehicle is in a trust governed by substantially similar or virtually identical documents.

27. The Purchase Agreement states in Section 2.1(a) that:

“Sponsor [FMC] sells and assigns to the Depositor, *without recourse*...all of the right, title, and interest of the Sponsor...to the Purchased Property” [emphasis added].

Section 1.1 of the Purchase Agreement indicates that certain defined terms in the Purchase Agreement are defined in Appendix A of the Sale and Servicing Agreement between Trust and FMC and Depositor (“Sale and Servicing Agreement”). “Purchased Property” is defined in Appendix A of the Sale and Servicing Agreement as “(a) the Receivables, (b) all amounts received and applied on the Receivables on or after the Cutoff Date, (c) the Security Interests in the Financed Vehicles granted by Obligors pursuant to the Receivables and any other interest of [FMC] in the Financed Vehicles...”

28. Plaintiffs further allege that the Purchase Agreement states in Section 2.2 under the heading “Savings Clause” that:

“It is the intention of the Sponsor and the Depositor that (i) the sale and assignment pursuant to Section 2.1 above constitute an absolute sale of the Purchased Property, conveying good title to the Purchased Property free and clear of any Lien other than Permitted Liens, from the Sponsor to the Depositor and (ii) the Purchased Property not be a part of the Sponsor’s estate in the event of a bankruptcy or insolvency of the Sponsor...”

29. Plaintiffs further allege that Depositor, through a Sale and Servicing Agreement, further sold, transferred, or assigned its interest in Vehicle to Trust or a subsequent similar trust. The Sale and Servicing Agreement between FMC, Depositor and Trust is attached hereto as Exhibit “C” and made a part hereof. The Sale and Servicing Agreement is attached hereto for purposes of demonstration, and Plaintiffs believe that if the vehicle in question is not part of the specified trust, that the vehicle is in a trust governed by a substantially similar or virtually identical document.

30. Plaintiffs allege that the Sale and Servicing Agreement under Section 2.1 states, in pertinent part:

“In consideration of the [Trust’s] delivery to the Depositor of Notes....the Depositor irrevocably sells and assigns to the [Trust], *without recourse* (subject to the obligations of the Depositor under this Agreement), all right, title and interest of the Depositor...in and to the Receivables and other Trust Property” [emphasis added].”

31. Plaintiffs further allege that the Sale and Servicing Agreement states in Section 2.2 under the heading “Savings Clause” that:

“It is the intention of the Depositor and the [Trust] that (i) the sale and assignment pursuant to Section 2.1 constitutes an absolute sale of the Trust Property conveying good title free and clear of any lien, other than Permitted Liens, from the Depositor to the [Trust], and (ii) the Trust Property not be a part of the Depositor’s estate in the event of the bankruptcy or insolvency of the Depositor...”

32. The Plaintiffs allege that the Prospectus and Prospectus Supplement clearly states that FMC, as the originator, will assign its security instruments to the Depositor, who will assign it to the Trust. Furthermore, the Prospectus and Prospectus Supplement states that FMC will continue to hold the certificates in the capacity of an administrative lien holder.

33. The Plaintiffs allege that the Prospectus and Prospectus Supplement in the Risk Factors Section, beginning on page 6 of the Prospectus and Prospectus Supplement clearly and unequivocally states:

“If another person acquires an interest in a receivable or a related financed vehicle that is superior to the trust’s interest, the collections on that receivable or the proceeds from the sale of that financed vehicle may not be available to make payments on your notes. If the trust does not have a perfected security interest in a receivable or a financed vehicle, its ability to repossess and sell the financed vehicle securing a defaulted receivable may be adversely affected. Another person could acquire an interest in a receivable or a financed vehicle that is superior to the trust’s interest if:

- the trust does not have a perfected security interest in the receivable or financed vehicle because Ford Credit’s security interest in the receivable or financed vehicle was not properly perfected,
- **the trust does not have a perfected security interest in the financed vehicle in certain states because the servicer will not amend the certificate of title to identify the trust as the new secured party...**” (Emphasis added.)

34. The Plaintiffs allege that pursuant to North Carolina General Statute §20-58 a security interest in a motor vehicle may only be perfected by the application to and notation of the name and address of the holder of the security interest on the certificate of title for the motor vehicle. Specifically, the Plaintiff alleges that NCGS §20-58 provides that:

“§ 20-58. Perfection by indication of security interest on certificate of title.

(a) Except as provided in G.S. 20-58.8, a security interest in a vehicle of a type for which a certificate of title is required shall be perfected only as hereinafter provided.

- (1) If the vehicle is not registered in this State, the application for notation of a security interest shall be the application for certificate of title provided for in G.S. 20-52.
- (2) If the vehicle is registered in this State, the application for notation of a security interest shall be in the form prescribed by the Division, signed by the debtor, and contain the date of application of each security interest, and name and address of the secured party from whom information concerning the security interest may be obtained. The application must be accompanied by the existing certificate of title unless in the possession of a prior secured party. If there is an existing certificate of title issued by this or any other jurisdiction in the possession of a prior secured party, the application for notation of the security interest shall in addition contain the name and address of such prior secured party. An application for notation of a security interest may be signed by the secured party instead of the debtor when the application is accompanied by documentary evidence of the applicant's security interest in that motor vehicle signed by the debtor and by affidavit of the applicant stating the reason the debtor did not sign the application. In the event the certificate cannot be obtained for recordation of the security interest, when title remains in the name of the debtor, the Division shall cancel the certificate and issue a new certificate of title listing all the respective security interests.
- (3) If the application for notation of security interest is made in order to continue the perfection of a security interest perfected in another jurisdiction, it may be signed by the secured party instead of the debtor. Such application shall be accompanied by documentary evidence of a perfected security interest. No such application shall be valid unless an application for a certificate of title has been made in North Carolina. The security interest perfected herein shall be subject to the provisions set forth in G.S. 20-58.5.

(b) When a manufacturer's statement of origin or an existing certificate of title on a motor vehicle is unavailable, a first lienholder who holds a valid license as a motor vehicle dealer issued by the Commissioner under Article 12 of this Chapter or his designee may file a notarized copy of an instrument creating and evidencing a security interest in the motor vehicle with the Division of Motor Vehicle. A filing pursuant to this subsection shall constitute constructive notice to all persons of the security interest in the motor vehicle described in the filing. The constructive notice shall be effective from the date of the filing if the filing is made within 20 days after the date of the security agreement. The constructive notice shall date from the date of the filing with the Division if it is made more than 20 days after the date of the security agreement. The notation of a security interest created under this subsection shall automatically expire 60 days after the date of the creation of the security interest, or upon perfection of the security interest as provided in subsection (a) of this section, whichever occurs first. A security interest notation made under this subsection and then later perfected

under subsection (a) of this section shall be presumed to have been perfected on the date of the earlier filing. The Division may charge a fee not to exceed ten dollars (\$10.00) for each notation of security interest filed pursuant to this subsection. The fee shall be credited to the Highway Fund. A false filing with the Division pursuant to this subsection shall constitute a Class H felony.”

35. The Plaintiffs further allege that the provisions of NCGS §20-58 provide the exclusive methods of giving constructive notice of a lien or encumbrance upon a registered vehicle pursuant to NCGS §20-58 as confirmed by NCGS §25-9-303(c), part of Article 9 of the Uniform Commercial Code as adopted by North Carolina, which states:

“Applicable law. -- The local law of the jurisdiction under whose certificate of title the goods are covered governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in goods covered by a certificate of title from the time the goods become covered by the certificate of title until the goods cease to be covered by the certificate of title.”

36. The Plaintiffs are informed and believe and therefore allege that under the mandatory provisions of NCGS §20-58 if the application for notation of a security interest with the required fee is delivered to the Division of Motor Vehicle within 20 days after the date of the security agreement, the security interest is perfected as of the date of the execution of the security agreement. Otherwise, the Plaintiffs allege that the security interest is not perfected until the date of the actual delivery of the application to the Division.
37. The Plaintiffs further allege that pursuant to NCGS §20-72, any person holding a lien or encumbrance on a vehicle may assign the title or interest in or to the vehicle to another party without the consent of the owner, but is under a legal duty to give written notice of the assignment to the owner. The Division of Motor Vehicle, upon receiving a certificate of title assigned by a lien holder, is required to issue a new certificate of title. If the said secured party fails or neglects to enter the transferee’s name on a properly endorsed certificate of title, or fails or neglects to properly endorse and deliver a certificate of title to a transferee or owner entitle thereto, NCGS §20-58 provides that such failure constitutes a Class 2 misdemeanor under North Carolina Law.
38. The Plaintiffs allege that under NCGS §20-58.4 upon the satisfaction or other discharge of a security interest in a motor vehicle for which the certificate of title is in the possession of the secured party, the secured party shall within 10 days after receipt of final payment under NCGS §20-58.4, execute a release of his security interest, in the space provided on the certificate, and mail or deliver the certificate and release to the next secured party named therein, or if none, to the owner or other person authorized to receive the certificate for the owner. NCGS §20-58.4 states, in pertinent part, as follows:
- (a) Upon the satisfaction or other discharge of a security interest in a vehicle for which the certificate of title is in the possession of the secured party, the secured party shall within 10 days after demand and, in any event, within 30 days, execute a release of his security interest, in the space

provided therefor on the certificate or as the Division prescribes, and mail or deliver the certificate and release to the next secured party named therein, or if none, to the owner or other person authorized to receive the certificate for the owner.

- (b) Upon the satisfaction or other discharge of a security interest in a vehicle for which the certificate of title is in the possession of a prior secured party, the secured party whose security interest is satisfied shall within 10 days execute a release of his security interest in such form as the Division prescribes and mail or deliver the same to the owner or other person authorized to receive the same for the owner.
- (c) An owner, upon securing the release of any security interest in a vehicle shown upon the certificate of title issued therefor, may exhibit the documents evidencing such release, signed by the person or persons making such release, and the certificate of title to the Division which shall, when satisfied as to the genuineness and regularity of the release, issue to the owner either a new certificate of title in proper form or an endorsement or rider attached thereto showing the release of the security interest.
- (d) If an owner exhibits documents evidencing the release of a security interest as provided in subsection (c) of this section but is unable to furnish the certificate of title to the Division because it is in possession of a prior secured party, the Division, when satisfied as to the genuineness and regularity of the release, shall procure the certificate of title from the person in possession thereof for the sole purpose of noting thereon the release of the subsequent security interest, following which the Division shall return the certificate of title to the person from whom it was obtained and notify the owner that the release has been noted on the certificate of title.”

- 39. The Plaintiffs allege that the sale of the Contract and security interest in the Vehicle in this case by the FMC to the Trust via the Depositor as alleged herein was for cash or equivalent consideration and that such transaction(s) triggered the mandatory provisions NCGS §20-58.4. The Plaintiffs further allege that rather than complying with this mandatory provision the FMC did not release its lien on the certificate of title but rather retained such title with the lien duly noted thereon.
- 40. Alternatively, if the transaction was not completed by cash settlement, Plaintiffs allege that the Purchase Agreement between FMC and the Depositor was made without recourse, thus satisfying the requirements for a final payment pursuant to NCGS §25-3-414.
- 41. The Plaintiffs also allege upon information and belief that after the sale of the Contract and security interest in the Vehicle to the Trust, FMC failed by its own admission to notify the Debtors or the Division of Motor Vehicle pursuant to NCGS §20-72.
- 42. The Plaintiffs allege upon information and belief that the FMC and the Trust had actual knowledge of the North Carolina motor vehicle title laws and of the consequences of

their failure to follow the same, but in order to avoid the expenses of compliance, willfully and intentionally elected not to comply at their own risk and as a fully disclosed risk to the investors who purchased bonds or certificates issued by the Underwriter for the trust and, thus, the risk of another party seeking relief as sought by the Plaintiff in paragraph B of the prayer for relief below was known to FMC and Trust and the purchasers of securities issued by the trust.

FIRST CLAIM FOR RELIEF

DECLARATORY JUDGMENT FMC IS UNSECURED, ORDER FMC TO CANCL THE LIEN THE CERTIFICATE OF TILE, AND FOR TURNOVER OF THE TITLE TO THE DEBTORS IN POSSESSION

43. The allegations contained in Paragraphs 1 – 42 of this complaint are re-alleged and incorporated herein by this reference.
44. The Debtors in Possession, pursuant to 11 U.S.C. §544 shall have, as of the commencement of the case, and without regard to any knowledge of the trustee or of any creditor, the rights and powers of, or may avoid any transfer of property of the debtor or any obligation incurred by the debtor that is voidable by: “(1) a creditor that extends credit to the debtor at the time of the commencement of the case, and that obtains, at such time and with respect to such credit, a judicial lien on all property on which a creditor on a simple contract could have obtained such a judicial lien, whether or not such a creditor exists;”
45. FMC by virtue of the sale of the Contract to the Trust, no longer has a valid security interest in the Contract.
46. FMC has never transferred its security interest in the Vehicle pursuant to the North Carolina Motor Vehicle Title Laws to the Trust. Under applicable North Carolina motor vehicle law, FMC was required to cancel the lien it held on the title within 30 days of the date of the “true sale” of the retail installment contract.
47. Since FMC must cancel the lien it holds on the certificate of title on the Vehicle, FMC is, therefore, not the perfected secured creditor under North Carolina law.
48. The interest of the Debtors in Possession under 11 U.S.C. §544 is therefore superior to the interest of the FMC, and the lien of FMC must be avoided.
49. Based upon the foregoing, the Motion of the FMC to allow it relief from the automatic stay should be denied.
50. Furthermore, based upon the foregoing, the Court should issue an Order requiring FMC to cancel the lien on the title to the Vehicle and turnover the Certificate of Title to the Plaintiffs.

SECOND CLAIM FOR RELIEF

VIOLATION OF THE AUTOMATIC STAY PURSUANT TO 11 U.S.C. §362(a)(3)

51. The allegations contained in Paragraphs 1 – 50 of this complaint are re-alleged and incorporated herein by this reference.
52. The Plaintiffs are informed and believe and, therefore, allege that FMC in filing its Motion for Relief from Stay was acting as the agent for the Trust in its role as the servicer for the Trust under the Sale and Servicing Agreement. As such, Trust is liable for the acts of FMC taken in the scope of its agency.
53. FMC, in its Motion for Relief from Stay, has stated unequivocally that it holds a validly perfected, first priority security interest in the Vehicle.
54. This statement is false and misleading. The Purchase Agreement states that the parties' intent is that the transfer of the receivables is intended to constitute a sale between the parties. The Prospectus and Prospectus Supplement clearly indicate that the Contract is owned by the Trust. Furthermore, FMC and Trust both have knowledge the Trust may not be perfected in some states because of the language in the Prospectus and Prospectus Supplement under risk factors.
55. FMC's Motion for Relief from Stay is an attempt to exercise control over property of the estate in which it has no enforceable rights or interests to the detriment of the estate, the trustee, and other unsecured creditors. If the vehicle is deemed unencumbered, then there will be non-exempt equity in the Vehicle subject to sale by the Debtors in Possession or distribution to unsecured creditors pursuant to a confirmed plan of reorganization pursuant to 11 USC 1129(a)(7). Unsecured creditors will be harmed due to the preferential treatment received by another unsecured creditor, Trust, if the relief requested by the Plaintiffs is not granted.
56. As such, FMC and Trust are liable for actual damages for violation of the automatic stay as Plaintiffs have incurred loss of time and legal expenses in bringing this adversary proceeding.
57. FMC and Trust should also be liable for punitive damages for their willful misrepresentation of its legal status as the owner and holder of the note at issue herein.

THIRD CLAIM FOR RELIEF **VIOLATION OF NCUDAP**

58. The allegations in paragraphs 1 through 57 of this complaint are realleged and incorporated herein by this reference.
59. The Plaintiffs allege that the sale of the Contract and security interest in the Vehicle in this case by the FMC to the Trust via the Depositor as alleged herein was for cash or equivalent consideration and that such transaction(s) triggered the mandatory provisions NCGS §20-58.4. The Plaintiffs further allege that rather than complying with this mandatory provision the FMC

did not release its lien on the certificate of title but rather retained such title with the lien duly noted thereon.

60. The Plaintiffs allege that a violation of NCGS §20-58.4 is a violation of the North Carolina Retail Installment Sales Act, which violation, in turn, is a violation of the NC UDAP statutes.

61. The actions and conduct of the Defendant in this case constitute unfair and deceptive acts and practices in violation of the provisions of Section 75-1.1 of the North Carolina General Statutes. Specifically, the unfair acts and practices of FMC arose out of its failure to comply with the mandatory provisions of Chapter 20 of the North Carolina General Statutes.

62. As a result of the unfair acts and deceptive practices of FMC, the Plaintiffs are entitled to the recovery of actual and treble damages under the provision of Section 75-16 of the North Carolina General Statutes.

63. As a result of the unfair acts and deceptive practices of the Defendant, the Plaintiffs are entitled to the recovery of reasonable legal fees under the provisions of Section 75-16.1 of the North Carolina General Statutes.

FOURTH CLAIM FOR RELIEF
FILING A FALSE AND FRAUDULENT PROOF OF CLAIM

64. The allegations in paragraphs 1 through 63 of this complaint are realleged and incorporated herein by this reference.

65. The Plaintiffs allege that FMC has intentionally filed a false and fraudulent Proof of Claim as a device to perpetuate a fraud upon this Court, the Bankruptcy Administrator, the scheduled creditors in this case, and the Debtors in this proceeding.

66. FMC is longer the owner and holder of the RISA contract and does not hold a valid lien on the title to the Vehicle.

67. The conduct of the Defendant in filing an improper proof of claim constitutes fraud on the Court.

68. The Plaintiffs allege that this Court has authority under Section 105(a) of Title 11 of the United States Code to “issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.”

69. The Plaintiffs allege that this Court should impose sanctions against the Defendant for filing an improper claim in this case.

WHEREFORE, the Plaintiffs respectfully pray of the Court as follows:

- A. That this Court issue an Order denying Defendant FMC's Motion for Relief from stay;
- B. That this Court issue an Order avoiding the security interest claimed by FMC and the Trust in the Vehicle;
- C. That the Plaintiffs be awarded actual damages for violation of the automatic stay by Defendant FMC;
- D. That the Plaintiffs be awarded punitive damages for violation of the automatic stay by Defendant FMC;
- E. That the Plaintiffs have and recover against the Defendant the sum of \$4,000.00 for its violation of N.C.G.S. Section §20-58.4, et seq.; and
- F. For attorneys' fees and costs incurred in this matter; and
- G. For all other just and proper relief to which the debtors may be entitled.

This the _____ day of _____, 2010



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**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME: CHAPMAN, MARION DOUGLAS

**CHAPTER 13 CASE NO. 09-40194
OUR FILE NO. 12813-WG**

**ADDRESS: 2408 EMERALD MINE RD.
SHELBY, NC 28152**

SSN: --- -- 7132

DEBTOR

**MARION D. CHAPMAN
STEVEN G. TATE**

Adversary Proc. No. 09-_____

Plaintiffs

versus

**CHRYSLER FINANCIAL SERVICES AMERICAS,
LLC**

Defendant

**COMPLAINT SEEKING TO AVOID LIEN AS A PREFERENCE
(THIS CASE SETTLED IN 12/09 FOR \$20,022.45)**

Introduction

1. This is an action brought by the debtor and Steven G. Tate, Chapter 13 Trustee, to avoid the lien of Chrysler Financial Services Americas, LLC (hereinafter "Chrysler Financial") as a preferential transfer pursuant to 11 U.S.C. §547 of the Bankruptcy Code. This is also an action to 105(a), 502(b) and 506 of the Bankruptcy Code and Amended Rule 3007 of the Bankruptcy Rules.

Jurisdiction and Venue

2. Jurisdiction is conferred on this Court pursuant to the provisions of Section 1334 of Title 28 of the United States Code in that this proceeding arises in and is related to the above-captioned Chapter 13 case under Title 11 and concerns property of the Debtor in that case.

3. This Court has both personal and subject matter jurisdiction to hear this case pursuant to Section 1334 of Title 28 of the United States Code, Section 157(b)(2) of Title 28 of the United States Code, and pursuant to the Order entered by the Judges of the United States District Court for the Western District of North Carolina on July 30, 1984 (the Referral Order), which Order was entered in accordance with the Bankruptcy Amendments and Federal Judgeship Act of 1984.

4. This Court has supplemental jurisdiction to hear all state law claims pursuant to Section

1367 of Title 28 of the United States Code.

5. This matter is primarily a core proceeding and therefore the Bankruptcy Court has jurisdiction to enter a final order. However, in the event this case is determined to be a non-core proceeding then and in that event the Plaintiff consents to the entry of a final order by the Bankruptcy Judge.

6. Venue lies in this District pursuant to Section 1391(b) of Title 28 of the United States Code.

Parties

7. Plaintiff Steven G. Tate is the duly appointed trustee in this Case commenced by the filing of a petition with the clerk of this Court by Plaintiff debtor on March 13, 2009.

8. Plaintiff Marion Chapman is a Chapter 13 debtor and former owner of the car that is the subject of this Complaint.

8. Defendant, Chrysler Financial, is a foreign corporation doing business in the State of North Carolina, with its principal business location at 27777 Inkster Rd, Farmington Hills Michigan 48334. Chrysler Financial has a designated agent for service in the State of North Carolina, registered with the North Carolina Secretary of State's Office as CT Corporation System, 225 Hillsborough Street, Raleigh, NC 27603.

Factual Allegations

9. Debtor's petition and schedules filed in this case indicate that debtor had an ownership interest in a 2008 Dodge Ram 1500, bearing Vehicle Identification Number #1D7HA182X8S575112, with an alleged secured debt owing to Chrysler Financial in the amount of \$36,411.57. Debtor listed the value of the vehicle as \$18,825.00. Debtor's Statement of Intentions indicated that Debtor would surrender the vehicle to Dodge Finance.

10. Chrysler Financial, by its attorney, filed a Motion for Relief from Stay on April 22, 2009. The Motion for Relief states that Chrysler Financial is a creditor of debtor by virtue of a retail installment contract entered into on October 29, 2009. The Motion further alleges that Chrysler Financial holds a validly perfected, first priority security interest in the 2008 Dodge Ram 1500, bearing Vehicle Identification Number 1D7HA182X8S575112, as noted on the Direct Lien Filing and/or Certificate of Title issued by the State of North Carolina. A copy of the contract and title are attached to the Motion for Relief from Stay, and the Certificate of Title Chrysler Financial as first lienholder. The Plaintiffs allege that by filing the contract and title with the motion the Defendant has made a judicial representation to this Court that it is the lawful "holder" of the Retail Installment Sales Contract, and that it is the lawful beneficiary and owner of the first lien on the said certificate of title.

11. Debtor filed a response to the Motion for Relief from Stay on April 26, 2009, not objecting to the relief requested since the 2008 Dodge Ram was being surrendered.

12. The motion for relief from stay contained both a retail installment sale contract and copy of the certificate of title. The RISA was signed on October 28, 2008. The North Carolina certificate of title indicates that a lien was recorded on the title on December 16th, 2008. The lien was in favor of an entity noted as DC Fin SVCS LLE. The entity appears to be related to the Defendant in this case.

13. The lien was recorded more than 30 days after the purchase date and was given during

the 90 day preference period. The time between the recording of the lien and the filing of the bankruptcy was 84 days. Therefore, the lien is avoidable as a preference and the Truck was property of the bankruptcy estate.

14. Pursuant to 11 U.S.C. Section 547(e)(2)(B), since the time period between the perfection and the agreement was more than 30 days, the Defendant cannot claim the safe harbor provision provided by that section and the date the security interest attached is deemed to be December 16th, 2008, which places the transfer within the preference period and thus avoidable by the trustee.

15. Upon information and belief the Defendant has sold the truck and therefore the Defendant should be required to pay the chapter 13 estate the value of the truck. The Defendant valued the truck in their motion for relief from stay in an amount between \$15,725.00 and \$18,400.00.

CLAIM FOR RELIEF- TURNOVER OF MONEY TO THE ESTATE

16. The December 16, 2008 lien notation on the title by the Defendant was a transfer made within the 90 day preference period prior to the debtor's bankruptcy filing.

17. The transfer of property to the defendant was beneficial to them, since it would have created a secured interest in the property that could have defeated the Trustee's strong arm provisions granted to him under 11 U.S.C. Section 542.

18. The transfer of property to the Defendant was done while the debtor was insolvent.

19. The transfer was done "on an account of an antecedent debt owed by the debtor before such transfer was made." 11 U.S.C Section 547(b)(2).

20. The transfer constitutes an avoidable preference under 11 U.S.C. Section 547 and such the trustee can recover the property pursuant to 11 U.S.C. Section 550.

WHEREFORE, the Plaintiffs respectfully pray of the Court as follows:

- A. That the Court deem the December 16th, 2008 lien notation as a preference as defined by 11 U.S.C. Section 547.
- B. Order that the Defendant immediately turnover the Truck or the reasonable value of the truck to the Chapter 13 estate pursuant to 11 U.S.C. Section 550.
- C. Grant the attorney for the debtor's reasonable attorney fees to be paid from the money turned over to the estate by the Defendant.
- D. For such other and further relief as may be just and proper.

Dated this the 16th day of September 2009.



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Gardner Law Offices
Attorney for the Debtor(s)

/s/ _____
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Chapter 13 Trustee

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A Worrisome Opinion on Perfection of Liens

By Elizabeth M. Guffy

Texas Lawyer

A recent decision by a Texas bankruptcy court — holding that the assignee of a lien against property subject to the Texas Certificate of Title Act (COTA) must obtain a new certificate of title to perfect its assigned security interest — has caused a considerable stir in the world of securitizations, but Texas lawyers should know that its effects are likely to reverberate well beyond the world of structured finance.

Anyone seeking to buy a vehicle subject to COTA soon may find that there are fewer financing companies willing to loan money to Texas customers. For the same reason, financing companies holding loans secured by vehicles titled in Texas may find fewer investors willing to buy their receivables. And investors who already hold certificates backed by loans secured by vehicles titled in Texas could see the value of their investments fall, perhaps dramatically.

U.S. Bankruptcy Judge Leif M. Clark of the Western District of Texas issued the opinion in *Clark Contracting Services Inc. v. Wells Fargo Equipment Finance (In Re: Clark Contracting Services Inc.)*. On first reading, the Nov. 28, 2008, opinion would not seem to have such far-reaching effects. The facts of the case outlined in the opinion don't make for compelling reading: CIT Group/Equipment Financing Inc. provided the financing for Clark Contracting's purchase of six large specialized trucks, complied with all of the COTA requirements for perfecting its security interest in the vehicles and filed a financing statement with the Texas secretary of state. CIT later sold its debt and assigned its liens to Wells Fargo Equipment Finance, which took possession of the certificates of title and duly noted CIT's liens but which did not take any steps to have new titles issued to reflect the assignment of those liens. When Clark Contracting later filed bankruptcy, Wells Fargo applied for relief from the stay to foreclose on its collateral. In response, the debtor challenged the perfection of the liens in Wells Fargo's hands and asked the bankruptcy court to set them aside under Bankruptcy Code §544.

With the facts not in dispute, both sides filed motions for summary judgment. The opinion noted that the debtor, now acting through a trustee, pointed to COTA §501.114, which provides: "A lienholder may assign a lien recorded under Section 501.113 by . . . applying to the county assessor-collector for the assignment of the lien . . . and notifying the debtor of the assignment. . . . The issuance of a certificate of title . . . is recordation of the assignment."

The opinion went on to note that, according to the debtor's reading of this provision, an assigned security interest can only be perfected through the issuance of a new certificate of title listing the assignee as lienholder. Wells Fargo rejected this interpretation, contending instead that the use of the word "may" meant that the statute was intended to permit the assignee to record the assignment on the face of the title, rather than to require recordation to perfect the assigned lien. In particular, Wells Fargo argued that Texas Uniform Commercial Code §9-310(c) doesn't require an assignee to take any action to perfect its security interest and that COTA §501.005 provides that, in case of a conflict, the UCC controls.

The bankruptcy court sided with the debtor, finding that "may" in COTA §501.114 was intended to permit the assignment itself, with the rest of the statute being the steps required to perfect the assignment. Because Wells Fargo had, by its own admission, failed to comply with the provisions of §501.114, its liens against the debtor's vehicles weren't perfected at the time of the bankruptcy and were therefore voided under Bankruptcy Code §544.

Major Change

This holding calls into question the longstanding practices of companies financing receivables secured by motor vehicles. Typically, these companies take assignment of the seller's lien but don't apply for a new certificate of title reflecting the assignment. That's because the lien usually is assigned multiple times through the course of securitization and warehouse lending. (In warehouse lending, a company sets up a line of credit with a lender, secured by a pool of receivables, and moves loans in and out of that pool as it sells or securitizes the loans.) Obtaining a new certificate of title at each

step would add a hefty administrative burden and considerable cost to the process. Instead, financiers of Texas motor vehicle receivables have relied on the same interpretation of COTA and provisions of the Texas UCC cited by Wells Fargo in *Clark Contracting* .

If *Clark Contracting* stands, the security interests of a large percentage of the holders of Texas-originated motor vehicle receivables would not be perfected. According to the March 31 testimony of American Securitization Forum deputy executive director Tom Deutsch before the Texas Senate Committee on Business and Commerce, three large asset-backed security issuers collectively issued more than \$5 billion of securities backed by Texas auto loans between 2004 and 2008. Obviously, if the underlying auto loans prove to be unsecured, the value of these securities will plummet, further disrupting financial markets. Consumers will suffer as well. If Texas-originated auto loans aren't eligible for securitizations, Texas lenders will lose one of their primary sources of liquidity, and consumers will find auto loans more expensive and harder to find.

Regardless of whether the parties appeal the bankruptcy court's ruling, the securitization industry has realized that it will take more than success on appeal to fix the problem created by this opinion. Bills introduced in both houses of the Texas Legislature would amend COTA to reverse the bankruptcy court's decision. State Rep. Joe Deshotel, D-Beaumont, has authored H.B. 077, and state Sen. Troy Fraser, R-Horseshoe Bay, has authored S.B. 1592. Unless and until the Legislature acts, the fate of auto receivables in Texas remains uncertain.

Elizabeth M. Guffy is a Houston solo with extensive experience in the interworking of the U.S. Bankruptcy Code, the Uniform Commercial Code and structured finance. After practicing for a number of years with the Texas offices of Dewey & LeBoeuf, she recently opened her own practice.

399 B.R. 789

IN RE CLARK CONTRACTING SERVICES, INC.

IN RE CLARK CONTRACTING SERVICES, INC.
399 B.R. 789 (Bankr. W.D. Tex. 2008)

In re CLARK CONTRACTING SERVICES, INC.,
Debtor.
Clark Contracting Services, Inc., Plaintiff,
v.
Wells Fargo Equipment Finance, Defendant.

Bankruptcy No. 08-50046-LMC. Adversary No.
08-5045-LMC.

United States Bankruptcy Court, W.D. Texas, San
Antonio Division.

November 28, 2008

790

This Page Contains Headnotes.

791

Dean William Greer, San Antonio, TX, for
Debtor/Plaintiff.

792

Marshall L. Armstrong, Robert L. Barrows, San Antonio,
TX, for Defendant.

MEMORANDUM OPINION REGARDING THE PARTIES' RESPECTIVE MOTIONS FOR SUMMARY JUDGMENT

LEIF M. CLARK, Bankruptcy Judge.

Before the court are the defendant's motion for partial summary judgment and the plaintiff's response and cross-motion for summary judgment. The facts are not in material dispute. The only question of law raised by the two motions is what, if anything, chapter 501 of the Texas Transportation Code (hereinafter the "Certificate of Title Act")(fn1) requires of a lienholder in order to perfect an assigned lien. The issue is relevant because the debtor-in-possession ("debtor"), exercising the strong arm powers in section 544(a), seeks to avoid the liens of Wells Fargo Equipment Finance ("Wells Fargo") on certain vehicles, liens that Wells Fargo obtained by assignment from CIT Group/Equipment Financing, Inc. ("CIT"). For the reasons that follow, the court will deny the defendant's motion and grant partial summary judgment in favor of the plaintiff, holding that, to be effective against a hypothetical judgment creditor, the assignee of a lien on vehicles governed by the Texas Certificate of Title Act must take the affirmative steps set

out in that enactment to have their identity as lienholder reflected on the certificates of title.

I. BACKGROUND

Clark Contracting Services, Inc. is a construction company that provides contracting services related to the clearing and paving of land and pad sites for commercial developments. Facing potential foreclosure actions by a number of creditors, the Clark Contracting commenced a chapter 11 bankruptcy case on January 9, 2008, becoming a debtor-in-possession. Then, on April 1, 2008, the debtor-in-possession filed this adversary proceeding seeking to avoid several liens held by defendant Wells Fargo Equipment Finance ("Wells Fargo"), using the strong-arm powers of section 544(a) of the Bankruptcy Code.(fn2) The debtor contends that Wells Fargo failed to perfect many of these liens under applicable state law in a manner sufficient to prevail over a hypothetical judgment lien creditor with a returned execution as of the date of the commencement of the case. No one disputes that CIT was noted on the certificates of title as lienholder as of that date, and that Wells Fargo was not.

Wells Fargo is seeking partial summary judgment that six of the disputed liens are valid, enforceable, and not avoidable under section 544(a). Wells Fargo explains that it acquired these six duly perfected liens by assignment from CIT Group/Equipment Financing, Inc. ("CIT"), and that it did not need to take any further action to maintain that perfection, because the UCC does not require assignees to take any additional steps to perfect liens that were already duly perfected by the assignor prior to assignment.

The debtor originally granted the six liens to CIT in 2005 by executing a Master Security Agreement through which CIT agreed to finance several of the debtor's future purchases of construction equipment for use in the debtor's business. On December 4, 2006, CIT advanced funds to the debtor under the Master Security Agreement for the purchase of a Rosco Maximizer 3 asphalt distributor mounted on a 2007 IHC Model 7300 truck (the "Asphalt Truck"). CIT filed a UCC-1 financing

793

statement for that transaction with the Secretary of State on the same date, and, shortly thereafter, CIT applied for and obtained a certificate of title listing its lien on the certificate of title for the Asphalt Truck.

On January 30, 2007, CIT advanced additional funds under the Master Security Agreement. This second loan financed the debtor's purchase of five 2007 Ford F750 trucks with Ledwell 2000 gallon water tanks (the "Water

Trucks"). As in the first transaction, CIT filed a UCC-1 financing statement with the Secretary of State. Also, as in the first transaction, CIT applied for and obtained certificates of title, listing CIT's liens on the titles for each vehicle. Neither party disputes the validity or the perfection of CIT's liens on the Asphalt Truck or the five Water Trucks.

On June 21, 2007, Wells Fargo purchased CIT's notes and security interests with respect to the six motor vehicles described above.^(fn3) The debtor does not dispute the validity or enforceability of that assignment transaction. The debtor does challenge Wells Fargo's claim that its liens are sufficiently perfected under applicable state law so as to prevail over the competing claim of a judgment creditor who obtains execution of its judgment *i.e.* a "judgment lien creditor". If they are not so perfected, then, under section 544(a), the liens may be avoided. Thus, for purposes of this dispute, perfection is the whole ball game.

II. THE ARGUMENTS OF THE PARTIES

The crux of the debtor's argument is simple. According to the debtor, the UCC defers to the Texas Certificate of Title Act on matters such as perfection, and the latter enactment requires an affirmative act by an assignee to maintain lien perfection.^(fn4)

Wells Fargo acknowledges that its liens are subject to the Certificate of Title Act, but argues that the Certificate of Title Act does not expressly require recordation of *assigned* liens. When Wells Fargo acquired the liens from CIT in 2007, Wells Fargo elected not to record the assignment (though it could have done so pursuant to provisions for the recordation of assignments in the Certificate of Title Act).^(fn5) Wells Fargo instead chose to simply hold the existing certificates that reflect CIT as the lienholder, relying on the more general rule stated in section 9.310(c) of the Texas version of the UCC that assignees need take no further action to enjoy the perfected status of their assignors.

794

As a result of this choice, however, the Texas Department of Transportation was not (and would not have been) aware of the existence of Wells Fargo as alien holder -- its records would still reflect CIT as the lienholder with respect to these vehicles.^(fn6) Wells Fargo did file amendments to the existing UCC-1 financing statements as precautionary matter, but maintains that even that action was not necessary. Wells Fargo contends that the provision for recordation of assignments found in section 501.114 of the Certificate of Title Act is permitted, but not required. Indeed, says Wells Fargo, this provision of the Certificate of Title Act actually conflicts with section 9.310(c) of the UCC, and the UCC must control.^(fn7)

The debtor counters that section 9.310(c) of the UCC is the wrong place to look. That section, says the debtor,

is only a general rule regarding assignment of ordinary liens. The right place to look is section 9.311 of the UCC, says the debtor, which refers holders of liens on vehicles to the Texas Certificate of Title Act. There, says the debtor, the lienholder will be instructed that liens on motor vehicles can be perfected *only by* recording the lien *on the certificate of title* in *some* fashion described by the Act. *See id.* § 501.111(a) (emphasis added). The debtor then points out that, because of this unique procedure for recordation (as opposed to a public records filing that can be easily inspected by third parties), the Certificate of Title Act also instructs lienholders on how to properly assign perfected liens on motor vehicles in a way that will maintain that perfection, including a specific procedure for making sure that the assignee is properly identified as the current holder of the lien by notation on a newly issued certificate of title. The debtor claims that the Act is clear, unambiguous, and in fact does *not* conflict with the UCC. Nor, says the debtor, can the provisions of the Certificate of Title Act be viewed as permissive. Wells Fargo, says the debtor, chose to ignore the procedures in the Certificate of Title for notating its assigned liens on the certificates of title for these vehicles, and so was left unperfected on the petition date -- because Wells Fargo was not shown as the current lienholder on the certificates of title for these vehicles, nor was it known to the Department of Transportation as the lienholder of right. Thus, says the debtor, Wells Fargo would lose in a contest with a judgment lien creditor. As such, concludes the debtor, the liens must be avoidable under section 544(a).^(fn8)

The dispute thus turns on how the UCC and the Certificate of Title Act interact with respect to the assigned liens on motor vehicles. Both parties acknowledge the lack of Texas case law interpreting the relevant provisions of the Certificate of Title Act. The court's own research has turned up few helpful opinions in Texas on the issue. Nonetheless, a careful application of the rules of statutory construction leads this court to conclude that the Certificate of Title Act was enacted specifically

795

to ensure that assigned liens on vehicles subject to the Certificate of Title Act must be reflected on the certificates of title as a condition to continuous perfection. Failure to comply with the Act may result in a lien becoming unperfected as against a third party judgment lien creditor following the assignment of that lien. Wells Fargo's liens were unperfected as of January 9, 2008 (the date of the debtor's petition) because they were nowhere notated on the certificates of title. They are thus avoidable under section 544(a) of the Bankruptcy Code. Summary judgment will be granted in favor of the plaintiff-debtor, and Wells Fargo's motion should be denied.^(fn9)

II. JURISDICTION

This matter arises under a provision of title 11 of the United States Code, and thus falls within the subject matter jurisdiction conferred by section 1334(b) of title 28. While the court looks to state law to resolve the issue of perfection under the Certificate of Title Act and the UCC, the debtor's avoidance power arises under the Bankruptcy Code, and this type of dispute could arise only in the context of a bankruptcy case. *See In re Gandy*, 299 F.3d at 497. Accordingly, subject matter jurisdiction is proper under section 1334(b) of title 28. *See* 28 U.S.C. § 1334(b); *see also Geruschat v. Ernst & Young, LLP (In re Seven Fields Dev. Corp.)*, 505 F.3d 237, 263 (3d Cir.2007). Furthermore, because jurisdiction exists under these narrower categories of bankruptcy jurisdiction, involving an exercise of a trustee's chapter 5 powers and a subordinate determination of the extent, validity, and priority of Wells Fargo's liens, this is a core proceeding for which this court may hear and make final determinations. *See id.*; *see also* 28 U.S.C. §§ 157(b)(1) & (b)(2)(K). Finally, venue is proper under section 1409(a) of title 28.

III. DISCUSSION

A. Avoidance Under Section 544(a)

The Bankruptcy Code provides a trustee with certain "strong-arm" powers to avoid unperfected pre-petition transfers made by the debtor of interests in property. *See* 11 U.S.C. §§ 544(a), 1107. To do this, section 544(a) grants to the trustee the powers of a hypothetical judgment lien creditor deemed to be perfected on the date of petition. *See* 11 U.S.C. § 544(a)(1). Thus, any lien that would be vulnerable or subordinate to such a hypothetical judgment lien creditor, such as, by way of example, a lien that is not perfected as of the petition date, is avoidable under section 544(a)(1). The debtor-in-possession (DIP) in a chapter 11 case can exercise this trustee power. *See NetBank, FSB v. Kipperman (In re Comm. Money Center, Inc.)*, 350 B.R. 465, 474 (9th Cir. BAP 2006); *see also* 11 U.S.C. § 1107.

In the present case, the debtor contends that six of the liens held by Wells Fargo were not perfected as against a perfected judgment creditor as of the petition date. Wells Fargo contends that its liens are and have always been sufficiently perfected

796

since CIT first perfected its liens in accordance with the Certificate of Title Act. The facts are not in dispute, and the law regarding a trustee's power to avoid unperfected security interests is well-settled, the only issue for this court to determine is whether Wells Fargo's liens were perfected as against a hypothetical judgment creditor with a fully perfected judgment lien as of January 9, 2008, the date the debtor commenced the related bankruptcy case. For that determination, we turn to applicable state law.

B. Perfection of Security Interests in Motor Vehicles

Under Texas Law

As a general rule, a security interest in most types of personal property is perfected by filing a financing statement with the Secretary of State. *See* TEX. BUS. & COMM.CODE § 9.310(a). Also generally speaking, the assignment of a duly perfected security interest does not affect the perfection status of that security interest. *See id.* § 9.310(c). If a financing statement was filed by the assignor, for example, the assignee would enjoy the benefit of that lien remaining continuously perfected through the assignment without any additional filing requirements. *See id.* These general rules, however, are not without exception. No filing is necessary to perfect certain types of collateral, such as certain certificated securities, documents, goods, instruments, deposit accounts, electronic chattel paper, investment property, or letter-of-credit rights. *See, e.g., id.* § 9.310(b)(5), (b)(8), (b)(9).

Where the collateral is a motor vehicle, the UCC prescribes a completely different set of rules for perfection. *See id.* §§ 9.310(b)(3), 9.311(a). The filing of a financing statement for perfection of liens on certificated motor vehicles is wholly ineffective. *Id.* The perfection of security interests in such collateral is governed by the Texas Certificate of Title Act. *See id.*; *see also* TEX. TRANSP. CODE §§ 501.111-.116. The Act requires a separate certificate of title for each vehicle, reflecting the Department of Transportation's records. The certificate must list, among other things, the name and address of each party asserting lien rights in the vehicle, listed chronologically according to the date on which each lien was first recorded. *See* TEX. TRANSP. CODE § 501.021(b).

The rules for perfecting a motor vehicle lien under the Act are quite unlike the general perfection rules under the UCC. Rather than relying on a generally searchable database, the perfection scheme relies on physical notation of security interests on the very document required to legally transfer a motor vehicle. This scheme reflects the Act's larger purpose to assure the ability to sell vehicles without the need of enforced disclosure to the purchaser of the existence of a lien on the vehicle. *See* Tex. Transp. Code, § 501.003.(fn10) Adds a recent commentator, with regard to the difference in approaches between the UCC and the Certificate of Title Act:

Article 9 was intended in large part to wire around the historical aversion to non-possessory security interests in personal property--the secret lien problem.

797

[citing 1 GRANT GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 9.1 (1965)]. [Certificate of Title] laws were intended to prevent the theft of certain personal property that, because of its peculiar nature (ease of movement between jurisdictions), was especially vulnerable to theft. [citing *inter alia* Fairfax Leary, Jr.,

Horse and Buggy Lien Law and Migratory Automobiles, 96 U. PA. L. REV. 455 (1948)]. Because the property subject to certificate of title acts was also a common form of collateral in secured financing, conflicts were inevitable.

Larry T. Bates, *Certificates of Title in Texas Under Revised Article 9*, 53 BAYLOR L. REV. 735, 736 (Fall 2001). Professor Bates notes that a plea was made to expressly preempt state certificate of title laws when revised article 9 was under consideration, but that plea was rejected. *Id.*, at 740.(fn11) In short, only notation on the certificate of title will count for purposes of notifying third parties -- be they purchasers, lenders, or judgment creditors -- of the existence and identity of a given lienholder. Professor Bates in fact explains that, when a vehicle is converted into money or other proceeds, the lienholder will not enjoy "continued perfection" in proceeds without further action that it otherwise does not have to take with respect to types of collateral that are perfected under the provisions of the UCC itself:

... [E]quating notation on a certificate of title with filing a financing statement will cause proceeds to remain perfected for more than twenty days only if a financing statement covering the proceeds would be filed in the same office as the financing statement covering the original collateral. But since no financial statement was actually filed [with respect to certificated motor vehicles], a filing covering the proceeds would necessarily be filed in a different office. And even if the proceeds were titled collateral, a financing statement would not be sufficient to perfect a security interest in such collateral. Thus, the

798

hypothetical filing would not be effective to perfect the security interest in the proceeds even if we reversed the fiction and equated the hypothetical financing statement with notation on the original COT. The original COT would be effective only to cover the original car since certificates of title are vehicle specific. Thus, a security interest in the proceeds of titled collateral will not be perfected for more than twenty days unless the secured party takes whatever action is necessary to perfect a security interest in the proceeds themselves.

Bates, at 751-752. A failure to notate a continuing security interest correctly on the certificate of title can thus be fatal to perfection for a secured creditor. By the same token, the level of diligence imposed on innocent third parties is low -- they are entitled to rely on what appears on the certificate of title, and need look no further. Indeed, there is nowhere else to look because a searchable databases of filings is not publicly available.

The Act expressly states that notation on the certificate of title equals perfection of the lien, and the method of achieving that notation is specifically laid out in the Act. *See id.* §§ 501.113, 501.111(a). In the ordinary

case, a lien may be perfected by notifying the county assessor-collector of the lien. *Id.* Once the assessor-collector receives verification of the lien (and a filing fee), it forwards the information to the Department of Transportation, which records the lien and issues a new certificate of title on which the lienholder is specifically identified, by name and address, on the face of the certificate itself, with that lien listed on the certificate. *Id.*

Our unique problem arises not with the original perfection of a lien, but with its *continued* perfection once it has been assigned. However, the basic principles that underlay the scheme of perfection (and thereby notice to third parties) in the special context of motor vehicles points strongly to the conclusion that assignments too must be notated on the certificate of title if the lienholder's claim is to be effective against innocent third parties such as judgment creditors. What is more, the public filing system used for the perfection of most other kinds of collateral makes the general rule in 9.310(c) a sensible one for that context -- but also strongly suggests that the same general rule would have limited utility in a notational system like that used for motor vehicles, where there is no publicly searchable database on which parties are directed to rely.

The Certificate of Title Act lays out a specific procedure for how to handle the assignment of lien interests in motor vehicles. That procedure includes a mechanism for notating the identity of the assignee on the certificate of title. *See id.* § 501.114.(fn12) It is worth recalling here,

799

that physical notation on the face of the certificate of title is the Act's selected mode for notifying third parties of the existence of a prior lien, so a procedure that specifically spells out how to make sure that the assignee is reflected as the correct lienholder on the face of the title is consistent with the larger scheme of perfection adopted in the Certificate of Title Act. The original lienholder, we are told may(fn13) assign a lien that has been recorded in accordance with the Act's procedures for notating liens on certificates of title.(fn14) To do that, the assigning lienholder must (1) notify the debtor of the assignment(fn15) and (2) submit an application for recordation with the county assessor collector once again. *Id.* The application submitted to the assessor-collector must be signed *by the person to whom the lien is assigned* -- i.e., the assignee must sign the application. A copy of the executed assignment agreement must also be submitted, proof that the lien currently recorded on the records of the Department of Transportation will no longer be owned by the lienholder there originally reflected. The original of the certificate of title (which should be in the possession of the assignor) must also be submitted to the Department. *See id.* § 501.114(c). Once the completed application is remitted to the Department

of Transportation, the Department then issues a new certificate of title, showing the assignee as the new current lienholder of record. *See id.* § 501.114(d). The new certificate of title is sent to the first lienholder disclosed on the application -- namely, the assignee. *See id.* §§ 501.114(d)(2); 501.027(b). At this point then, the assignee should be in possession of the newly issued original certificate of title, now reflecting the assignee as first lienholder. Also, at this point, the assignee's lien is now perfected because, in the language of the statute, the certificate of title issued under subsection (d) of section 501.114 "is recordation of the assignment."

800

See id., § 501.114(e). In addition, the assignee now enjoys the benefit of a "relation-back" perfection, because "the time of the recordation of a lien assigned under this section(fn16) is considered to be the time the lien(fn17) was recorded under Section 501.113." *See id.* Section 501.113, it will be recalled, tells us that "recordation of a lien under [the Certificate of Title Act] is considered to occur when the county assessor-collector is presented with an application for a certificate of title that discloses the lien." *See id.* § 501.113(a)(1). What is more, the time of recording a lien in this fashion "is considered to be the time of filing the security interest" for purposes of Article 9 of the UCC. *See id.*, § 501.113(b).

Read *in pari materia*, then, the intent of the Certificate of Title Act seems clear. An assignee who wants to be assured that its lien will "relate back" to the recordation date of the original lien by the assignor needs to follow the procedures set out in this section. What is more, only by following this procedure will the Department of Transportation know that the assignee is the current holder of the first lien. Otherwise, the assignee will find itself holding the original certificate of title, but that certificate will not show the assignee as the record lienholder. The only recognized means of perfection in the Act, namely notation on the face of the title of the name and address of the current lienholder, seems fairly obviously to imply that an assignee who wants to be able to stand in the shoes of its assignor with continued perfection needs to be make sure that the assignee is shown on the face of the certificate of title, with a proper name and address. There is no other means of perfection available under the Act, and none other is even implied. *See id.*, §§ 501.021(a)(7)(B), 501.003(3).(fn18) Perfection of security interests in certificated motor vehicles imposes no particular due diligence on a third party, because the mechanism for warning innocent third party purchasers of a pre-existing security interest hinges entirely on what's on the certificate of title itself. *See id.* §§ 501.021(b)(7); § 501.113(a). Thus, just a cursory examination of the statute's structure alone supports the conclusion that, for an assignee to enjoy its assignor's lien position, it needs to follow the procedure laid out in section 501.114 of the

Act.(fn19)

Because of the importance of the correctness of the information on the certificate of title itself to innocent third parties

801

acquiring the vehicle, the statute may be understood as an *authorization* to assign liens, *provided that* the parties to the assignment follow the procedures laid out there. The statute expressly states "a lienholder may assign a lien. . . ." *See id.*, § 501.114(a). The authorization is given to the *assignor*. If the statute were to mean what Wells Fargo suggests (*i.e.*, that "may" means that the assignee has the option of not complying with these procedures, the option of doing nothing), then the statute would apply the permissive "may" not to the assignor but to the *assignee*, the party who expects to be the beneficiary of its assignor's perfection. What is more, the word "may" would not authorize assignment as such but rather a means of recording the assignment. It might, for example, read something like this: "The assignee of a lienholder whose lien is recorded under section 501.113 may record its assignment by:"

Instead, the statute says that the *assignor* is allowed to assign its lien, then spells out the procedure for doing so. The procedures in the statute are all aimed at the same problem--assuring that the certificate of title contains the correct information about who currently holds liens against the vehicle, information essential in a scheme that relies on the certificate of title itself for purposes of transferring an interest in the vehicle to third parties. *See id.*, § 501.003. The assignor and assignee need to furnish proof to the Department of Transportation that the lien has in fact been assigned. *Id.*, § 501.114(c)(B). The assignor needs to surrender the original of the certificate of title to the Department of Transportation, so that a new certificate reflecting the assignee's name and address as lienholder can be prepared. *Id.*, § 501.114(c)(C), (d)(2). Once a new certificate is issued, the assignee is rewarded with a statutory assurance that its perfection will relate back to the perfection date of its assignor's lien. *Id.*, § 501.114(e). Taken together, the procedures confirm the clear intent of the statute--a lien holder wanting to enjoy the benefits of recordation of its lien on the certificate of title needs to be sure that the information on the certificate of title is accurate, and that duty equally applies to assignees of liens. *See Nashua Mfg. Co. v. Hooper Trailer Sales, Inc.*, 445 F.2d 1321, 1322-23 (9th Cir.1971) (ruling on a similar assignment recordation issue involving accounts receivable under Idaho law).(fn20)

C. Perfection of Liens in Motor Vehicles as against Judgment Creditors

We next take up how the contest between a notated consensual lienholder and a judgment creditor seeking to execute on a motor vehicle plays out. When a judgment

creditor executes its judgment, it obtains a writ of execution which is delivered to the sheriff, who in turn seeks out property of the debtor to sell.^(fn21) When the sheriff encounters a motor vehicle, he may or may not be able to acquire the certificate of title--there is no guarantee that the debtor will cooperate, or that the debtor's representative would even know where the title to the vehicle is located. It

802

is almost certainly not in the vehicle. The Certificate of Title Act anticipates these realities, as it lays out a procedure for the sheriff to obtain a new title. *See id.*, § 501.074(a)(5). The sheriff must first have a bill of sale in hand (reflecting the fact of a sale and the identity of the new purchaser). Thus, we know that the sheriff conducting a sheriff's sale is expected to sell the vehicle *without* a certificate of title in hand. In fact, the sheriff cannot even *apply* to the Department of Transportation for a new title until *after* the sale has been conducted. The sheriff has no practical or legal way of knowing of the existence of a prior security interest in the vehicle prior to selling, and apparently no need to know either. We also know that the purchaser at a sheriff's sale must know that it will get a new, clean and clear certificate (*i.e.*, one without lien notations), because it has no way of knowing whether there are any security interests against the vehicle at the time of sale (unless the sheriff happens to have the vehicle certificate in hand). The purchaser would otherwise be unable to make an intelligible offer for the vehicle (it would not know how to price for undisclosed liens). The statute in fact states that a new certificate of title is issued in the name of the new purchaser, with no mention of notation of prior security interests on the new title. *See id.*^(fn22) Thus, the purchaser likely takes free of the consensual and properly notated lien.^(fn23)

But what of the judicial lienholder? The sheriff turns over the proceeds of sale to the judicial lien creditor, of course. None of these parties would necessarily know of the identity of *any* lienholders noted on the certificate of title, because it is not required that the sheriff have the certificate of title in hand as a precondition to repossessing and selling the vehicle. Indeed, it is precisely because the sheriff will in all likelihood *not* have the original certificate of title that this statute has to be in place. Otherwise, the sheriff would be at the mercy of the debtor, who could simply refuse to turn over the certificate of title (a judgment lien, after all, is not a search warrant).

The procedures laid out here are not appreciably different from what might occur

803

with respect to the repossession and sale of other kinds of personal property. Certainly the sheriff would have no duty to review the Secretary of State filing records before

repossessing and selling collateral. But there are differences both with respect to purchasers at a sheriff's sale and the judgment creditor. In the case of other kinds of property, for which a publicly searchable database of recorded security interests is available, a purchaser can (and in some jurisdictions would be expected to) review those records in order to price the property, taking into account lienholders of record.^(fn24) There is no searchable database for lienholders on certificated vehicles, and arguably, therefore, no duty of inquiry that could be imposed on a purchaser of a vehicle at a sheriff's sale. The procedures for how a new certificate is issued in the sheriff's sale context buttress that conclusion.

But again what of the judgment lien creditor? Here again, a judgment lien creditor is presumed to be aware of prior perfected security interests in most other kinds of personalty, due to the public filing database. If that creditor nonetheless asks the sheriff to execute on an item of personalty so encumbered, then that creditor would then, at the least, have a duty to assure that the proceeds from the sale be applied first to the satisfaction of those duly perfected interests, on pain of conversion.^(fn25)

The point to be made here, however, is that the *original* lienholder faces the same practical difficulties but has an advantage that the assignee who has not followed the rules does not. The lienholder's remedy would appear to be an action against the judgment lien creditor (once it is discovered that the vehicle has been sold), for conversion. In such an action, the properly notated original lienholder should have little difficulty prevailing, because it would have in hand the certificate of title showing it as the lienholder. The assignee, however, while it would hold the certificate of title, would not be reflected on the certificate as the lienholder of record. Perhaps the assignee would argue, in such an action (as Wells Fargo has argued here), that it is in fact the "true" holder of the lien, and that it need not have recorded its assignment because the UCC excuses it from doing so and the Certificate of Title Act makes recordation of the assignment merely optional. The problem for such an assignee (and for Wells Fargo here) is that Texas' Certificate of Title Act has a comprehensive and clear scheme for recordation of an assignment, one that makes it express that only by following that procedure will the assignee then succeed to its assignor's lien priority position relative to intervening creditors. *See* TEX. TRANS. CODE, § 501.114(e) ("The issuance of a certificate of title under Subsection (d) is recordation of the assignment. The time of the recordation of a lien assigned *under this section* is considered to be the time the lien was recorded under Section 501.113") (emphasis added).

This brings us to Wells Fargo's reliance on the commentary offered by the Permanent Editorial Board with regard to this issue. In 1994, the PEB issued Commentary

No. 12, regarding Section 9-302, the prior incarnation of section 9.310(c) of Revised Article 9. *See* PEB Commentary on the Uniform Commercial Code, Commentary No. 12 (American Law Institute 1994). The Board states that its commentaries are issued under the authority of the American Law Institute and the National Conference of Commissioners on Uniform State Laws, to offer guidance in interpreting and resolving issues raised by the UCC and its Official Comments. Wells Fargo says that Commentary No. 12 demonstrates the intention of the drafters of the UCC that, when perfection is governed by a certificate of title enactment, that enactment should only be read to apply to perfection issues, not assignment of perfected security interests.

Wells Fargo has adequately stated the general thrust of this Commentary. However, Wells Fargo overstates its application to the law as it stands in Texas. Indeed, says the Commentary, to determine whether the "no filing" rule of the UCC relating to assignments applies to certificated vehicles,

It is first necessary to ascertain whether the certificate of title statute applicable to the particular transaction contains provisions concerning an assignment of a security interest and, if so, whether such provisions relate to perfection.

PEB Commentary No. 12, at 6. The Commentary then discusses a variety of situations in which the state's certificate of title enactment might be ambiguous regarding assignment, or might not tie the assignment of a security interest to its perfection. While there is a strongly expressed policy in favor of continued perfection, there is also a recognition that, when a given state *has* been specific about tying assignment to perfection, the state enactment must be respected. *See* PEB Commentary No. 12, at 9. Texas did not enact the Uniform Motor Vehicle Certificate of Title and Anti-Theft Act cited in the PEB Commentary. It did not enact § 22(b) of that uniform enactment either, which makes perfection of an assignment a mere option. Instead, Texas enacted a specific statute that makes assignments optional *as to the assignor*, but is explicit in noting that, for the assignee to enjoy the perfected status of its assignor, it needs to comply with the procedures in section 501.114. *See* TEX. TRANSP. CODE, § 501.114(e).

Thus, in a contest between a judgment creditor with a judicial lien on a motor vehicle and an assignee who has failed to comply with the recordation procedures in section 501.114 of the Texas Transportation Code, this court concludes that the judicial lien creditor would prevail. As such the trustee in bankruptcy in an action under section 544(a)(1), who enjoys that hypothetical status, also prevails.

D. Other States' Statutes

As a final note, the court declines Wells Fargo's invitation to consider other similar statutes from different states.(fn26) With respect

to those states' legislators (and the courts that have attempted to interpret each respective statute), this court finds it a dangerous and unnecessary exercise of statutory construction to use interpretations of other states' statutes to import meaning into *this* state's statutes. The Texas Certificate of Title Act is not an enactment of a uniform code, as is the Uniform Commercial Code. These other statutes contain materially different language and may potentially serve materially diverse interests. Such an exercise of statutory construction would only serve to create an ambiguity that, to the extent it exists, is fully reconcilable without resorting to these external sources. This court has no evidence that these states' legislative enactments had any effect on the enactment of the Texas Certificate of Title Act. For these reasons, the court declines Wells Fargo's invitation to consider other state statutes.

V. CONCLUSION

Summary judgment in favor of the plaintiff is granted, for the reasons stated herein. Motion for summary judgment in favor of the defendant is denied, for the reasons stated. A separate form of order shall be furnished by the plaintiff trustee.

Footnotes:

FN1. *See* TEX. TRANSP. CODE §§ 501.001 et seq. (2008).

FN2. *See* 11 U.S.C. § 544(a) (2008).

FN3. *See* Wells Fargo's Motion for Summary Judgment, Adv. Proc. No. 08-5045-lmc, Dkt. No. 9, Exs. M-9, M-10, M-11.

FN4. *See* TEX. TRANSP. CODE §§ 501.001 et seq. (2008); *see also* TEX. BUS. & COMM.CODE §§ 9.101 et Seq. (2008). More specifically, subchapter F of the Certificate of Title Act contains the statutory scheme for creditors to obtain and perfect liens on motor vehicles not held by the debtor as inventory. The Certificate of Title Act is important in light of section 9.311(a) & (b) of the Texas Business and Commerce Code (or more commonly known as the UCC). For ease of reference in this opinion, references to any provision of the UCC shall be construed as a reference to the Texas Business and Commerce Code. Likewise, references to the Certificate of Title Act shall mean chapter 501 of the Texas Transportation Code.

FN5. *See* TEX. TRANSP. CODE, § 501.114 (Vernon 2007). Had it followed the procedure laid out in section

501.114, Wells Fargo would have received new certificates of title reflecting Wells Fargo as the lienholder, in place of CIT. *See id.*, at §§ 501.114(d)(2), 501.027. All agree that, had such a procedure been followed, Wells Fargo's lien position *vis-a-vis* judgment lien creditors holding executed returns would have been unassailable, and Wells Fargo would thus have had no exposure to liability under section 544(a).

FN6. *See* TEX. TRANSP. CODE, § 501.114(d) (stating that the Department of Transportation, on receipt of an application for assignment of lien, may amend its records "to substitute the subsequent lienholder for the previous lienholder").

FN7. *See* TEX. TRANSP. CODE § 501.005 ("Chapters 1-9, Business & Commerce Code, control over a conflicting provision of this chapter").

FN8. The debtor is acting as a debtor-in-possession, *see* 11 U.S.C. § 1107, and so has the same strong-arm powers the trustee has under section 544(a). *See Gandy v. Gandy (Matter of Gandy)*, 299 F.3d 489, 497 (5th Cir. 2002) (citing *Ins. Co. of N. Am. v. NGC Settlement Trust & Asbestos Claims Mgmt. (In re Nat'l Gypsum Co.)*, 118 F.3d 1056, 1068 (5th Cir. 1997)).

FN9. It is appropriate to note here that the court granted Wells Fargo relief from the automatic stay on April 30, 2008, to allow Wells Fargo to foreclose on these vehicles. This relief was granted *not* based on the validity of Wells Fargo's liens, but instead based on the court's understanding that the debtor could not provide any sort of adequate protection *and* the understanding that the debtor could always recover the vehicles or the value of the vehicles if it was successful in this litigation. *See* 11 U.S.C. § 550(a). During a recent hearing, counsel for the debtor informed the court that Wells Fargo may have sold the vehicles through foreclosure proceedings. Based on this court's ruling on the cross-motions for summary judgment, the debtor is free to use its remedies for recovering the value of these vehicles. That issue, however, is not yet before the court.

FN10. Says the statute:

This chapter shall be liberally construed to lessen and prevent:

- (1) the theft of motor vehicles;
- (2) the importation into this state of and traffic in motor vehicles that are stolen; and
- (3) the sale of an encumbered motor vehicle without the enforced disclosure to the purchaser of a lien secured by the vehicle.

TEX. TRANSP. CODE, § 501.003 (Vernon 2007).

FN11. Explains Prof. Bates:

Of course this was no more acceptable in 1994 than it would have been when original Article 9 was conceived. 24 The PEB [Permanent Editorial Board] and its drafting committees had to accept the existence of competing systems for titled collateral and find a way to integrate the COT [Certificate of Title] acts into Revised Article 9 with minimal displacement of creditors' expectations-at least under Article 9.

Revised Article 9 simplifies the choice of law rule for titled collateral by making the location of collateral, the movement of collateral, the registration of collateral, and the surrender of certificates not relevant to the choice of law determination. Revised Article 9 also modifies the substantive rules that affect perfection and priority when the choice of law rule requires a change in the law governing titled collateral. In Texas, the effect of these changes to Article 9 on transactions that involve titled collateral will depend on which COT Act applies to the collateral because the Texas COT Acts differ in their requirements and their scope. These differences within the state of Texas itself illustrate some of the difficulties that result on the national level from the non-uniformity of COT acts generally.

Bates, at 740-741 Of special note here is that Revised Article 9 limited its incursion into Certificate of Title statutes to situations in which choice of law problems might be created as between different states. The assignment of a security interest with respect to vehicles which themselves have not moved outside the state of Texas raises no choice of law issues. Later in his article, after an extended discussion of what might happen to a vehicle that starts in Texas and ends in Oklahoma (and the impact that changes in Revised Article 9 might have on various permutations of that move), the author says, "Putting the pieces together, we can see that generally perfection of a security interest in goods subject to a COT statute can only be accomplished by complying with the terms of the applicable COT statute." Bates, at 749.

FN12. Here is the provision in its entirety:

(a) A lienholder may assign a lien recorded under Section 501.113 by:

- (1) applying to the county assessor-collector for the assignment of the lien; and
- (2) notifying the debtor of the assignment.

(b) A lienholder's failure to notify a debtor of an assignment does not create a cause of action against the lienholder.

(c) An application under Subsection (a) must be:

- (1) signed by the person to whom the lien is assigned;

and

(2) accompanied by:

(A) the applicable fee;

(B) a copy of the assignment agreement executed by the parties; and

(C) the certificate of title on which the lien to be assigned is recorded.

(d) On receipt of the completed application and fee, the department:

(1) may amend the department's records to substitute the subsequent lienholder for the previous lienholder; and

(2) shall issue a new certificate of title as provided by Section 501.027.

(e) The issuance of a certificate of title under Subsection (d) is recordation of the assignment. The time of recordation of a lien assigned under this section is considered to be the time the lien was recorded under Section 501.113.

Id. § 501.114. While the drafting of this provision, like most pieces of legislation, could always have been improved, its meaning remains clear -- especially when the section is read from end-to-beginning, *i.e.*, starting with subsection (e) and reading back up, following the subsection references within the statute.

FN13. *See* TEX. TRANSP. CODE, § 501.114(a). Wells Fargo argues that the use of the word "may" here means that the procedure laid out in this section is merely optional. However, as discussed *infra*, the permission here granted can equally be read as granted to the assignor. That is, lienholders are allowed to assign their liens, *provided* they follow the procedures set out in this section. If Wells Fargo's argument were valid, then the "perfection option" laid out here (if we were to treat it as such) would be expected to have been granted to the assignee, rather than the assignor. After all, it is the assignee, not the assignor, that has the vested interest in continued perfection of the lien position that it is acquiring by assignment. However, the statute does not apply "may" to the assignee -- it applies "may" to the assignor.

FN14. The Act lays out the procedures for notating (or "recording") a lien in the immediately previous section, section 501.113. *See* Tex. Transp. Code, § 501.113.

FN15. Interestingly, the statute tells us that, if the assigning lienholder fails to tell the debtor about the assignment, the debtor does not have a cause of action back against the assignor for not telling him or her about the assignment. *See* TEX. TRANSP. CODE, §

501.114(b). The statute says nothing about any duty, one way or another, to notify third party purchasers, subsequent lenders, or judgment creditors of the assignment.

FN16. In this case, that would be the first lien originally granted to CIT.

FN17. Again, that would be CIT's lien, now assigned to Wells Fargo.

FN18. The statute says that a motor vehicle certificate of title is an instrument issued by the Department of Transportation that includes, *inter alia*, a statement "of the name and address of each lienholder and the date of each lien on the vehicle." *Id.* If the lien is assigned without compliance with section 501.114, then the certificate will no longer accurately reflect "the name and address" of the lienholder. This might not matter but for the fact that, for purposes of *perfection* of liens on motor vehicles, the sole method of perfection is proper notation on the certificate of title. *See* TEX. BUS. & COMM.CODE § 9.311(b).

FN19. It bears repeating that, for motor vehicles, there is no publicly searchable database for liens. For other kinds of goods and equipment, of course, the UCC *does* have such a system, and a rule that says an assignee need take no further steps to perfect makes sense when a third party is required to consult that public filing system to check for competing claims. A third party acquiring a motor vehicle, by contrast, has no apparent further duty of inquiry beyond relying on what the face of the certificate of title says (or beyond following other procedures set out in the Act, which are discussed below).

FN20. Said the court: "We do not find appellant's arguments particularly persuasive. . . . the Act is not a mere 'validation' statute . . . Rather, although it does use the permissive word 'may,' it appears to set up a complete scheme under which assignees, by recording, can obtain protection against both bona fide purchasers and creditors. The clear implication would seem to be that, if an assignee wants such protection, he should follow the Act." *Id.*

FN21. The debtor in this case is a company, not an individual, so special problems that might crop up when a claim of exemption is made do not arise in this context and will not be examined here.

FN22. Compare to other parts of the Act, in which such prior interests *are* routinely noted, such as, for example, when someone claims the certificate has been lost and seeks a replacement. *See* TEX. TRANSP. CODE, § 501.134.

FN23. We say "likely" because there is at least one case that suggests otherwise. *See General Motors Acceptance Corporation v. Byrd, Sheriff of Dallas*

County, 707 S.W.2d 292, 296 (Tex. App.--Ft. Worth 1986, no writ). There, GMAC was the secured creditor. The sheriff repossessed a mobile home to satisfy a judgment lien creditor's claim, and apparently retrieved the title as well. It was thus aware of the existence of GMAC and gave it notice of the sale. GMAC appeared at the sale, and was the successful bidder. The title was transferred to GMAC but the proceeds were held by the sheriff, to be turned over to the judgment creditor. GMAC sought to enjoin the sheriff from paying the judgment creditor, but the court declined its request for injunctive relief, because it believed that it had a sufficient at-law remedy. It concluded that its lien continued in either the vehicle in the hands of a subsequent purchaser because, "GMAC could have foreclosed its interests and sold the motor home pursuant to sec. 9.504." *Id.* The case did not discuss the Texas Certificate of Title Act, which now provides that "in the event of a conflict between this section [*i.e.*, the section that governs sheriffs' sales of motor vehicles] and other law, this section controls." TEX. TRANS. CODE, § 501.074(d). Thus, the current version of the Texas Certificate of Title Act would appear to overrule this already questionable precedent. *See also Williams v. Cawthon*, 237 S.W.2d 652 (Tex.Civ.App.--Amarillo 1950 no writ) (noting that the purposes of the Certificate of Title Act, first enacted in the 1930's was to cover the whole field of sales and liens on motor vehicles), *citing Motor Inv. Co. v. City of Hamlin*, 142 Tex. 486, 179 S.W.2d 278 (1944).

FN24. *See Note, Secured Creditors Holding Lien Creditors Hostage: Have a Little Faith in Revised Article 9*, 81 IND. L.J. 733, 735 (Spring 2006) (noting that, in some jurisdictions, the sale of property subject to the perfection rules in Revised Article 9 is deemed "subject to" perfected lien claims).

FN25. *See generally* Russell J. Hakes, *A Quest for Justice in the Conversion of Security Interests*, 82 Ky. L.J. 837 (1993/1994) (discussing the difficulties of applying the conversion remedy as a means of enforcing relative rights between senior and junior creditors, including judgment lien creditors, under Article 9).

FN26. Specifically, Wells Fargo refers the court to statutes from Florida, Georgia, Michigan, Missouri, and New York. Those statutes are as follows:

If the original lienholder sells and assigns his or her lien to some other person and *if such assignee desires to have his or her name substituted on the certificate of title as the holder of the lien*, the assignee *may*, after delivering the original certificate of title to the department and providing a sworn statement of the assignment, have his or her name substituted as the lienholder. . . .

FLA. STAT. ANN. § 319.27(6)(d) (2008) (emphasis added);

The assignee *may, but need not to perfect the assignment*, have the certificate of title endorsed or issued with the assignee named as holder of a security interest or lien. . . .

GA.CODE ANN. § 40-3-55(b) (2008) (emphasis added);

The assignee *may* have the certificate of title indorsed with the assignee named as the holder of the security interest by providing the department with a copy of the assignment instrument *but the failure of the assignee to do so shall not affect the validity of the security interest of the assignment thereof*.

MICH. COMP. LAWS ANN. § 257.238(b)(2) (2008) (emphasis added);

An assignee under subsection 1 of this section *may, but need not to perfect the assignment*, have the certificate of title issued with the assignee named as lienholder. . . .

Mo. ANN. STAT. § 700.365(2) (2008) (emphasis added); and

The assignee *may, but need not to perfect the assignment*, have the certificate of title endorsed or issued with the assignee named as lienholder. . . .

N.Y. VEH. & TRAF. LAW § 2120(b) (McKinney 2008) (emphasis added).

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797

[citing 1 GRANT GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 9.1 (1965)]. [Certificate of Title] laws were intended to prevent the theft of certain personal property that, because of its peculiar nature (ease of movement between jurisdictions), was especially vulnerable to theft. [citing *inter alia* Fairfax Leary, Jr., *Horse and Buggy Lien Law and Migratory Automobiles*, 96 U. PA. L. REV. 455 (1948)]. Because the property subject to certificate of title acts was also a common form of collateral in secured financing, conflicts were inevitable.

798

hypothetical filing would not be effective to perfect the security interest in the proceeds even if we reversed the fiction and equated the hypothetical financing statement with notation on the original COT. The original COT would be effective only to cover the original car since certificates of title are vehicle specific. Thus, a security interest in the proceeds of titled collateral will not be perfected for more than twenty days unless the secured party takes whatever action is necessary to perfect a security interest in the proceeds themselves.

**IN THE UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION**

**IN RE: ANGELIA MICHELLE BUFORD,

DEBTOR.**

**CASE NO.: 5:08-bk-11968
CHAPTER 7**

**RENEE S. WILLIAMS,
CHAPTER 7 TRUSTEE,**

PLAINTIFF,

**V.
AMERICAN HONDA FINANCE CORP.,**

ADV. PRO. NO.: 5:08-01177

DEFENDANT

**FIRST INTERROGATORIES AND REQUEST FOR PRODUCTION OF
DOCUMENTS FROM THE PLAINTIFF TO THE DEFENDANT**

COMES NOW the above-named Chapter 7 Trustee and plaintiff herein, by and through her attorneys of record, and herewith serves upon the Defendant in this case the following written interrogatories pursuant to the provisions of Rule 7033 of the Rules of Bankruptcy Procedure and Rule 33 of the Federal Rules of Civil Procedure as provided for and set forth in the foregoing rules. Answers to these Interrogatories and Request for Production of Documents must be furnished within forty-five (45) days of the service of the Summons and Complaint or within thirty (30) days of the service of these Interrogatories, whichever is later.

GENERAL INSTRUCTIONS

1. If any communication or document required to be identified in response to these Interrogatories and Requests for Production of Documents are claimed to be privileged, identify such communication or document by giving the date, subject matter, author, addressee, where made or created, persons to whom copies were furnished and to whom the substance of the documents was communicated, where applicable, and the ground(s) for the privilege claimed.
2. If there is insufficient space after each Interrogatory for you to provide a full and complete answer, then you should state your full and complete answer on a separate page, identify the page, and attach the page to your response as a properly identified and marked exhibit thereto.
3. If the information requested in an Interrogatory is contained in or may otherwise be derived or ascertained from a document, you may, in lieu of setting forth the requested information:
 - A. Identify the document from which the answer may be derived;
 - B. Specify the portion or portions of the document that contain the information, or the way in which the information may be derived or ascertained from the document; and

- C. Produce the document for inspection and copying, or deliver a copy of the document to the Trustee's counsel prior to, or contemporaneous with, service of the answers to the Interrogatories.
- 4. When producing documents pursuant hereto, copies may be produced in lieu of originals, if both sides of any two-sided document is reproduced and _____ or an officer of Defendant attests by affidavit or declaration under penalty of perjury that the copies provided are true, correct, complete and accurate duplications of the originals.
- 5. The Interrogatories and Requests for Production of Documents shall be deemed continuing and you shall promptly supply, by way of supplemental answers, any and all information that may become known prior to any trial or evidentiary hearing of this action that is additionally responsive or necessary to maintain the accuracy of answers previously served.
- 6. If you believe that an Interrogatory or Request for Production of Documents contains an ambiguity, you should construe the Interrogatory or Request so as to bring within the scope of such Interrogatory or Request responses that might otherwise be construed to be outside its scope.
- 7. To the extent not set forth herein, Defendant should respond to these discovery requests in accordance with and pursuant to any and all applicable requirements of the Federal Rules of Civil Procedure, the Bankruptcy Rules of Procedure and/or any other applicable law, rules or regulations.

DEFINITIONS

- A. The term "Document" means all writings of any kind, including the originals and all other non-identical copies, whether different from the originals by reason of any notation made on such copies or otherwise, including but not limited to correspondence, memoranda, notes, diaries, desk or other calendars, statistics, letter, telegrams, minutes, business records, personal records, accountants' statements, account statements, contracts, reports, credit reports, studies, checks, statements, receipts, invoices, bills, return checks, summaries, pamphlets, books, inter-office and intra-office communications, notations of any sort of conversations or meetings, telephone call meetings or other communications, written agreements, bulletins, printed matter, computer printouts, teletypes, telefaxes, invoices, worksheets, all drafts, alterations, modifications, changes and amendment of any kind with respect to any of the foregoing, graphic or oral records or representations of any kind (including, without limitation, tapes, cassettes, discs, recordings, electronic mail records, computer memory records such as hard disk drives and mater back-up tapes, diskettes, or other devices such as zip drive records).
- B. The term "act" as used herein includes acts of every kind and description.
- C. The term "identify" or "describe" when used in reference to a "document" means to state:
 - a. The type of document (e.g., letter, memorandum, report, electronic mail records, notes, etc.);
 - b. The date of the document;
 - c. The name of the parties or parties who originated the document, their past or present position with the defendants, their general duties and

- responsibilities, their current physical location with the company, and their e-mail, telephone number and telephone extension;
 - d. The name and address of the current custodian of the document;
 - e. The name and current address of each signatory thereon;
 - f. The reason, in detail, for the preparation of the document;
 - g. The subject or subjects covered by the document;
 - h. The names, business addresses and titles of the persons to whom the document writing was directed; and
 - i. The name and address and title of each person who originated, read or received the document.
- D. The term "identify" as used herein in connection with a "person" or "persons," shall mean the relationship of such person or persons to Defendant, and such person's current business address and business telephone number.
- E. The term "each" includes the word "every" and "every" includes the word "each." The term "any" includes the word "all" and "all" includes the word "any." The terms "and" as well as "or" shall be construed either disjunctively or conjunctively so as to bring within the scope of the request responses that might otherwise be construed to be outside the scope.
- F. The term "identify" as used herein with respect to or in connection with an "act" means to:
 - a. Furnish the date and place of the act;
 - b. Identify the person acting, the person for whom the act was performed, and the person against whom the act was directed; and
 - c. Describe in detail the act.
- G. The terms "describe" or "state" as used herein means to:
 - a. Describe or state fully by reference to underlying facts rather than by ultimate facts or conclusions of law;
 - b. Particularize as to the:
 - I. Time;
 - II. Date;
 - III. Matter; and
 - IV. Place.
- H. The term "oral communication" as used herein means and includes any face-to-face conversation, meeting, conference, telephone conversation, cell-phone conversation, computer conversation with voice mail, or anyone for more of these or related devices.
- I. The term "person" or "persons" are used herein means and includes all natural persons, public and private corporations, associates, wholly owned affiliates or subsidiary corporations or any other form of a business association, and any other type of entity and the agents, employees, officers, deputies and representatives thereof.
- J. The terms "_____", "you" or "your" as used herein means the Defendant, _____, and any related or affiliated companies associated in any way therewith.

- K. All "requests" shall be deemed to include any documents in the possession, custody or control of Defendant, including but not limited to those made by, held by, or maintained in the files or any predecessor, successor, employee, agent or assignee of Defendant.
- L. The term "Account" when used herein without qualification means the Account Number _____ and all other accounts between or among the Borrower and Defendants, its predecessors, agents or assigns, including any account originated by or any related _____ entity that was or has been assigned or otherwise transferred to Defendants.
- M. The term "Loan" shall mean that certain loan by and between the Borrower and _____ its predecessors, agents or assigns, including any loan originated by Defendant or any related Defendant entity.
- N. The term "Note" shall mean the Promissory Note or other written form of obligation evidencing the Borrower's indebtedness related to the Loan.
- O. The term "Borrower" shall mean the above-captioned Debtor, _____.
- P. The term "Trustee" shall mean _____, the Standing Chapter 13 Trustee for the Western District of North Carolina.
- Q. The term "Requests" shall refer to these Interrogatories and Requests for Production of Documents.
- R. The term "Bankruptcy Case" shall refer to the above-captioned Chapter 13 bankruptcy case filed in the Western District of North Carolina.
- S. The term "Petition Date" shall mean the date of the filing of the Bankruptcy Case, i.e., _____.

INTERROGATORIES

INTERROGATORY NUMBER 1: Please state the physical location of the Debtor's receivables file by street address, name of the facility, and the name of the party having direct custody thereof.

RESPONSE:

INTERROGATORY NUMBER 2: Please provide the name, business address, location and phone number of each American Honda Finance Corporation employee who currently has access to the Debtor's receivables file or who has had access to the file at any time since the receipt of the debtor's signed forms.

RESPONSE:

INTERROGATORY NUMBER 3: Please provide the Debtor's account number for the purchase of the 2007 Honda Accord at Landers Honda, Pine Bluff, Arkansas, on or about February 27, 2007 and identified as a 2007 model with VIN number 1HGCM55197A092926.

RESPONSE:

INTERROGATORY NUMBER 4: Please state whether or not the Debtor's account number has ever changed.

RESPONSE:

INTERROGATORY NUMBER 5: If the answer to Interrogatory Number 4 is yes, then please describe, in detail under what circumstances the account number was changes, how many times the account number was changes since origination of the receivable, and whether any additional account numbers are noted with respect to the debtor's retail installment contract.

RESPONSE:

INTERROGATORY NUMBER 6: Please describe the notations or other identifying marks used by American Honda Finance Corporation to designate, label, specify, or otherwise indicate which automobile receivables are sold into securitized trusts.

RESPONSE:

INTERROGATORY NUMBER 7: Please describe in detail what criteria or other method of selection is used by American Honda Finance Corporation to chose which receivables are sold into securitized trusts.

RESPONSE:

INTERROGATORY NUMBER 8: Please describe in detail under what circumstances a receivable that was originated between July 14, 2004 and on or before April 28, 2007 and

meets all of the qualifications set forth in Section 2.03 of the Sale and Servicing Agreement for the 2007-2 Trust would be excepted from sale into that securitized trust.

RESPONSE:

INTERROGATORY NUMBER 9: Please describe in detail under what circumstances a receivable that was originated between December 10, 2001 and on or before May 31, 2007 and meets all of the qualifications set forth in Section 2.03 of the Sale and Servicing Agreement for the 2007-3 Trust would be excepted from sale into that securitized trust.

RESPONSE:

INTERROGATORY NUMBER 10: Please describe in detail what entries are made in American Honda Finance Corporation's general account records which indicate that a receivable has been transferred and sold to an issuer as part of a securitized trust transaction.

RESPONSE:

INTERROGATORY NUMBER 11: Please provide the name and location of the institution or entity wherein American Honda Finance Corporation maintains a "Collection Account" pursuant to Section 4.01 of the Sale and Servicing Agreement for the 2007-2 Trust.

RESPONSE:

INTERROGATORY NUMBER 12: Please provide the name and location of the Document Custodian pursuant to the Sale and Servicing Agreement for the 2007-2 Trust.

RESPONSE:

INTERROGATORY NUMBER 13: Please provide the account number for the Collection Account described in Interrogatory Number 11 above.

RESPONSE:

INTERROGATORY NUMBER 14: Please provide the name and location of the institution or entity wherein American Honda Finance Corporation maintains a "Collection Account" pursuant to Section 4.01 of the Sale and Servicing Agreement for the 2007-3 Trust.

RESPONSE:

INTERROGATORY NUMBER 15: Please provide the name and location of the Document Custodian pursuant to the Sale and Servicing Agreement for the 2007-3 Trust.

RESPONSE:

INTERROGATORY NUMBER 16: Please provide the account number for the Collection Account described in Interrogatory Number 14 above.

RESPONSE:

REQUESTS FOR PRODUCTION

REQUEST FOR PRODUCTION NUMBER 1: Please produce a complete list of the Schedule of Receivables for the 2007-2 Trust.

RESPONSE:

REQUEST FOR PRODUCTION NUMBER 2: Please provide a complete list of the Schedule of Receivables for the 2007-3 Trust.

RESPONSE:

REQUEST FOR PRODUCTION NUMBER 3: In addition to Request for Production Numbers 1 and 2, please produce any amendments to the Schedule of Receivables for the 2007-2 and for the 2007-3 Trusts reporting any newly assigned account number as provided for in Section 3.14 of the Sale and Servicing Agreements for both the 2007-2 and 2007-3 Trusts.

RESPONSE:

REQUEST FOR PRODUCTION NUMBER 4: Please produce copies of all electronic records pertaining to Debtor's account from acquisition of the account through the date of the responses to these Interrogatories and Requests for Production.

RESPONSE:

REQUEST FOR PRODUCTION NUMBER 5: Please produce copies of the general accounting records pertaining to Debtor's account from acquisition of the account through the date of the responses to these Interrogatories and Requests for Production.

RESPONSE:

REQUEST FOR PRODUCTION NUMBER 6: Please produce a complete accounting history on Debtor's account.

RESPONSE:

REQUEST FOR PRODUCTION NUMBER 7: Please produce copies of all cancelled checks (including the image from the front and back of such cancelled checks) or evidence of electronic transfer from the Debtor to American Honda Finance Corporation for each monthly payment made by Debtor from the date of purchase to the date of these Interrogatories and Requests for Production of Documents. Each evidence of payment requested in this Request for Production should clearly denote the institution from which the payments came and the institution and account into which the payments were deposited.

RESPONSE:

REQUEST FOR PRODUCTION NUMBER 8: Please produce the monthly remittance reports from American Honda Finance Corporation to the 2007-2 Trust for the period beginning on January 1, 2007 and ending on May 31, 2008 which in any way refer to any account number assigned to the Debtor.

RESPONSE:

REQUEST FOR PRODUCTION NUMBER 9: Please produce the monthly remittance reports from American Honda Finance corporation to the 2007-2 Trust for the period beginning on January 1, 2007 and ending on May 31, 2008 which in any way refer to any account number assigned to the Debtor.

RESPONSE:

REQUEST FOR PRODUCTION NUMBER 10: Please produce a list of the criteria and procedures utilized by American Honda Finance Corporation for the selection of the receivables that are sold into the securitized trust other than the "Characteristics of Receivables" set forth in Section 2.03 of the Sale and Servicing Agreement for both the 2007-2 and 2007-3 Trusts.

RESPONSE:

REQUEST FOR PRODUCTION NUMBER 11: Please produce the original Retail Installment Sales Agreement Executed by the Debtor in this case.

RESPONSE:

REQUEST FOR PRODUCTION NUMBER 12: Please produce any and all endorsements, assignments, transfers, negotiations, or any other document evidencing any sale of the Retail Installment Sales Agreement executed by the Debtor in this case.

RESPONSE:

REQUEST FOR PRODUCTION NUMBER 13: Please produce any an all transfer and acceptance receipts or any other documents related to any delivery of the Retail Installment Sales Agreement executed by the Debtor in this case from American Honda Finance Corporation to any other party and from that transferee to any subsequent party.

RESPONSE:

REQUEST FOR PRODUCTION NUMBER 14: Please produce any and all documents in paper or electronic files currently in the possession of American Honda Finance corporation related in any way to the Debtor in this case.

RESPONSE:

REQUEST FOR PRODUCTION NUMBER 15: Please produce any and all financial records that indicate that all payments made by the Debtor on the Retail Installment Sales Agreement in this case were treated as taxable gross income by American Honda Finance Corporation.

RESPONSE:

REQUEST FOR PRODUCTION NUMBER 16: Please produce any and all financial records that indicate that the total financial obligations of the Debtor in this case under her Retail Installment Sales Agreement were or are treated as a receivable owned by American Honda Finance Corporation.

RESPONSE:

REQUEST FOR PRODUCTION NUMBER 17: Please produce any and all financial records of American Honda Finance Corporation that reveal any obligations owed to American Honda Finance Corporation by the either the 2007-2 or the 2007-3 Trusts referred to herein.

RESPONSE:

REQUEST FOR PRODUCTION NUMBER 18: Please produce copies of any and all electronic or paper transfers of any money paid by the Debtor herein to American Honda Finance Corporation on her Retail Installment Sales Agreement to any other party.

RESPONSE:

REQUEST FOR PRODUCTION NUMBER 19: Please produce any copies of any Amended Certificates of Title for the Debtor's 2007 Honda Accord vehicle identified by VIN number 1HGCM55 1 97A092926.

RESPONSE:

REQUEST FOR PRODUCTION NUMBER 20: Please produce any copies of any applications for Amended Certificates of Title for the Debtor's 2007 Honda Accord vehicle identified by VIN number 1HGCM55 1 97A092926.

RESPONSE:

REQUEST FOR PRODUCTION NUMBER 21: Please produce a complete list of all receivables owned by Trust 2007-2.

RESPONSE:

REQUEST FOR PRODUCTION NUMBER 22: Please produce a complete list of all receivables owned by Trust 2007-3.

RESPONSE:

REQUEST FOR PRODUCTION NUMBER 23: Please produce all records of any nature whatsoever which indicate that any third-party has paid any type of fee to American Honda Finance Corporation for the collection and processing of payments from the Debtor on her Retail Installment Sales Agreement.

RESPONSE:

Respectfully submitted,

/s/ Joel G. Hargis
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/s/ Annabelle Patterson
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**IN THE UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION**

**IN RE: ANGELIA MICHELLE BUFORD,

DEBTOR.**

**CASE NO.: 5:08-bk-11968
CHAPTER 7**

**RENEE S. WILLIAMS,
CHAPTER 7 TRUSTEE,**

PLAINTIFF,

**V.
AMERICAN HONDA FINANCE CORP.,**

ADV. PRO. NO.: 5:08-01177

DEFENDANT

PLAINTIFF'S FIRST REQUEST FOR ADMISSION

Comes now the Plaintiff, Renee S. Williams, Chapter 7 Trustee, by and through her attorneys, Joel G. Hargis and Annabelle Patterson, and propounds the following Request for Admission to American Honda Finance Corporation to be answered within the time and manner required by law.

Request for Admission 1: American Honda Finance Corporation has been sponsoring securitization trusts since 1992.

Admit or Deny Request for Admission 1:

Request for Admission 2: American Honda Finance Corporation is the sponsor for the Honda Auto Receivables 2007-2 Owner Trust.

Admit or Deny Request for Admission 2:

Request for Admission 3: American Honda Finance Corporation is the sponsor for the Honda Auto Receivables 2007-3 Owner Trust.

Admit or Deny Request for Admission 3:

Request for Admission 4: American Honda Finance Corporation transfers retail installment sales contracts to the trusts identified in Numbers 2 and 3 above.

Admit or Deny Request for Admission 4:

Request for Admission 5: American Honda Finance Corporation is contractually obligated to transfer all of the retail installment contracts it receives from Honda Motor Company dealers to a securitized trust.

Admit or Deny Request for Admission 5:

Request for Admission 6: American Honda Finance Corporation has no discretion as to whether or not a retail installment sales contract is transferred to a securitized trust.

Admit or Deny Request for Admission 6:

Request for Admission 7: The cut-off date for the Honda Auto Receivables 2007- 2 Owner Trust was June 1, 2007.

Admit or Deny Request for Admission 7:

Request for Admission 8: The cut-off date refers to the final date for the execution of a retail installment sales contract by a consumer at a Honda Motor Company dealership.

Admit or Deny Request for Admission 8:

Request for Admission 9: The cut-off date for the Honda Auto Receivables 2007-3 Owner Trust was August 1, 2007.

Admit or Deny Request for Admission 9 :

Request for Admission 10: The cut-off date refers to the final date for the execution of a retail installment sales contract by a consumer at a Honda Motor Company dealership.

Admit or Deny Request for Admission 10:

Request for Admission 11: The property of the Honda Auto Receivables 2007-2 Owner Trust consists of receivables defined as retail installment sales contracts executed by an obligor in respect of a financed vehicle, and all proceeds thereof and payments.

Admit or Deny Request for Admission 11:

Request for Admission 12: The property of the Honda Auto Receivables 2007-3 Owner Trust consist of receivables, which are defined as retail installment sales contracts executed by an obligor in respect of a financed vehicle, and all proceeds thereof and payments.

Admit or Deny Request for Admission 12:

Request for Admission 13: The receivables contained in the Honda Auto Receivables 2007- 2 Owner Trust must meet certain criteria as of the cut-off date.

Admit or Deny Request for Admission 13:

Request for Admission 14: The receivables contained in the Honda Auto Receivables 2007- 3 Owner Trust must meet certain criteria as of the cut-off date.

Admit or Deny Request for Admission 14:

Request for Admission 15: One of the criteria for inclusion of a retail installment sales contract in the Honda Auto Receivables 2007-2 Owner Trust is that the receivable was originated in the United States and the obligor is not a Federal, State, or Local Government entity.

Admit or Deny Request for Admission 15:

Request for Admission 16: One of the criteria for inclusion of a retail installment sales contract in the Honda Auto Receivables 2007-2 Owner Trust is that the receivable has a contractual annual percentage rate specified in the promissory note associated with each receivable ranging from 1.88% to 21.0%.

Admit or Deny Request for Admission 16:

Request for Admission 17: One of the criteria for inclusion of a retail installment sales contract in the Honda Auto Receivables 2007-2 Owner Trust is that the receivable provides for level monthly payments that fully amortize the amount financed over its original terms except that the payment in the first or last month during the life of the receivable may be different from the level payment.

Admit or Deny Request for Admission 17:

Request for Admission 18: One of the criteria for inclusion of a retail installment sales contract in the Honda Auto Receivables 2007-2 Owner Trust is that the receivable has a remaining term to maturity of not less than 6 months and not more than 71 months.

Admit or Deny Request for Admission 18:

Request for Admission 19: One of the criteria for inclusion of a retail installment sales contract in the Honda Auto Receivables 2007-2 Owner Trust is that the receivable is less than 30 days past due as of the cut-off date.

Admit or Deny Request for Admission 19:

Request for Admission 20: One of the criteria for inclusion of a retail installment sales contract in the Honda Auto Receivables 2007-2 Owner Trust is that the receivable was originated on or after July 14, 2004 and on or prior to April 28, 2007.

Admit or Deny Request for Admission 20:

Request for Admission 21: One of the criteria for inclusion of a retail installment sales contract in the Honda Auto Receivables 2007-2 Owner Trust is that the receivable has been entered in by an obligor that was not in a bankruptcy proceeding or is bankrupt or insolvent according to the records of American Honda Finance Corporation.

Admit or Deny Request for Admission 21:

Request for Admission 22: One of the criteria for inclusion of a retail installment sales contract in the Honda Auto Receivables 2007-2 Owner Trust is that the receivable is secured by a financed vehicle that has not been repossessed according to the records of American Honda Finance Corporation.

Admit or Deny Request for Admission 22:

Request for Admission 23: One of the criteria for inclusion of a retail installment sales contract in the Honda Auto Receivables 2007-3 Owner Trust is that each receivable shall have an original maturity of not less than 24 months nor great than 72 months and as of the cut-off date a remaining maturity of not less than 6 months nor greater than 71 months.

Admit or Deny Request for Admission 23:

Request for Admission 24: One of the criteria for inclusion of a retail installments sales contract in the Honda Auto Receivables 2007-3 Owner Trust is that the receivable provides for the payment of a finance charge calculated on a basis of an annual percentage rate ranging from 1.9% to 21%.

Admit or Deny Request for Admission 24:

Request for Admission 25: One of the criteria for inclusion of a retail installment sales contract in the Honda Auto Receivables 2007-3 Owner Trust is that each receivable has an original principal balance not less than \$1,038.35 nor greater than \$59,296.21 and an average unpaid balance as of the cut-off date \$17,390.58.

Admit or Deny Request for Admission 25:

Request for Admission 26: One of the criteria for inclusion of a retail installment sales contract in the Honda Auto Receivables 2007-3 Owner Trust is that the receivable was originated on or after December 10, 2001 and on or before May 31, 2007.

Admit or Deny Request for Admission 26:

Request for Admission 27: One of the criteria for inclusion of a retail installment sales contract in the Honda Auto Receivables 2007-3 Owner Trust is that no receivable shall have a schedule of payment more than 30 days past due as of the cut-off date.

Admit or Deny Request for Admission 27:

Request for Admission 28: There is a written retail installment sales contract dated February 27, 2007, arising out of a purchase of a 2007 Honda Accord, VIN number 1HGCM55 1 97A092926, executed between Angelia Michelle Buford on the one hand and Landers Honda of Pine Bluff, Arkansas, on the other.

Admit or Deny Request for Admission 28:

Request for Admission 29: The retail installment sales contract between Angelia Michelle Buford and Landers Honda of Pine Bluff, Arkansas was purchased from Landers Honda of Pine Bluff, Arkansas by American Honda Finance Corporation.

Admit or Deny Request for Admission 29:

Request for Admission 30: The retail installment sales contract between Angelia Michelle Buford and Landers Honda of Pine Bluff, Arkansas was assigned, sold and transferred from Landers Honda of Pine Bluff, Arkansas to American Honda Finance Corporation.

Admit or Deny Request for Admission 30:

Request for Admission 31: The transfer, sale and assignment of the retail installment sales contract of Angelia Michelle Buford from Landers Honda of Pine Bluff, Arkansas, to American Honda Finance Corporation was a true sale for adequate consideration.

Admit or Deny Request for Admission 31:

Request for Admission 32: The retail installment sales contract of Angelia Michelle Buford meets the written criteria contained in the prospectus supplement and the sales and servicing agreement for the Honda Auto Receivable 2007-2 Owner Trust for inclusion in said trust.

Admit or Deny Request for Admission 32:

Request for Admission 33: The retail installment sales contract of Angelia Michelle Buford meets the written criteria set forth in the prospectus supplement and the sales and servicing agreement for the Honda Auto Receivable 2007-3 Owner Trust for inclusion in said trust.

Admit or Deny Request for Admission 33:

Request for Admission 34: The retail installment sales contract of Angelia Michelle Buford was sold, transferred, and assigned by American Honda Finance Corporation either to the Honda Auto Receivable 2007-2 Owner Trust or to the Honda Auto Receivable 2007-3 Owner Trust.

Admit or Deny Request for Admission 34:

Request for Admission 35: The retail installment sales contract of Angelia Michelle Buford is currently owned either by the Honda Auto Receivable 2007-2 Owner Trust or by the Honda Auto Receivable 2007-3 Owner Trust.

Admit or Deny Request for Admission 35:

Request for Admission 36: Under the terms of the Honda Auto Receivables 2007-2 Owner Trust American Honda Finance Corporation receives payments on the receivables included in the said Trust and deposits those payments into a collections account.

Admit or Deny Request for Admission 36:

Request for Admission 37: Under the terms of the Honda Auto Receivables 2007-3 Owner Trust American Honda Finance Corporation receives payments on the receivables included in the said Trust and deposits those payments into a collections account.

Admit or Deny Request for Admission 37:

Request for Admission 38: American Honda Finance Corporation keeps a receivable file for each receivable included in the Honda Auto Receivables 2007-2 Owner Trust.

Admit or Deny Request for Admission 38:

Request for Admission 39: American Honda Finance Corporation keeps a receivable file for each receivable included in the Honda Auto Receivables 2007-3 Owner Trust.

Admit or Deny Request for Admission 39:

Request for Admission 40: A receivable file may include the fully executed original of the receivable.

Admit or Deny Request for Admission 40:

Request for Admission 41: A receivable file may include the documents evidencing or related to any insurance policy.

Admit or Deny Request for Admission 41:

Request for Admission 42: A receivable file may include the original credit application of each obligor on an American Honda Finance Corporation customary form or on a form approved by American Honda Finance Corporation for such application.

Admit or Deny Request for Admission 42:

Request for Admission 43: A receivable file may include the original certificate of title for the related financed vehicle.

Admit or Deny Request for Admission 43:

Request for Admission 44: A receivable file may include evidence that such certificate of title has been applied for or such documents that American Honda Finance Corporation shall keep on file in accordance with its customary procedures evidencing that American Honda Finance Corporation holds a security interest in the related financed vehicle.

Admit or Deny Request for Admission 44:

Request for Admission 45: A receivable file may include any and all other documents that American Honda Finance Corporation may keep on file in accordance with its customary procedures related to such obligor or to the financed vehicle.

Admit or Deny Request for Admission 45:

Request for Admission 46: The receivables included in the Honda Auto Receivables 2007-2 Owner Trust were conveyed by American Honda Finance Corporation to American Honda Receivables Corporation pursuant to the terms of a Receivables Purchase Agreement dated June 1, 2007.

Admit or Deny Request for Admission 46:

Request for Admission 47: The transfer of the receivables made pursuant to the Receivables Purchase Agreement dated June 1, 2007 were made for fair consideration and constituted a true and complete sale of the said receivables from American Honda Finance Corporation to American Honda Receivables Corporation.

Admit or Deny Request for Admission 47:

Request for Admission 48: The receivables conveyed by American Honda Finance Corporation to American Honda Receivables Corporation pursuant to the terms of a Receivables Purchase Agreement dated August 1, 2007 were subsequently conveyed by American Honda Receivables Corporation to Honda Auto Receivables 2007-3 Owner Trust.

Admit or Deny Request for Admission 48:

Request for Admission 49: The receivables conveyed to Honda Auto Receivables 2007-3 Owner Trust by American Honda Receivables Corporation under the Receivables Purchase Agreement dated August 1, 2007 were made for fair consideration and constituted a true and complete sale of the said receivables from American Honda Receivables Corporation to Honda Auto Receivables 2007-3 Owner Trust.

Admit or Deny Request for Admission 49:

Request for Admission 50: The receivables included in the Honda Auto Receivables 2007-2 Owner Trust were conveyed by American Honda Receivables Corporation to the Honda Auto Receivables 2007-2 Owner Trust pursuant to the terms of a Sales and Servicing Agreement dated June 1, 2007.

Admit or Deny Request for Admission 50:

Request for Admission 51: The transfer of the receivables made pursuant to the Receivables Purchase Agreement dated June 1, 2007 were made for fair consideration and constituted a true and complete sale of the said receivables from American Honda Receivables Corporation to Honda Auto Receivables 2007-2 Owner Trust.

Admit or Deny Request for Admission 51:

Request for Admission 52: The receivables included in the Honda Auto Receivables 2007-3 Owner Trust were conveyed by American Honda Receivables Corporation to the Honda Auto Receivables 2007-3 Owner Trust pursuant to the terms of a Sales and Servicing Agreement dated August 1, 2007.

Admit or Deny Request for Admission 52:

Request for Admission 53: The conveyances and transfers described in Requests for Admissions 46 – 52 are intended to be true sales, granting to the respective purchasers a first priority perfected security interest in all of the seller's right, title and interest in, to and under the receivables.

Admit or Deny Request for Admission 53:

Request for Admission 54: American Honda Finance Corporation takes no action to identify the owner trusts referred to herein as the secured party on the certificates of title for the receivables transferred and conveyed to either.

Admit or Deny Request for Admission 54:

Request for Admission 55: American Honda Finance Corporation remains as the identified first lien holder on all of the certificates of title for the receivables transferred to either Honda Auto Receivables 2007-2 Owner Trust or to Honda Auto Receivables 2007-3 Owner Trust.

Admit or Deny Request for Admission 55:

Request for Admission 56: The Prospectus and the Prospectus Supplements filed with the United States Securities and Exchange Commission by American Honda Receivables Corporation includes a stated “risks” to investors in Honda Auto Receivables 2007-2 Owner Trust that the trust may not have a perfected security interest in the financed vehicles because the certificates of title will not be amended to reflect the said Trust as the first lien holder.

Admit or Deny Request for Admission 56:

Request for Admission 57: The Prospectus and the Prospectus Supplements filed with the United States Securities and Exchange Commission by American Honda Receivables Corporation includes a stated “risks” to investors in Honda Auto Receivables 2007-3 Owner Trust that the trust may not have a perfected security interest in the financed vehicles because the certificates of title will not be amended to reflect the said Trust as the first lien holder.

Admit or Deny Request for Admission 57:

Request for Admission 58: The Arkansas certificate of title for the 2007 Honda Accord, VIN number 1HGCM55197A092926, titled in the name of Angelia Michelle Buford, indicates that the holder of the first lien is American Honda Finance Corporation.

Admit or Deny Request for Admission 58:

Request for Admission 59: The retail installment sales contract of Angelia Michelle Buford was executed on February 27, 2007, for an unpaid principal balance of \$19,020.00, with a stated annual interest rate of 11.25%, and for a term of 6 years.

Admit or Deny Request for Admission 59:

Request for Admission 60: The Arkansas certificate of title for the 2007 Honda Accord, VIN number 1HGCM55197A092926, titled in the name of Angelia Michelle Buford, was never amended so as to indicate that the holder of the first lien on the vehicle was Honda Auto Receivables 2007-2 Owner Trust.

Admit or Deny Request for Admission 60:

Request for Admission 61: The Arkansas certificate of title for the 2007 Honda Accord, VIN number 1HGCM55197A092926, titled in the name of Angelia Michelle Buford, was never amended so as to indicate that the holder of the first lien on the vehicle was Honda Auto Receivables 2007-3 Owner Trust.

Admit or Deny Request for Admission 61:

Respectfully submitted,

/s/ Joel G. Hargis
Joel G. Hargis, ABN 2004-007
Crawley & DeLoache of Central Arkansas, P.L.L.C.
P.O. Box 8546
Hot Springs Village, AR. 71910
PH: (501) 915-8336
FX: (501) 915-1410

/s/ Annabelle Patterson
Annabelle Patterson, ABN 85204
Baim, Gunti, Mouser, Havner, Boyd, & Worsham, P.L.C.
835 Central Ave., Ste. 114
Hot Springs, AR. 71901
PH: (501) 609-9800
FX: (501) 609-9296

F – AVOID MORTGAGE SECURITIZED TRUST

IN RE SAMUEL M. BROTHERS

Real Life Example of How to Avoid
Claims in a Chapter 13

IN THE UNITED STATES BANKRUPTCY COURT FOR
THE NORTHERN DISTRICT OF MISSISSIPPI

IN THE MATTER OF:

CHAPTER 13 NO.:

SAMUEL M. BROTHERS &
LORA BROTHERS

10-10518-NPO

TRUSTEE'S OBJECTION TO PROOF OF CLAIM (Clm . #9)

COMES NOW Trustee, Locke D. Barkley, by and through counsel, and files this Objection to the proof of claim filed herein by Bank of America (hereinafter "Creditor"); and in support thereof states as follows:

1. Creditor filed a proof of claim (Clm. #9) with a pre-petition arrearage claim of \$19,934.12. Said arrearage claim includes an amount for escrow shortages in the amount of \$2,631.92.

2. The Trustee demands strict proof of the components (i.e., principal, interest and escrow) of the pre-petition payments and post-petition payments, as well as strict proof of said escrow shortages as set forth in the proof of claim worksheet.

3. Should the Creditor fail to provide strict proof, the Debtor's pre-petition arrearage claim should be reduced and escrow shortage in the total amount of \$2,631.92 should be removed from the arrearage claim.

WHEREFORE, PREMISES CONSIDERED, Trustee, Locke D. Barkley, prays that upon notice and hearing that this Court enter its order sustaining Trustee's objection and for such other relief to which Trustee and this bankruptcy estate may be entitled.

Dated: April 19, 2010

Respectfully submitted,
LOCKE D. BARKLEY, TRUSTEE

BY: /s/ W. Jeffrey Collier
W. JEFFREY COLLIER, ESQ.
Attorney for Trustee
817 E. River Place
Post Office Box 55829
Jackson, Miss. 39296
(601) 355-6661
ssmith@barkley13.com
MSB No. 10645

C E R T I F I C A T E

I, W. Jeffrey Collier, Attorney for Trustee, do hereby certify that I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, and I hereby certify that I have electronically served through the CM/ECF system, a copy of the above and foregoing to the following attorneys of record and/or parties of interest:

Office of the U. S. Trustee
USTPRegion05.AB.ECF@usdoj.gov

Michael W. Boyd, Esq.
boydlawoffice@yahoo.com
clyburnlawoffice@gmail.com

Michael Alan Jedynak, Esq.
ecf@ms.creditorlawyers.com

The following parties of interest shall be served with the foregoing pursuant to the Court's Standing Order Delegating Certain Noticing Responsibilities once a Notice of Hearing is generated by the Court:

Samuel M. Brothers
Lora Brothers
668 West McCorkle Circle
Greenville, MS 38703

Dated: April 19, 2010

/s/ W. Jeffrey Collier
W. JEFFREY COLLIER

**IN THE UNITED STATES BANKRUPTCY COURT FOR
THE NORTHERN DISTRICT OF MISSISSIPPI**

IN THE MATTER OF:

CHAPTER 13 NO.:

**SAMUEL M. BROTHERS &
LORA BROTHERS**

10-10518-NPO

ORDER

THIS MATTER came before the Court on Trustee's Objection to the proof of claim filed herein by Bank of America ("Creditor") after proper notice and an opportunity for hearing the Court, being fully advised in its premises, finds that no response was timely filed and Trustee's Objection is well taken and should be sustained.

IT IS THEREFORE ORDERED AND ADJUDGED as follows:

1. Trustee's Objection shall be and is hereby sustained.
2. Within fifteen (15) days from the date of this order, Creditor shall provide the Trustee with the components (i.e., principal, interest and escrow) of the pre-petition payments and post-petition payments, as well as strict proof of said escrow advances and escrow shortages as set forth in the Itemization of Claim or the Creditor's mortgage arrearage claim shall be amended to remove escrow shortage in the total amount of \$2,631.92.
5. Trustee shall serve a copy of this order upon Creditor and file a certificate of service with the Court evidencing same.

SO ORDERED

SUBMITTED BY:

/s/ W. Jeffrey Collier
W. JEFFREY COLLIER, ESQ.
Attorney for Trustee
Post Office Box 55829
Jackson, Miss. 39296
(601) 355-6661
ssmith@barkley13.com
MSB No. 10645

B19 (Official Form 10) (12/07)

UNITED STATES BANKRUPTCY COURT Northern		DISTRICT OF MISSISSIPPI	PROOF OF CLAIM
Name of Debtor: Samuel M. Brothers & Lora Brothers aka Loriann Brothers		Case Number: 10-10518-NPO	
<small>NOTE: This form should not be used to make a claim for an administrative expense arising after the commencement of the case. A request for payment of an administrative expense may be filed pursuant to 11 U.S.C. § 503.</small>			
Name of Creditor (the person or other entity to whom the debtor owes money or property): BAC Home Loans Servicing, LP as servicer for The Bank of New York Mellon Trust Company, N.A.		<input type="checkbox"/> Check this box to indicate that this claim amends a previously filed claim.	
Name and address where notices should be sent: Morris & Associates 2309 Oliver Rd Monroe, La 71201		Court Claim Number: (If known)	
Telephone number: (318) 330-9020		Filed on:	
Name and address where payment should be sent (if different from above): Bank of America 7105 Corporate Drive Plano TX 75024		<input type="checkbox"/> Check this box if you are aware that anyone else has filed a proof of claim relating to your claim. Attach copy of statement giving particulars. <input type="checkbox"/> Check this box if you are the debtor or trustee in this case.	
1. Amount of Claim as of Date Case Filed: \$66,344.36 If all or part of your claim is secured, complete item 4 below; however, if all of your claim is unsecured, do not complete item 4. If all or part of your claim is entitled to priority, complete item 5. <input type="checkbox"/> Check this box if claim includes interest or other charges in addition to the principal amount of claim. Attach itemized statement of interest or charges.		5. Amount of Claim Entitled to Priority under 11 U.S.C. §507(a). If any portion of your claim falls in one of the following categories, check the box and state the amount. Specify the priority of the claim. <input type="checkbox"/> Domestic support obligation under 11 U.S.C. §507(a)(1)(A) or (a)(1)(B). <input type="checkbox"/> Wages, salaries, or commissions (up to \$10,950*) earned within 180 days before filing of the bankruptcy petition or cessation of the debtor's business, whichever is earlier - 11 U.S.C. §507 (a)(4). <input type="checkbox"/> Contributions to an employee benefit plan - 11 U.S.C. §507 (a)(5). <input type="checkbox"/> Up to \$2,425* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use - 11 U.S.C. §507 (a)(7). <input type="checkbox"/> Taxes or penalties owed to governmental units - 11 U.S.C. §507 (a)(8). <input type="checkbox"/> Other - Specify applicable paragraph of 11 U.S.C. §507 (a)(____). Amount entitled to priority: \$ _____	
2. Basis for Claim: Money Loaned (See instruction #2 on reverse side.)			
3. Last four digits of any number by which creditor identifies debtor: 6440 3a. Debtor may have scheduled account as: (See instruction #3a on reverse side.)			
4. Secured Claim (See instruction #4 on reverse side.) Check the appropriate box if your claim is secured by a lien on property or a right of setoff and provide the requested information. Nature of property or right of setoff: <input checked="" type="checkbox"/> Real Estate <input type="checkbox"/> Motor Vehicle <input type="checkbox"/> Other Describe: Value of Property: _____ Annual Interest Rate: 7.260% Amount of arrearage and other charges as of time case filed included in secured claim, if any: \$19,934.12 Basis for perfection: Security Deed Amount of Secured Claim: \$66,344.36 Amount Unsecured:			
6. Credits: The amount of all payments on this claim has been credited for the purpose of making this proof of claim. 7. Documents: Attach redacted copies of any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements or running accounts, contracts, judgments, mortgages, and security agreements. You may also attach a summary. Attach redacted copies of documents providing evidence of perfection of a security interest. You may also attach a summary. (See definition of "redacted" on reverse side.) DO NOT SEND ORIGINAL DOCUMENTS. ATTACHED DOCUMENTS MAY BE DESTROYED AFTER SCANNING. If the documents are not available, please explain:			
Date: Apr 5, 2010	Signature: The person filing this claim must sign it. Sign and print name and title, if any, of the creditor or other person authorized to file this claim and state address and telephone number if different from the notice address above. Attach copy of power of attorney, if any. /S/ MICHAEL JEDYNAK Michael Jedynak, MS Bar Number 103014		FOR COURT USE ONLY

Penalty for presenting fraudulent claim: Fine of up to \$500,000 or imprisonment for up to 5 years, or both. 18 U.S.C. §§ 152 and 3571.

Exhibit "G"

PROOF OF CLAIM WORKSHEET

LOAN # 6440

PRE-PETITION CLAIMS ARREARAGES

PAYMENTS

DUE FROM:	# PAYMENTS	AMOUNT
TOTAL		
07/08-04/10	22	\$ 716.52
\$ 15,763.44		

LATE CHARGES

# OF LATE CHARGES	AMOUNT
TOTAL	
Uncollected late charges	\$ 112.85

TOTAL PAYMENTS: \$ 15,763.44

TOTAL LATE CHARGES: \$ 112.85

ARREARAGES CLAIM:

TOTAL PAYMENTS	\$15,763.44
TOTAL LATE CHARGES	\$
NSF FEES	\$ 15.00
BPO	\$
ACCRUED LATE CHARGES	\$ 112.85
PROPERTY INSPECTION FEES	\$
FORECLOSURE COSTS	\$ 870.91
FORECLOSURE FEES	\$ 540.00
ESCROW SHORTAGE	\$ 2,631.92
PREVIOUS ATTORNEY FEES & COSTS	\$
PREVIOUS BANKRUPTCY FEES	\$

TOTAL ARREARAGES CLAIM: \$19,934.12

TOTAL SECURED CLAIM:

PRINCIPAL BALANCE: \$ 66,344.36

MONTHLY PAYMENT: \$ 716.52 (\$ 497.31 P&I + \$ 219.21 ESCROW)

AMENDED AND RESTATED NOTE

Multistate

October 31, 2000

668 W MCCORKLE CIR
GREENVILLE, MS 38701

1. PARTIES

"Borrower" means each person signing at the end of this Note, and the person's successors and assigns. "Lender" means Countrywide Home Loans, Inc. and its successors and assigns.

2. BORROWER'S PROMISE TO PAY; INTEREST

In return for a loan received from Lender, Borrower promises to pay the principal sum of Sixty Eight Thousand Two Hundred Forty Four Dollars and Eighty One Cents (Dollars U.S. \$68,244.81) plus interest, to the order of Lender. Interest will be charged on unpaid principal, from the date of disbursement of the loan proceeds by Lender, at the rate of Seven Point Two Six percent (7.26%) per year until the full amount of principal has been paid.

3. PROMISE TO PAY SECURED

Borrower's promise to pay is secured by a mortgage, deed of trust or similar security instrument that is dated the same date as this Note and called the "Security Instrument." The Security Instrument protects the Lender from losses which might result if Borrower defaults under this Note.

4. MANNER OF PAYMENT

(A) Time

Borrower shall make a payment of principal and interest to Lender on the first day of each month beginning on January 01, 2007. Any principal and interest remaining on the first day of June 01, 2031, will be due on that date, which is called the "Maturity Date."

(B) Place

Payment shall be made at
155 North Lake Avenue Pasadena, California 91109
or at such place a Lender may designate in writing by notice to Borrower.

(C) Amount

Each monthly payment of principal and interest will be in the amount of U.S. \$ 497.31. This amount will be part of a larger monthly payment required by the Security Instrument, that shall be applied to principal, interest and other items in the order described in the Security Instrument.

(D) Allonge to this Note for payment adjustments

If an allonge providing for payment adjustments is executed by Borrower together with this Note, the covenants of the allonge shall be incorporated into and shall amend and supplement the covenants of this Note as if the allonge were a part of this Note. [Check applicable box]

Graduated Payment Allonge

Growing Equity Allonge

Other [specify]

5. BORROWER'S RIGHT TO PREPAY

Borrower has the right to pay the debt evidenced by this Note, in whole or in part, without charge or penalty, on the first day of any month. Lender shall accept prepayment on other days provided that Borrower pays interest on the amount prepaid for the remainder of the month to the extent required by Lender and permitted by regulations of the Secretary. If Borrower makes a partial prepayment, there will be no changes in the due date or in the amount of the monthly payments unless Lender agrees in writing to those changes.



6. BORROWER'S FAILURE TO PAY

(A) Late Charge for Overdue Payments

If Lender has not received the full monthly payment required by the Security Instrument, as described in Paragraph 4(C) of this Note, by the end of fifteen calendar days after the payment is due, Lender may collect a late charge in the amount of Four percent (4%) of the overdue amount of each payment.

(B) Default

If Borrower defaults by failing to pay in full any monthly payment, then Lender may, except as limited by regulations of the Secretary in the case of payment defaults, require immediate payment in full of the principal balance remaining due and all accrued interest. Lender may choose not to exercise this options without waiving its rights in the event of any subsequent default. In many circumstances regulations issued by the Secretary will limit Lender's rights to require immediate payment in full in the case of payment defaults. This Note does not authorize acceleration when not permitted by HUD regulations. As used in this Note, "Secretary" means the Secretary of Housing and Urban Development or his or her designee.

(C) Payment of Costs and Expenses

If Lender has required immediate payment in full, as described above, Lender may require Borrower to pay costs and expenses including reasonable and customary attorneys' fees for enforcing this Note to the extent not prohibited by applicable law. Such fees and costs shall bear interest from the date of disbursement at the same rate as the principal of this Note.

7. WAIVERS

Borrower and any other person who has obligations under this Note waive the right of presentment and notice of dishonor. "Presentment" means the right to require Lender to demand payment of amounts due. "Notice of dishonor" means the right to require Lender to give notice to other persons that amounts due have not been paid.

8. GIVING OF NOTICES

Unless applicable law requires a different method, any notice that must be given to Borrower under this Note will be given by delivering it or by mailing it by first class mail to Borrower at the property address above or at a different address if Borrower has given Lender a notice of Borrower's different address. Any notice that must be given to Lender under this Note will be given by first class mail to Lender at the address stated in Paragraph 4(B) or at a different address if Borrower is given a notice of that different address.

9. OBLIGATIONS OF PERSONS UNDER THIS NOTE

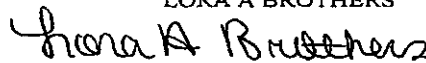
If more than one person signs this Note, each person is fully and personally obligated to keep all of the promises made in this Note, including the promise to pay the full amount owed. Any person who is a guarantor, surety or endorser of this Note is also obligated to do these things. Any person who takes over these obligations, including the obligations of a guarantor, surety or endorser of this Note, is also obligated to keep all of the promises made in this Note. Lender may enforce its rights under this Note against each person individually or against all signatories together. Any one person signing this Note may be required to pay all of the amounts owed under this Note.

BY SIGNING BELOW, borrower accepts and agrees to the terms and covenants contained in this Note.

SAMUEL M BROTHERS



LORA A BROTHERS



Multistate

NOTE

October 31, 2000

[Date]

668 MCCORKLE CIRCLE, GREENVILLE, MS 38701

[Property Address]

1. PARTIES

"Borrower" means each person signing at the end of this Note and the person's successors and assigns. "Lender" means Realty Mortgage Corporation,

and its successors and assigns.

2. BORROWER'S PROMISE TO PAY; INTEREST

In return for a loan received from Lender, Borrower promises to pay the principal sum of Sixty Eight Thousand Four Hundred Five and no/100

Dollars (U.S. \$ 68,405.00), plus interest, to the order of Lender. Interest will be charged on unpaid principal, from the date of disbursement of the loan proceeds by Lender, at the rate of Seven and Thirteen / Fiftieths percent (7.2600 %) per year until the full amount of principal has been paid.

3. PROMISE TO PAY SECURED

Borrower's promise to pay is secured by a mortgage, deed of trust or similar security instrument that is dated the same date as this Note and called the "Security Instrument." The Security Instrument protects the Lender from losses which might result if Borrower defaults under this Note.

4. MANNER OF PAYMENT

(A) Time

Borrower shall make a payment of principal and interest to Lender on the first day of each month beginning on December 1, 2000. Any principal and interest remaining on the first day of November 2030, will be due on that date, which is called the "Maturity Date."

(B) Place

Payment shall be made at 215 Katherine Drive, Jackson, MS 39208

or at such place as Lender may designate in writing

by notice to Borrower.

(C) Amount

Each monthly payment of principal and interest will be in the amount of U.S. \$ 467.11. This amount will be part of a larger monthly payment required by the Security Instrument, that shall be applied to principal, interest and other items in the order described in the Security Instrument.

(D) Allonge to this Note for payment adjustments

If an allonge providing for payment adjustments is executed by Borrower together with this Note, the covenants of the allonge shall be incorporated into and shall amend and supplement the covenants of this Note as if the allonge were a part of this Note. [Check applicable box]

☐ Graduated Payment Allonge ☐ Growing Equity Allonge ☐ Other [specify]

5. BORROWER'S RIGHT TO PREPAY

Borrower has the right to pay the debt evidenced by this Note, in whole or in part, without charge or penalty, on the first day of any month. Lender shall accept prepayment on other days provided that Borrower pays interest on the amount prepaid for the remainder of the month to the extent required by Lender and permitted by regulations of the Secretary. If Borrower makes a partial prepayment, there will be no changes in the due date or in the amount of the monthly payment unless Lender agrees in writing to those changes.



6. BORROWER'S FAILURE TO PAY

(A) Late Charge for Overdue Payments

If Lender has not received the full monthly payment required by the Security Instrument, as described in Paragraph 4(C) of this Note, by the end of fifteen calendar days after the payment is due, Lender may collect a late charge in the amount of Four percent (4.0000 %) of the overdue amount of each payment.

(B) Default

If Borrower defaults by failing to pay in full any monthly payment, then Lender may, except as limited by regulations of the Secretary in the case of payment defaults, require immediate payment in full of the principal balance remaining due and all accrued interest. Lender may choose not to exercise this option without waiving its rights in the event of any subsequent default. In many circumstances regulations issued by the Secretary will limit Lender's rights to require immediate payment in full in the case of payment defaults. This Note does not authorize acceleration when not permitted by HUD regulations. As used in this Note, "Secretary" means the Secretary of Housing and Urban Development or his or her designee.

(C) Payment of Costs and Expenses

If Lender has required immediate payment in full, as described above, Lender may require Borrower to pay costs and expenses including reasonable and customary attorneys' fees for enforcing this Note to the extent not prohibited by applicable law. Such fees and costs shall bear interest from the date of disbursement at the same rate as the principal of this Note.

7. WAIVERS

Borrower and any other person who has obligations under this Note waive the rights of presentment and notice of dishonor. "Presentment" means the right to require Lender to demand payment of amounts due. "Notice of dishonor" means the right to require Lender to give notice to other persons that amounts due have not been paid.

8. GIVING OF NOTICES

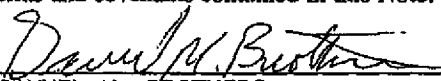

Unless applicable law requires a different method, any notice that must be given to Borrower under this Note will be given by delivering it or by mailing it by first class mail to Borrower at the property address above or at a different address if Borrower has given Lender a notice of Borrower's different address.

Any notice that must be given to Lender under this Note will be given by first class mail to Lender at the address stated in Paragraph 4(B) or at a different address if Borrower is given a notice of that different address.

9. OBLIGATIONS OF PERSONS UNDER THIS NOTE

If more than one person signs this Note, each person is fully and personally obligated to keep all of the promises made in this Note, including the promise to pay the full amount owed. Any person who is a guarantor, surety or endorser of this Note is also obligated to do these things. Any person who takes over these obligations, including the obligations of a guarantor, surety or endorser of this Note, is also obligated to keep all of the promises made in this Note. Lender may enforce its rights under this Note against each person individually or against all signatories together. Any one person signing this Note may be required to pay all of the amounts owed under this Note.

BY SIGNING BELOW, Borrower accepts and agrees to the terms and covenants contained in this Note.

_____ (Seal)		_____ (Seal)
-Borrower	SAMUEL M. BROTHERS	-Borrower
_____ (Seal)		_____ (Seal)
-Borrower	LORA A. BROTHERS	-Borrower
_____ (Seal)	_____	_____ (Seal)
-Borrower		-Borrower
_____ (Seal)	_____	_____ (Seal)
-Borrower		-Borrower

WITHOUT RECOURSE PAY TO THE ORDER OF

TRUSTMARK NATIONAL BANK
REALTY MORTGAGE CORPORATION

BY  Anna Deser

AMENDED AND RESTATED NOTE

Multistate

October 31, 2000

668 W MCCORKLE CIR
GREENVILLE, MS 38701

1. PARTIES

"Borrower" means each person signing at the end of this Note, and the person's successors and assigns. "Lender" means Countrywide Home Loans, Inc. and its successors and assigns.

2. BORROWER'S PROMISE TO PAY; INTEREST

In return for a loan received from Lender, Borrower promises to pay the principal sum of Sixty Eight Thousand Two Hundred Forty Four Dollars and Eighty One Cents (Dollars U.S. \$68,244.81) plus interest, to the order of Lender. Interest will be charged on unpaid principal, from the date of disbursement of the loan proceeds by Lender, at the rate of Seven Point Two Six percent (7.26%) per year until the full amount of principal has been paid.

3. PROMISE TO PAY SECURED

Borrower's promise to pay is secured by a mortgage, deed of trust or similar security instrument that is dated the same date as this Note and called the "Security Instrument." The Security Instrument protects the Lender from losses which might result if Borrower defaults under this Note.

4. MANNER OF PAYMENT

(A) Time

Borrower shall make a payment of principal and interest to Lender on the first day of each month beginning on January 01, 2007. Any principal and interest remaining on the first day of June 01, 2031, will be due on that date, which is called the "Maturity Date."

(B) Place

Payment shall be made at
155 North Lake Avenue Pasadena, California 91109
or at such place a Lender may designate in writing by notice to Borrower.

(C) Amount

Each monthly payment of principal and interest will be in the amount of U.S. \$ 497.31. This amount will be part of a larger monthly payment required by the Security Instrument, that shall be applied to principal, interest and other items in the order described in the Security Instrument.

(D) Allonge to this Note for payment adjustments

If an allonge providing for payment adjustments is executed by Borrower together with this Note, the covenants of the allonge shall be incorporated into and shall amend and supplement the covenants of this Note as if the allonge were a part of this Note. [Check applicable box]

Graduated Payment Allonge

Growing Equity Allonge

Other [specify]

5. BORROWER'S RIGHT TO PREPAY

Borrower has the right to pay the debt evidenced by this Note, in whole or in part, without charge or penalty, on the first day of any month. Lender shall accept prepayment on other days provided that Borrower pays interest on the amount prepaid for the remainder of the month to the extent required by Lender and permitted by regulations of the Secretary. If Borrower makes a partial prepayment, there will be no changes in the due date or in the amount of the monthly payments unless Lender agrees in writing to those changes.



6. BORROWER'S FAILURE TO PAY

(A) Late Charge for Overdue Payments

If Lender has not received the full monthly payment required by the Security Instrument, as described in Paragraph 4(C) of this Note, by the end of fifteen calendar days after the payment is due, Lender may collect a late charge in the amount of Four percent (4%) of the overdue amount of each payment.

(B) Default

If Borrower defaults by failing to pay in full any monthly payment, then Lender may, except as limited by regulations of the Secretary in the case of payment defaults, require immediate payment in full of the principal balance remaining due and all accrued interest. Lender may choose not to exercise this options without waiving its rights in the event of any subsequent default. In many circumstances regulations issued by the Secretary will limit Lender's rights to require immediate payment in full in the case of payment defaults. This Note does not authorize acceleration when not permitted by HUD regulations. As used in this Note, "Secretary" means the Secretary of Housing and Urban Development or his or her designee.

(C) Payment of Costs and Expenses

If Lender has required immediate payment in full, as described above, Lender may require Borrower to pay costs and expenses including reasonable and customary attorneys' fees for enforcing this Note to the extent not prohibited by applicable law. Such fees and costs shall bear interest from the date of disbursement at the same rate as the principal of this Note.

7. WAIVERS

Borrower and any other person who has obligations under this Note waive the right of presentment and notice of dishonor. "Presentment" means the right to require Lender to demand payment of amounts due. "Notice of dishonor" means the right to require Lender to give notice to other persons that amounts due have not been paid.

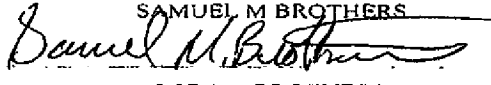
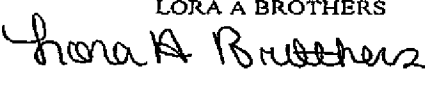
8. GIVING OF NOTICES

Unless applicable law requires a different method, any notice that must be given to Borrower under this Note will be given by delivering it or by mailing it by first class mail to Borrower at the property address above or at a different address if Borrower has given Lender a notice of Borrower's different address. Any notice that must be given to Lender under this Note will be given by first class mail to Lender at the address stated in Paragraph 4(B) or at a different address if Borrower is given a notice of that different address.

9. OBLIGATIONS OF PERSONS UNDER THIS NOTE

If more than one person signs this Note, each person is fully and personally obligated to keep all of the promises made in this Note, including the promise to pay the full amount owed. Any person who is a guarantor, surety or endorser of this Note is also obligated to do these things. Any person who takes over these obligations, including the obligations of a guarantor, surety or endorser of this Note, is also obligated to keep all of the promises made in this Note. Lender may enforce its rights under this Note against each person individually or against all signatories together. Any one person signing this Note may be required to pay all of the amounts owed under this Note.

BY SIGNING BELOW, borrower accepts and agrees to the terms and covenants contained in this Note.

SAMUEL M BROTHERS

LORA A BROTHERS


STD PAYOFF LOAN INTEREST ENQUIRY

LT/SC : 2 - 0
FHA 7 E
WarnCd: 4
LockOut: 2

Investor Acctg SS
P/O Date Interest/Date
12/05/2006 12/31/2006

Principal Balance Applied : 64087.52 #days INT
Borrower Interest @ Payoff: 3101.84 ... 244
Investor Interest @ Payoff: 387.73 26
Per Diem : 12.7472 @ .07260
MONTHLY Interest : 387.73
Note Rate - LOAN MASTER : .07260
INTEREST VARIANCE : .00
DUE DAY : 1

===== ARM CHANGE INFO =====

CHGY MM NEWRT OLDRT PER DIEM

Beginning Escrow Balance : 408.91-
LAST ACTIVITY Date : 11/13/2006
Previous Paid-To-Date : 5/01/2006
Year-To-Date Interest : 3118.78
First Due Date : 12/2000

Customer Name / Property Addr

SAMUEL M BROTHERS
668 W MCCORKLE CIR
GREENVILLE, MS

38701

F3=Exit

F12=BYPASS

BOOK 2155 PAGE 199

[Space Above This Line For Recording Data]

State of Mississippi

DEED OF TRUST

THIS DEED OF TRUST ("Security Instrument") is made on October 31, 2000 ✓
The Grantor is SAMUEL M. BROTHERS and LORA A. BROTHERS, Husband and Wife

("Borrower"). The trustee is Charles A. Myers

215 KATHERINE DRIVE, JACKSON, MS 39208-9588

("Trustee"). The beneficiary is Realty Mortgage Corporation,

which is organized and existing under the laws of THE STATE OF MISSISSIPPI, and
whose address is 215 Katherine Drive, Jackson, MS 39208

("Lender"). Borrower owes Lender the principal sum of
Sixty Eight Thousand Four Hundred Five and no/100

Dollars (U.S. \$ 68,405.00 ✓).

This debt is evidenced by Borrower's note dated the same date as this Security Instrument ("Note"), which
provides for monthly payments, with the full debt, if not paid earlier, due and payable on November 1, 2030 ✓

This Security Instrument secures to Lender: (a) the repayment of the debt evidenced by the ✓
Note, with interest, and all renewals, extensions and modifications of the Note; (b) the payment of all other sums,
with interest, advanced under paragraph 7 to protect the security of this Security Instrument; and (c) the performance

FHA Mississippi Deed of Trust - 4/96

12/10-4R(MS) (9804).01

VMP MORTGAGE FORMS - (800)521-7291

Page 1 of 8

MW 04/98.01

Initials: *SMB*
LAB



BOOK 2155 PAGE 200

of Borrower's covenants and agreements under this Security Instrument and the Note. For this purpose, Borrower irrevocably grants and conveys to the Trustee, in trust, with power of sale, the following described property located in
WASHINGTON
County, Mississippi:

Lot 18 of Block 3 of the McCORKLE ADDITION to the City of Greenville, Washington County, Mississippi, according to a map or plat of said Addition, recorded in Plat Book 5 at Page 15 of the land records of Washington County, Mississippi.

which has the address of 668 MCCORKLE CIRCLE, GREENVILLE
Mississippi 38701 (Zip Code) ("Property Address");

[Street, City],

TOGETHER WITH all the improvements now or hereafter erected on the property, and all easements, appurtenances and fixtures now or hereafter a part of the property. All replacements and additions shall also be covered by this Security Instrument. All of the foregoing is referred to in this Security Instrument as the "Property."

BORROWER COVENANTS that Borrower is lawfully seized of the estate hereby conveyed and has the right to grant and convey the Property and that the Property is unencumbered, except for encumbrances of record. Borrower warrants and will defend generally the title to the Property against all claims and demands, subject to any encumbrances of record.

THIS SECURITY INSTRUMENT combines uniform covenants for national use and non-uniform covenants with limited variations by jurisdiction to constitute a uniform security instrument covering real property.

Borrower and Lender covenant and agree as follows:

UNIFORM COVENANTS.

1. **Payment of Principal, Interest and Late Charge.** Borrower shall pay when due the principal of, and interest on, the debt evidenced by the Note and late charges due under the Note.

2. **Monthly Payment of Taxes, Insurance and Other Charges.** Borrower shall include in each monthly payment, together with the principal and interest as set forth in the Note and any late charges, a sum for (a) taxes and special assessments levied or to be levied against the Property, (b) leasehold payments or ground rents on the Property, and (c) premiums for insurance required under paragraph 4. In any year in which the Lender must pay a mortgage insurance premium to the Secretary of Housing and Urban Development ("Secretary"), or in any year in which such premium would have been required if Lender still held the Security Instrument, each monthly payment shall also include either: (i) a sum for the annual mortgage insurance premium to be paid by Lender to the Secretary, or (ii) a monthly charge instead of a mortgage insurance premium if this Security Instrument is held by the Secretary, in a reasonable amount to be determined by the Secretary. Except for the monthly charge by the Secretary, these items are called "Escrow Items" and the sums paid to Lender are called "Escrow Funds."

Lender may, at any time, collect and hold amounts for Escrow Items in an aggregate amount not to exceed the maximum amount that may be required for Borrower's escrow account under the Real Estate Settlement Procedures Act of 1974, 12 U.S.C. Section 2601 *et seq.* and implementing regulations, 24 CFR Part 3500, as they may be amended from time to time ("RESPA"), except that the cushion or reserve permitted by RESPA for unanticipated disbursements or disbursements before the Borrower's payments are available in the account may not be based on amounts due for the mortgage insurance premium.

If the amounts held by Lender for Escrow Items exceed the amounts permitted to be held by RESPA, Lender shall account to Borrower for the excess funds as required by RESPA. If the amounts of funds held by Lender at any time are not sufficient to pay the Escrow Items when due, Lender may notify the Borrower and require Borrower to make up the shortage as permitted by RESPA.

The Escrow Funds are pledged as additional security for all sums secured by this Security Instrument. If Borrower tenders to Lender the full payment of all such sums, Borrower's account shall be credited with the balance remaining for all installment items (a), (b), and (c) and any mortgage insurance premium installment that Lender has not become obligated to pay to the Secretary, and Lender shall promptly refund any excess funds to Borrower. Immediately prior to a foreclosure sale of the Property or its acquisition by Lender, Borrower's account shall be credited with any balance remaining for all installments for items (a), (b), and (c).

3. Application of Payments. All payments under paragraphs 1 and 2 shall be applied by Lender as follows:

First, to the mortgage insurance premium to be paid by Lender to the Secretary or to the monthly charge by the Secretary instead of the monthly mortgage insurance premium;

Second, to any taxes, special assessments, leasehold payments or ground rents, and fire, flood and other hazard insurance premiums, as required;

Third, to interest due under the Note;

Fourth, to amortization of the principal of the Note; and

Fifth, to late charges due under the Note.

4. Fire, Flood and Other Hazard Insurance. Borrower shall insure all improvements on the Property, whether now in existence or subsequently erected, against any hazards, casualties, and contingencies, including fire, for which Lender requires insurance. This insurance shall be maintained in the amounts and for the periods that Lender requires. Borrower shall also insure all improvements on the Property, whether now in existence or subsequently erected, against loss by floods to the extent required by the Secretary. All insurance shall be carried with companies approved by Lender. The insurance policies and any renewals shall be held by Lender and shall include loss payable clauses in favor of, and in a form acceptable to, Lender.

In the event of loss, Borrower shall give Lender immediate notice by mail. Lender may make proof of loss if not made promptly by Borrower. Each insurance company concerned is hereby authorized and directed to make payment for such loss directly to Lender, instead of to Borrower and to Lender jointly. All or any part of the insurance proceeds may be applied by Lender, at its option, either (a) to the reduction of the indebtedness under the Note and this Security Instrument, first to any delinquent amounts applied in the order in paragraph 3, and then to prepayment of principal, or (b) to the restoration or repair of the damaged Property. Any application of the proceeds to the principal shall not extend or postpone the due date of the monthly payments which are referred to in paragraph 2, or change the amount of such payments. Any excess insurance proceeds over an amount required to pay all outstanding indebtedness under the Note and this Security Instrument shall be paid to the entity legally entitled thereto.

In the event of foreclosure of this Security Instrument or other transfer of title to the Property that extinguishes the indebtedness, all right, title and interest of Borrower in and to insurance policies in force shall pass to the purchaser.

5. Occupancy, Preservation, Maintenance and Protection of the Property; Borrower's Loan Application; Leaseholds. Borrower shall occupy, establish, and use the Property as Borrower's principal residence within sixty days after the execution of this Security Instrument (or within sixty days of a later sale or transfer of the Property) and shall continue to occupy the Property as Borrower's principal residence for at least one year after the date of occupancy, unless Lender determines that requirement will cause undue hardship for Borrower, or unless extenuating circumstances exist which are beyond Borrower's control. Borrower shall notify Lender of any extenuating circumstances. Borrower shall not commit waste or destroy, damage or substantially change the Property or allow the Property to deteriorate, reasonable wear and tear excepted. Lender may inspect the Property if the Property is vacant or abandoned or the loan is in default. Lender may take reasonable action to protect and preserve such vacant or

BOOK 2155 PAGE 202

abandoned Property. Borrower shall also be in default if Borrower, during the loan application process, gave materially false or inaccurate information or statements to Lender (or failed to provide Lender with any material information) in connection with the loan evidenced by the Note, including, but not limited to, representations concerning Borrower's occupancy of the Property as a principal residence. If this Security Instrument is on a leasehold, Borrower shall comply with the provisions of the lease. If Borrower acquires fee title to the Property, the leasehold and fee title shall not be merged unless Lender agrees to the merger in writing. *

6. **Condemnation.** The proceeds of any award or claim for damages, direct or consequential, in connection with any condemnation or other taking of any part of the Property, or for conveyance in place of condemnation, are hereby assigned and shall be paid to Lender to the extent of the full amount of the indebtedness that remains unpaid under the Note and this Security Instrument. Lender shall apply such proceeds to the reduction of the indebtedness under the Note and this Security Instrument, first to any delinquent amounts applied in the order provided in paragraph 3, and then to prepayment of principal. Any application of the proceeds to the principal shall not extend or postpone the due date of the monthly payments, which are referred to in paragraph 2, or change the amount of such payments. Any excess proceeds over an amount required to pay all outstanding indebtedness under the Note and this Security Instrument shall be paid to the entity legally entitled thereto.

7. **Charges to Borrower and Protection of Lender's Rights in the Property.** Borrower shall pay all governmental or municipal charges, fines and impositions that are not included in paragraph 2. Borrower shall pay these obligations on time directly to the entity which is owed the payment. If failure to pay would adversely affect Lender's interest in the Property, upon Lender's request Borrower shall promptly furnish to Lender receipts evidencing these payments.

If Borrower fails to make these payments or the payments required by paragraph 2, or fails to perform any other covenants and agreements contained in this Security Instrument, or there is a legal proceeding that may significantly affect Lender's rights in the Property (such as a proceeding in bankruptcy, for condemnation or to enforce laws or regulations), then Lender may do and pay whatever is necessary to protect the value of the Property and Lender's rights in the Property, including payment of taxes, hazard insurance and other items mentioned in paragraph 2.

Any amounts disbursed by Lender under this paragraph shall become an additional debt of Borrower and be secured by this Security Instrument. These amounts shall bear interest from the date of disbursement, at the Note rate, and at the option of Lender, shall be immediately due and payable.

Borrower shall promptly discharge any lien which has priority over this Security Instrument unless Borrower: (a) agrees in writing to the payment of the obligation secured by the lien in a manner acceptable to Lender; (b) contests in good faith the lien by, or defends against enforcement of the lien in, legal proceedings which in the Lender's opinion operate to prevent the enforcement of the lien; or (c) secures from the holder of the lien an agreement satisfactory to Lender subordinating the lien to this Security Instrument. If Lender determines that any part of the Property is subject to a lien which may attain priority over this Security Instrument, Lender may give Borrower a notice identifying the lien. Borrower shall satisfy the lien or take one or more of the actions set forth above within 10 days of the giving of notice.

8. **Fees.** Lender may collect fees and charges authorized by the Secretary.

9. **Grounds for Acceleration of Debt.**

(a) **Default.** Lender may, except as limited by regulations issued by the Secretary, in the case of payment defaults, require immediate payment in full of all sums secured by this Security Instrument if:

(i) Borrower defaults by failing to pay in full any monthly payment required by this Security Instrument prior to or on the due date of the next monthly payment, or

(ii) Borrower defaults by failing, for a period of thirty days, to perform any other obligations contained in this Security Instrument.

(b) **Sale Without Credit Approval.** Lender shall, if permitted by applicable law (including Section 341(d) of the Garn-St. Germain Depository Institutions Act of 1982, 12 U.S.C. 1701j-3(d)) and with the prior approval of the Secretary, require immediate payment in full of all sums secured by this Security Instrument if:

- (i) All or part of the Property, or a beneficial interest in a trust owning all or part of the Property, is sold or otherwise transferred (other than by devise or descent), and
- (ii) The Property is not occupied by the purchaser or grantee as his or her principal residence, or the purchaser or grantee does so occupy the Property but his or her credit has not been approved in accordance with the requirements of the Secretary.
- (c) **No Waiver.** If circumstances occur that would permit Lender to require immediate payment in full, but Lender does not require such payments, Lender does not waive its rights with respect to subsequent events.
- (d) **Regulations of HUD Secretary.** In many circumstances regulations issued by the Secretary will limit Lender's rights, in the case of payment defaults, to require immediate payment in full and foreclose if not paid. This Security Instrument does not authorize acceleration or foreclosure if not permitted by regulations of the Secretary.
- (e) **Mortgage Not Insured.** Borrower agrees that if this Security Instrument and the Note are not determined to be eligible for insurance under the National Housing Act within 60 days from the date hereof, Lender may, at its option, require immediate payment in full of all sums secured by this Security Instrument. A written statement of any authorized agent of the Secretary dated subsequent to 60 days from the date hereof, declining to insure this Security Instrument and the Note, shall be deemed conclusive proof of such ineligibility. Notwithstanding the foregoing, this option may not be exercised by Lender when the unavailability of insurance is solely due to Lender's failure to remit a mortgage insurance premium to the Secretary.

10. Reinstatement. Borrower has a right to be reinstated if Lender has required immediate payment in full because of Borrower's failure to pay an amount due under the Note or this Security Instrument. This right applies even after foreclosure proceedings are instituted. To reinstate the Security Instrument, Borrower shall tender in a lump sum all amounts required to bring Borrower's account current including, to the extent they are obligations of Borrower under this Security Instrument, foreclosure costs and reasonable and customary attorneys' fees and expenses properly associated with the foreclosure proceeding. Upon reinstatement by Borrower, this Security Instrument and the obligations that it secures shall remain in effect as if Lender had not required immediate payment in full. However, Lender is not required to permit reinstatement if: (i) Lender has accepted reinstatement after the commencement of foreclosure proceedings within two years immediately preceding the commencement of a current foreclosure proceeding, (ii) reinstatement will preclude foreclosure on different grounds in the future, or (iii) reinstatement will adversely affect the priority of the lien created by this Security Instrument.

11. Borrower Not Released; Forbearance By Lender Not a Waiver. Extension of the time of payment or modification of amortization of the sums secured by this Security Instrument granted by Lender to any successor in interest of Borrower shall not operate to release the liability of the original Borrower or Borrower's successor in interest. Lender shall not be required to commence proceedings against any successor in interest or refuse to extend time for payment or otherwise modify amortization of the sums secured by this Security Instrument by reason of any demand made by the original Borrower or Borrower's successors in interest. Any forbearance by Lender in exercising any right or remedy shall not be a waiver of or preclude the exercise of any right or remedy.

12. Successors and Assigns Bound; Joint and Several Liability; Co-Signers. The covenants and agreements of this Security Instrument shall bind and benefit the successors and assigns of Lender and Borrower, subject to the provisions of paragraph 9(b). Borrower's covenants and agreements shall be joint and several. Any Borrower who co-signs this Security Instrument but does not execute the Note: (a) is co-signing this Security Instrument only to mortgage, grant and convey that Borrower's interest in the Property under the terms of this Security Instrument; (b) is not personally obligated to pay the sums secured by this Security Instrument; and (c) agrees that Lender and any other Borrower may agree to extend, modify, forbear or make any accommodations with regard to the terms of this Security Instrument or the Note without that Borrower's consent.

13. **Notices.** Any notice to Borrower provided for in this Security Instrument shall be given by delivering it or by mailing it by first class mail unless applicable law requires use of another method. The notice shall be directed to the Property Address or any other address Borrower designates by notice to Lender. Any notice to Lender shall be given by first class mail to Lender's address stated herein or any address Lender designates by notice to Borrower. Any notice provided for in this Security Instrument shall be deemed to have been given to Borrower or Lender when given as provided in this paragraph.

14. **Governing Law; Severability.** This Security Instrument shall be governed by Federal law and the law of the jurisdiction in which the Property is located. In the event that any provision or clause of this Security Instrument or the Note conflicts with applicable law, such conflict shall not affect other provisions of this Security Instrument or the Note which can be given effect without the conflicting provision. To this end the provisions of this Security Instrument and the Note are declared to be severable.

15. **Borrower's Copy.** Borrower shall be given one conformed copy of the Note and of this Security Instrument.

16. **Hazardous Substances.** Borrower shall not cause or permit the presence, use, disposal, storage, or release of any Hazardous Substances on or in the Property. Borrower shall not do, nor allow anyone else to do, anything affecting the Property that is in violation of any Environmental Law. The preceding two sentences shall not apply to the presence, use, or storage on the Property of small quantities of Hazardous Substances that are generally recognized to be appropriate to normal residential uses and to maintenance of the Property.

Borrower shall promptly give Lender written notice of any investigation, claim, demand, lawsuit or other action by any governmental or regulatory agency or private party involving the Property and any Hazardous Substance or Environmental Law of which Borrower has actual knowledge. If Borrower learns, or is notified by any governmental or regulatory authority, that any removal or other remediation of any Hazardous Substances affecting the Property is necessary, Borrower shall promptly take all necessary remedial actions in accordance with Environmental Law.

As used in this paragraph 16, "Hazardous Substances" are those substances defined as toxic or hazardous substances by Environmental Law and the following substances: gasoline, kerosene, other flammable or toxic petroleum products, toxic pesticides and herbicides, volatile solvents, materials containing asbestos or formaldehyde, and radioactive materials. As used in this paragraph 16, "Environmental Law" means federal laws and laws of the jurisdiction where the Property is located that relate to health, safety or environmental protection.

NON-UNIFORM COVENANTS. Borrower and Lender further covenant and agree as follows:

17. **Assignment of Rents.** Borrower unconditionally assigns and transfers to Lender all the rents and revenues of the Property. Borrower authorizes Lender or Lender's agents to collect the rents and revenues and hereby directs each tenant of the Property to pay the rents to Lender or Lender's agents. However, prior to Lender's notice to Borrower of Borrower's breach of any covenant or agreement in the Security Instrument, Borrower shall collect and receive all rents and revenues of the Property as trustee for the benefit of Lender and Borrower. This assignment of rents constitutes an absolute assignment and not an assignment for additional security only.

If Lender gives notice of breach to Borrower: (a) all rents received by Borrower shall be held by Borrower as trustee for benefit of Lender only, to be applied to the sums secured by the Security Instrument; (b) Lender shall be entitled to collect and receive all of the rents of the Property; and (c) each tenant of the Property shall pay all rents due and unpaid to Lender or Lender's agent on Lender's written demand to the tenant.

Borrower has not executed any prior assignment of the rents and has not and will not perform any act that would prevent Lender from exercising its rights under this paragraph 17.

Lender shall not be required to enter upon, take control of or maintain the Property before or after giving notice of breach to Borrower. However, Lender or a judicially appointed receiver may do so at any time there is a breach. Any application of rents shall not cure or waive any default or invalidate any other right or remedy of Lender. This assignment of rents of the Property shall terminate when the debt secured by the Security Instrument is paid in full.

BY SIGNING BELOW, Borrower accepts and agrees to the terms contained in this Security Instrument and in any rider(s) executed by Borrower and recorded with it.
Witnesses:

_____	<u>Samuel M. Brothers</u> (Seal) SAMUEL M. BROTHERS -Borrower
_____	<u>Lora A. Brothers</u> (Seal) LORA A. BROTHERS -Borrower
_____ (Seal) -Borrower	_____ (Seal) -Borrower
_____ (Seal) -Borrower	_____ (Seal) -Borrower
_____ (Seal) -Borrower	_____ (Seal) -Borrower

STATE OF MISSISSIPPI, Washington

County ss:

On this 31st day of October, 2000, personally appeared before me, the undersigned authority in and for said County and State, the within named SAMUEL M. BROTHERS and LORA A. BROTHERS

that they signed and delivered the foregoing instrument on the day and year therein mentioned. , who acknowledged
Given under my hand and seal of office.

My Commission Expires: 2-11-2003

(Seal)

Theresa Rebecca Moon
Notary Public
.....

STATE OF MISSISSIPPI
COUNTY OF WASHINGTON

BOOK 2155 PAGE 300

ASSIGNMENT OF DEED OF TRUST

FOR AND IN CONSIDERATION of the sum of TEN DOLLARS (\$10.00), cash in hand paid and for other good and valuable consideration, the receipt and sufficiency of all of which is hereby acknowledged, the undersigned, **REALTY MORTGAGE CORPORATION**, a Mississippi Corporation, does hereby sell,

convey and assign unto Trustmark National Bank, P. O. Box 22889, Jackson, MS 39225

that certain Deed of Trust executed by Samuel M. Brothers and Lora A. Brothers,
Husband and Wife

to Charles A. Myers, Trustee, for the use and benefit of **REALTY MORTGAGE CORPORATION**, dated

October 31, 2000 securing a note in the sum of \$ 68,405.00
and recorded in Book 2155 at Page 199 of the records of the Chancery Clerk of
Washington County, Mississippi
together with the indebtedness secured thereby.

IN WITNESS WHEREOF, the said **REALTY MORTGAGE CORPORATION** has caused this conveyance to be signed by EDNA O'FLARITY, its SENIOR LOAN OFFICER, and its corporate seal to be hereto affixed this 31st day of October 2000.

REALTY MORTGAGE CORPORATION

Edna O'Flarity
EDNA O'FLARITY, SENIOR LOAN OFFICER



ATTEST:

Dana Rose

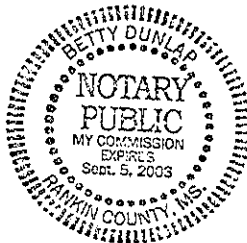
STATE OF MISSISSIPPI
COUNTY OF RANKIN

This day personally appeared before me, the undersigned authority in and for the state and county aforesaid EDNA O'FLARITY, who acknowledges to me that she is the SENIOR LOAN OFFICER of **REALTY MORTGAGE CORPORATION**, a Mississippi Corporation, and that she signed, executed, sealed and delivered the above and foregoing instrument of writing on the day and year therein mentioned, as and for her voluntary act and deed and as and for the voluntary act and deed of **REALTY MORTGAGE CORPORATION**, she having been first duly authorized to act for and on behalf of said Corporation.

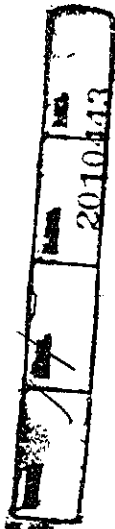
GIVEN UNDER MY HAND AN OFFICIAL SEAL, this the 31st day of October 2000.

Betty Dunlap
NOTARY PUBLIC

MY COMMISSION EXPIRES:



BOOK 2155 PAGE 301



*Realty Mortgage Corporation
assignment
Quotman National Bank*



RECORDING 600
MARGINAL 50
CERT. 650
TOTAL 650

STATE OF MISSISSIPPI, Washington County
I, Margaret P. Tucker, Clerk of the Chancery Court, in and for said County, do hereby certify that the foregoing assignment was filed in my office for record on this 6th day of Nov., 2000, at 9:36 A.M., on this day recorded in Mortgage Book 2155 Page 300 Given under my hand and official seal, this 6th day of November, A.D., 2000
MARGARET P. TUCKER, CHANCERY CLERK
By M. Tucker D.C.
Ret. P.

STATE OF MISSISSIPPI
COUNTY OF WASHINGTON

I, Marilyn Hansell Clerk of the Chancery Court in and for said County and State hereby certify that the within and foregoing instrument is a true and correct copy of assignment

as the same appears on file and of record in mortgage
Book 2155 Page 300
of the records in my office, at Greenville, Miss.

Witness my hand and official seal, this 6th day of
Aug A.D., 2010

Marilyn Hansell
Clerk of Chancery Court of Washington County, Miss.
By Matthews D.C.



2524 30369

Recorded in the Above
Deed of Trust Book & Page
12-30-2009 10:47:36 AM
Marilyn Hansell Chancery Clerk
Washington County

RECORD AND RETURN TO:
RECONTRUST COMPANY, N.A.
2380 Performance Dr, TX2-985-07-03
Richardson, TX 75082
TS No.: 09-0168458
TSG No.: 09-6-505533A
PARCEL No.: 14855800000
DHGW 50516G

SPACE ABOVE THIS LINE FOR RECORDER'S

THIS DOCUMENT WAS PREPARED
UNDER THE SUPERVISION OF
Dyke, Henry, Goldsholl & Winzerling, PLC
415 North McKinley, Suite 555
Little Rock, Arkansas 72205
Telephone No. (501) 661-1000

CORPORATION ASSIGNMENT OF DEED OF TRUST/MORTGAGE

ASSIGNOR:

TRUSTMARK NATIONAL BANK

TO:

ASSIGNEE:

THE BANK OF NEW YORK MELLON FKA THE BANK OF NEW YORK AS TRUSTEE FOR THE
CERTIFICATEHOLDERS OF CWMBS 2005-R1

THE REAL PROPERTY WHICH IS THE SUBJECT OF THIS CONVEYANCE IS DESCRIBED AS FOLLOWS:

LOT 18 OF BLOCK 3 OF THE MCCORKLE ADDITION TO THE CITY OF GREENVILLE,
WASHINGTON COUNTY, MISSISSIPPI, ACCORDING TO A MAP OR PLAT OF SAID
ADDITION, RECORDED IN PLAT BOOK 5 AT PAGE 15 OF THE LAND RECORDS OF
WASHINGTON COUNTY, MISSISSIPPI.

KNOW ALL MEN BY THESE PRESENT:

FOR VALUE RECEIVED, THE UNDERSIGNED HEREBY GRANTS, ASSIGNS AND TRANSFER TO:

THE BANK OF NEW YORK MELLON FKA THE BANK OF NEW YORK AS TRUSTEE FOR THE
CERTIFICATEHOLDERS OF CWMBS 2005-R1

ALL BENEFICIAL INTEREST UNDER THAT CERTAIN DEED OF TRUST DATED 10/31/2000, EXECUTED
BY: SAMUEL M BROTHERS and LORA A BROTHERS, TRUSTOR: TO CHARLES A. MYERS, AS TRUSTEE
IN BOOK 2155, PAGE 199 OF OFFICIAL RECORDS IN THE COUNTY RECORDERS OFFICE OF
WASHINGTON COUNTY, IN THE STATE OF MISSISSIPPI. DESCRIBING THE LAND THEREIN AS MORE
FULLY DESCRIBED IN SAID DEED OF TRUST.

TOGETHER WITH THE NOTE OR NOTES THEREIN DESCRIBED OR REFERRED TO, THE MONEY DUE
AND TO BECOME DUE THEREON WITH INTEREST, AND ALL RIGHTS ACCRUED OR TO ACCRUE
UNDER SAID DEED OF TRUST/MORTGAGE.

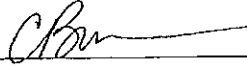
Form MSAssign (06/09)

Exhibit "E"

Dated:

TRUSTMARK NATIONAL BANK

By:



Title: Assistant Secretary

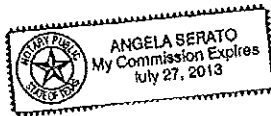
STATE OF Texas
COUNTY OF Dallas

Personally appeared before me, the undersigned authority in and for the said county and state, on this 26 day of December, 2009, within my jurisdiction, the within named Courtney Bullard, who acknowledged that (s)he is the Assistant Secretary of TRUSTMARK NATIONAL BANK, and that for and on behalf of the said corporation, and as its agent and deed (s)he executed the above and foregoing instrument after first having been duly authorized by said corporation so to do.

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal this 28 day of December, 2009.

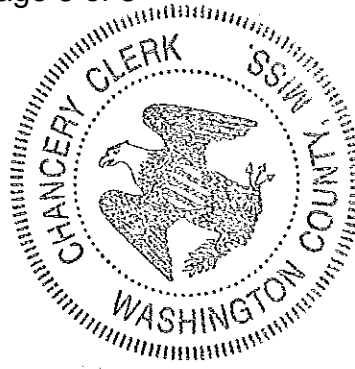
My Commission Expires:


Notary Public



Washington County
I certify this instrument was filed on
12-30-2009 10:47:36 AM
and recorded in Deed of Trust Book
2524 at pages 30369 - 30370
Marilyn Hansell Chancery Clerk

L Year



STATE OF MISSISSIPPI
COUNTY OF WASHINGTON

I, Marilyn Hansell Clerk of the Chancery Court in and for said
County and State hereby certify that the within and foregoing
instrument is a true and correct copy of assigned

as the same appears on file and of record in mortgage
Book 2524 Page 30369
of the records in my office, at Greenville, Miss.

Witness my hand and official seal, this 5th day of
Aug A.D., 2010

Marilyn Hansell

Clerk of Chancery Court of Washington County, Miss.

By: F. Matthews D.C.

AMENDED AND RESTATED NOTE

Multistate

October 31, 2000

668 W MCCORKLE CIR
GREENVILLE, MS 38701

1. PARTIES

"Borrower" means each person signing at the end of this Note, and the person's successors and assigns. "Lender" means Countrywide Home Loans, Inc. and its successors and assigns.

2. BORROWER'S PROMISE TO PAY; INTEREST

In return for a loan received from Lender, Borrower promises to pay the principal sum of Sixty Eight Thousand Two Hundred Forty Four Dollars and Eighty One Cents (Dollars U.S. \$68,244.81) plus interest, to the order of Lender. Interest will be charged on unpaid principal, from the date of disbursement of the loan proceeds by Lender, at the rate of Seven Point Two Six percent (7.26%) per year until the full amount of principal has been paid.

3. PROMISE TO PAY SECURED

Borrower's promise to pay is secured by a mortgage, deed of trust or similar security instrument that is dated the same date as this Note and called the "Security Instrument." The Security Instrument protects the Lender from losses which might result if Borrower defaults under this Note.

4. MANNER OF PAYMENT

(A) Time

Borrower shall make a payment of principal and interest to Lender on the first day of each month beginning on January 01, 2007. Any principal and interest remaining on the first day of June 01, 2031, will be due on that date, which is called the "Maturity Date."

(B) Place

Payment shall be made at
155 North Lake Avenue Pasadena, California 91109
or at such place a Lender may designate in writing by notice to Borrower.

(C) Amount

Each monthly payment of principal and interest will be in the amount of U.S. \$ 497.31. This amount will be part of a larger monthly payment required by the Security Instrument, that shall be applied to principal, interest and other items in the order described in the Security Instrument.

(D) Allonge to this Note for payment adjustments

If an allonge providing for payment adjustments is executed by Borrower together with this Note, the covenants of the allonge shall be incorporated into and shall amend and supplement the covenants of this Note as if the allonge were a part of this Note. [Check applicable box]

Graduated Payment Allonge

Growing Equity Allonge

Other [specify]

5. BORROWER'S RIGHT TO PREPAY

Borrower has the right to pay the debt evidenced by this Note, in whole or in part, without charge or penalty, on the first day of any month. Lender shall accept prepayment on other days provided that Borrower pays interest on the amount prepaid for the remainder of the month to the extent required by Lender and permitted by regulations of the Secretary. If Borrower makes a partial prepayment, there will be no changes in the due date or in the amount of the monthly payments unless Lender agrees in writing to those changes.

Page 1 of 2

FHA Multistate Fixed Rate Note - 10/95
Initials: SMB.
LAB



Exhibit "D"

6. BORROWER'S FAILURE TO PAY

(A) Late Charge for Overdue Payments

If Lender has not received the full monthly payment required by the Security Instrument, as described in Paragraph 4(C) of this Note, by the end of fifteen calendar days after the payment is due, Lender may collect a late charge in the amount of Four percent (4%) of the overdue amount of each payment.

(B) Default

If Borrower defaults by failing to pay in full any monthly payment, then Lender may, except as limited by regulations of the Secretary in the case of payment defaults, require immediate payment in full of the principal balance remaining due and all accrued interest. Lender may choose not to exercise this options without waiving its rights in the event of any subsequent default. In many circumstances regulations issued by the Secretary will limit Lender's rights to require immediate payment in full in the case of payment defaults. This Note does not authorize acceleration when not permitted by HUD regulations. As used in this Note, "Secretary" means the Secretary of Housing and Urban Development or his or her designee.

(C) Payment of Costs and Expenses

If Lender has required immediate payment in full, as described above, Lender may require Borrower to pay costs and expenses including reasonable and customary attorneys' fees for enforcing this Note to the extent not prohibited by applicable law. Such fees and costs shall bear interest from the date of disbursement at the same rate as the principal of this Note.

7. WAIVERS

Borrower and any other person who has obligations under this Note waive the right of presentment and notice of dishonor. "Presentment" means the right to require Lender to demand payment of amounts due. "Notice of dishonor" means the right to require Lender to give notice to other persons that amounts due have not been paid.

8. GIVING OF NOTICES

Unless applicable law requires a different method, any notice that must be given to Borrower under this Note will be given by delivering it or by mailing it by first class mail to Borrower at the property address above or at a different address if Borrower has given Lender a notice of Borrower's different address. Any notice that must be given to Lender under this Note will be given by first class mail to Lender at the address stated in Paragraph 4(B) or at a different address if Borrower is given a notice of that different address.

9. OBLIGATIONS OF PERSONS UNDER THIS NOTE

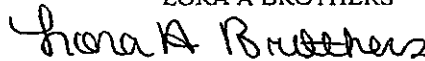
If more than one person signs this Note, each person is fully and personally obligated to keep all of the promises made in this Note, including the promise to pay the full amount owed. Any person who is a guarantor, surety or endorser of this Note is also obligated to do these things. Any person who takes over these obligations, including the obligations of a guarantor, surety or endorser of this Note, is also obligated to keep all of the promises made in this Note. Lender may enforce its rights under this Note against each person individually or against all signatories together. Any one person signing this Note may be required to pay all of the amounts owed under this Note.

BY SIGNING BELOW, borrower accepts and agrees to the terms and covenants contained in this Note.

SAMUEL M BROTHERS



LORA A BROTHERS



B10 (Official Form 10) (12/07)		PROOF OF CLAIM
UNITED STATES BANKRUPTCY COURT Northern DISTRICT OF MISSISSIPPI		
Name of Debtor: Samuel M. Brothers & Lora Brothers aka Loriann Brothers		Case Number: 10-10518-NPO
NOTE: This form should not be used to make a claim for an administrative expense arising after the commencement of the case. A request for payment of an administrative expense may be filed pursuant to 11 U.S.C. § 503.		
Name of Creditor (the person or other entity to whom the debtor owes money or property): BAC Home Loans Servicing, LP as servicer for The Bank of New York Mellon Trust Company, N.A.		<input checked="" type="checkbox"/> Check this box to indicate that this claim amends a previously filed claim.
Name and address where notices should be sent: Morris & Associates 2309 Oliver Rd Monroe, La 71201		Court Claim Number: 9 (If known)
Telephone number: (318) 330-9020		Filed on: Apr 5, 2010
Name and address where payment should be sent (if different from above): BAC Home Loans Servicing, LP Mail Stop: TX2-982-03-03 7105 Corporate Drive Piano, TX 75024		<input type="checkbox"/> Check this box if you are aware that anyone else has filed a proof of claim relating to your claim. Attach copy of statement giving particulars. <input type="checkbox"/> Check this box if you are the debtor or trustee in this case.
1. Amount of Claim as of Date Case Filed: \$66,344.36 If all or part of your claim is secured, complete item 4 below; however, if all of your claim is unsecured, do not complete item 4. If all or part of your claim is entitled to priority, complete item 5. <input type="checkbox"/> Check this box if claim includes interest or other charges in addition to the principal amount of claim. Attach itemized statement of interest or charges.		5. Amount of Claim Entitled to Priority under 11 U.S.C. §507(a). If any portion of your claim falls in one of the following categories, check the box and state the amount. Specify the priority of the claim. <input type="checkbox"/> Domestic support obligation under 11 U.S.C. §507(a)(1)(A) or (a)(1)(B). <input type="checkbox"/> Wages, salaries, or commissions (up to \$10,950*) earned within 180 days before filing of the bankruptcy petition or cessation of the debtor's business, whichever is earlier - 11 U.S.C. §507 (a)(4). <input type="checkbox"/> Contributions to an employee benefit plan - 11 U.S.C. §507 (a)(5). <input type="checkbox"/> Up to \$2,425* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use - 11 U.S.C. §507 (a)(7). <input type="checkbox"/> Taxes or penalties owed to governmental units - 11 U.S.C. §507 (a)(8). <input type="checkbox"/> Other - Specify applicable paragraph of 11 U.S.C. §507 (a)(____). Amount entitled to priority: \$ _____ *Amounts are subject to adjustment on 4/1/10 and every 3 years thereafter with respect to cases commenced on or after the date of adjustment.
2. Basis for Claim: Money Loaned (See instruction #2 on reverse side.)		
3. Last four digits of any number by which creditor identifies debtor: 6440 3a. Debtor may have scheduled account as: (See instruction #3a on reverse side.)		
4. Secured Claim (See instruction #4 on reverse side.) Check the appropriate box if your claim is secured by a lien on property or a right of setoff and provide the requested information. Nature of property or right of setoff: <input checked="" type="checkbox"/> Real Estate <input type="checkbox"/> Motor Vehicle <input type="checkbox"/> Other Describe: Value of Property: Annual Interest Rate 7.260% Amount of arrearage and other charges as of time case filed included in secured claim, if any: \$19,468.04 Basis for perfection: Security Deed Amount of Secured Claim: \$66,344.36 Amount Unsecured:		
6. Credits: The amount of all payments on this claim has been credited for the purpose of making this proof of claim.		
7. Documents: Attach redacted copies of any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements or running accounts, contracts, judgments, mortgages, and security agreements. You may also attach a summary. Attach redacted copies of documents providing evidence of perfection of a security interest. You may also attach a summary. (See definition of "redacted" on reverse side.) DO NOT SEND ORIGINAL DOCUMENTS. ATTACHED DOCUMENTS MAY BE DESTROYED AFTER SCANNING. If the documents are not available, please explain:		
Date: Aug 2, 2010	Signature: The person filing this claim must sign it. Sign and print name and title, if any, of the creditor or other person authorized to file this claim and state address and telephone number if different from the notice address above. Attach copy of power of attorney, if any. /S/ MICHAEL JEDYNAK Michael Jedynak, MS Bar Number 103014	FOR COURT USE ONLY

Penalty for presenting fraudulent claim: Fine of up to \$500,000 or imprisonment for up to 5 years, or both. 18 U.S.C. §§ 152 and 357.

Exhibit "H"

AMENDED PROOF OF CLAIM WORKSHEET

LOAN # 6440

PRE-PETITION CLAIMS ARREARAGES

PAYMENTS:

DUE FROM:	# PAYMENTS	AMOUNT	TOTAL
07/08-04/10	22	\$ 716.52	\$ 15,763.44

LATE CHARGES:

# OF LATE CHARGES	AMOUNT	TOTAL
Uncollected late charges	\$ 112.85	\$ 112.85

TOTAL PAYMENTS: \$ 15,763.44

TOTAL LATE CHARGES: \$ 112.85

ARREARAGES CLAIM:

TOTAL PAYMENTS: \$15,763.44

TOTAL LATE CHARGE:

NSF FEES: \$15.00

BPO:

UNCOLLECTED LATE CHARGES: \$112.85

PROPERTY INSPECTION FEES:

FORECLOSURE COSTS: \$870.91

FORECLOSURE FEES: \$540.00

ESCROW SHORTAGE: \$2,165.84

PREVIOUS ATTORNEY FEES & COSTS:

PREVIOUS BANKRUPTCY FEES:

SUSPENSE BALANCE:

LESS TRUSTEE DISBURSEMENTS:

TOTAL ARREARAGES CLAIM: \$19,468.04

TOTAL SECURED CLAIM:

PRINCIPAL BALANCE: \$ 66,344.36

MONTHLY PAYMENT: \$ 716.52 (\$ 497.31 P&I + \$ 219.21 ESCROW)

AMENDED AND RESTATED NOTE

Multistate

October 31, 2000

668 W MCCORKLE CIR
GREENVILLE, MS 38701

1. PARTIES

"Borrower" means each person signing at the end of this Note, and the person's successors and assigns. "Lender" means Countrywide Home Loans, Inc. and its successors and assigns.

2. BORROWER'S PROMISE TO PAY; INTEREST

In return for a loan received from Lender, Borrower promises to pay the principal sum of Sixty Eight Thousand Two Hundred Forty Four Dollars and Eighty One Cents (Dollars U.S. \$68,244.81) plus interest, to the order of Lender. Interest will be charged on unpaid principal, from the date of disbursement of the loan proceeds by Lender, at the rate of Seven Point Two Six percent (7.26%) per year until the full amount of principal has been paid.

3. PROMISE TO PAY SECURED

Borrower's promise to pay is secured by a mortgage, deed of trust or similar security instrument that is dated the same date as this Note and called the "Security Instrument." The Security Instrument protects the Lender from losses which might result if Borrower defaults under this Note.

4. MANNER OF PAYMENT

(A) Time

Borrower shall make a payment of principal and interest to Lender on the first day of each month beginning on January 01, 2007. Any principal and interest remaining on the first day of June 01, 2031, will be due on that date, which is called the "Maturity Date."

(B) Place

Payment shall be made at
155 North Lake Avenue Pasadena, California 91109
or at such place a Lender may designate in writing by notice to Borrower.

(C) Amount

Each monthly payment of principal and interest will be in the amount of U.S. \$ 497.31. This amount will be part of a larger monthly payment required by the Security Instrument, that shall be applied to principal, interest and other items in the order described in the Security Instrument.

(D) Allonge to this Note for payment adjustments

If an allonge providing for payment adjustments is executed by Borrower together with this Note, the covenants of the allonge shall be incorporated into and shall amend and supplement the covenants of this Note as if the allonge were a part of this Note. [Check applicable box]

Graduated Payment Allonge

Growing Equity Allonge

Other [specify]

5. BORROWER'S RIGHT TO PREPAY

Borrower has the right to pay the debt evidenced by this Note, in whole or in part, without charge or penalty, on the first day of any month. Lender shall accept prepayment on other days provided that Borrower pays interest on the amount prepaid for the remainder of the month to the extent required by Lender and permitted by regulations of the Secretary. If Borrower makes a partial prepayment, there will be no changes in the due date or in the amount of the monthly payments unless Lender agrees in writing to those changes.

Page 1 of 2

FHA Multistate Fixed Rate Note - 10/95
Initials: SMB.
LAB

Exhibit "A"



6. BORROWER'S FAILURE TO PAY

(A) Late Charge for Overdue Payments

If Lender has not received the full monthly payment required by the Security Instrument, as described in Paragraph 4(C) of this Note, by the end of fifteen calendar days after the payment is due, Lender may collect a late charge in the amount of Four percent (4%) of the overdue amount of each payment.

(B) Default

If Borrower defaults by failing to pay in full any monthly payment, then Lender may, except as limited by regulations of the Secretary in the case of payment defaults, require immediate payment in full of the principal balance remaining due and all accrued interest. Lender may choose not to exercise this options without waiving its rights in the event of any subsequent default. In many circumstances regulations issued by the Secretary will limit Lender's rights to require immediate payment in full in the case of payment defaults. This Note does not authorize acceleration when not permitted by HUD regulations. As used in this Note, "Secretary" means the Secretary of Housing and Urban Development or his or her designee.

(C) Payment of Costs and Expenses

If Lender has required immediate payment in full, as described above, Lender may require Borrower to pay costs and expenses including reasonable and customary attorneys' fees for enforcing this Note to the extent not prohibited by applicable law. Such fees and costs shall bear interest from the date of disbursement at the same rate as the principal of this Note.

7. WAIVERS

Borrower and any other person who has obligations under this Note waive the right of presentment and notice of dishonor. "Presentment" means the right to require Lender to demand payment of amounts due. "Notice of dishonor" means the right to require Lender to give notice to other persons that amounts due have not been paid.

8. GIVING OF NOTICES

Unless applicable law requires a different method, any notice that must be given to Borrower under this Note will be given by delivering it or by mailing it by first class mail to Borrower at the property address above or at a different address if Borrower has given Lender a notice of Borrower's different address. Any notice that must be given to Lender under this Note will be given by first class mail to Lender at the address stated in Paragraph 4(B) or at a different address if Borrower is given a notice of that different address.

9. OBLIGATIONS OF PERSONS UNDER THIS NOTE

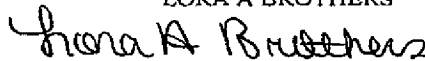
If more than one person signs this Note, each person is fully and personally obligated to keep all of the promises made in this Note, including the promise to pay the full amount owed. Any person who is a guarantor, surety or endorser of this Note is also obligated to do these things. Any person who takes over these obligations, including the obligations of a guarantor, surety or endorser of this Note, is also obligated to keep all of the promises made in this Note. Lender may enforce its rights under this Note against each person individually or against all signatories together. Any one person signing this Note may be required to pay all of the amounts owed under this Note.

BY SIGNING BELOW, borrower accepts and agrees to the terms and covenants contained in this Note.

SAMUEL M BROTHERS



LORA A BROTHERS



BOOK 2155 PAGE 199

[Space Above This Line For Recording Data]

State of Mississippi

DEED OF TRUST

THIS DEED OF TRUST ("Security Instrument") is made on October 31, 2000 ✓
The Grantor is SAMUEL M. BROTHERS and LORA A. BROTHERS, Husband and Wife

("Borrower"). The trustee is Charles A. Myers

215 KATHERINE DRIVE, JACKSON, MS 39208-9588

("Trustee"). The beneficiary is Realty Mortgage Corporation,

which is organized and existing under the laws of THE STATE OF MISSISSIPPI, and
whose address is 215 Katherine Drive, Jackson, MS 39208

("Lender"). Borrower owes Lender the principal sum of
Sixty Eight Thousand Four Hundred Five and no/100

Dollars (U.S. \$ 68,405.00 ✓).

This debt is evidenced by Borrower's note dated the same date as this Security Instrument ("Note"), which
provides for monthly payments, with the full debt, if not paid earlier, due and payable on November 1, 2030 ✓

. This Security Instrument secures to Lender: (a) the repayment of the debt evidenced by the ✓
Note, with interest, and all renewals, extensions and modifications of the Note; (b) the payment of all other sums,
with interest, advanced under paragraph 7 to protect the security of this Security Instrument; and (c) the performance

FHA Mississippi Deed of Trust - 4/96

12/10-4R(MS) (9804).01

VMP MORTGAGE FORMS - (800)521-7291

Page 1 of 8

MW 04/98.01

Initials: *SMB*
LAB

Exhibit "B"



BOOK 2155 PAGE 200

of Borrower's covenants and agreements under this Security Instrument and the Note. For this purpose, Borrower irrevocably grants and conveys to the Trustee, in trust, with power of sale, the following described property located in
WASHINGTON
County, Mississippi:

Lot 18 of Block 3 of the McCORKLE ADDITION to the City of Greenville, Washington County, Mississippi, according to a map or plat of said Addition, recorded in Plat Book 5 at Page 15 of the land records of Washington County, Mississippi.

Exhibit "C"

which has the address of 668 MCCORKLE CIRCLE, GREENVILLE [Street, City],
Mississippi 38701 [Zip Code] ("Property Address");

TOGETHER WITH all the improvements now or hereafter erected on the property, and all easements, appurtenances and fixtures now or hereafter a part of the property. All replacements and additions shall also be covered by this Security Instrument. All of the foregoing is referred to in this Security Instrument as the "Property."

BORROWER COVENANTS that Borrower is lawfully seized of the estate hereby conveyed and has the right to grant and convey the Property and that the Property is unencumbered, except for encumbrances of record. Borrower warrants and will defend generally the title to the Property against all claims and demands, subject to any encumbrances of record.

THIS SECURITY INSTRUMENT combines uniform covenants for national use and non-uniform covenants with limited variations by jurisdiction to constitute a uniform security instrument covering real property.

Borrower and Lender covenant and agree as follows:

UNIFORM COVENANTS.

1. **Payment of Principal, Interest and Late Charge.** Borrower shall pay when due the principal of, and interest on, the debt evidenced by the Note and late charges due under the Note.

2. **Monthly Payment of Taxes, Insurance and Other Charges.** Borrower shall include in each monthly payment, together with the principal and interest as set forth in the Note and any late charges, a sum for (a) taxes and special assessments levied or to be levied against the Property, (b) leasehold payments or ground rents on the Property, and (c) premiums for insurance required under paragraph 4. In any year in which the Lender must pay a mortgage insurance premium to the Secretary of Housing and Urban Development ("Secretary"), or in any year in which such premium would have been required if Lender still held the Security Instrument, each monthly payment shall also include either: (i) a sum for the annual mortgage insurance premium to be paid by Lender to the Secretary, or (ii) a monthly charge instead of a mortgage insurance premium if this Security Instrument is held by the Secretary, in a reasonable amount to be determined by the Secretary. Except for the monthly charge by the Secretary, these items are called "Escrow Items" and the sums paid to Lender are called "Escrow Funds."

Lender may, at any time, collect and hold amounts for Escrow Items in an aggregate amount not to exceed the maximum amount that may be required for Borrower's escrow account under the Real Estate Settlement Procedures Act of 1974, 12 U.S.C. Section 2601 *et seq.* and implementing regulations, 24 CFR Part 3500, as they may be amended from time to time ("RESPA"), except that the cushion or reserve permitted by RESPA for unanticipated disbursements or disbursements before the Borrower's payments are available in the account may not be based on amounts due for the mortgage insurance premium.

If the amounts held by Lender for Escrow Items exceed the amounts permitted to be held by RESPA, Lender shall account to Borrower for the excess funds as required by RESPA. If the amounts of funds held by Lender at any time are not sufficient to pay the Escrow Items when due, Lender may notify the Borrower and require Borrower to make up the shortage as permitted by RESPA.

The Escrow Funds are pledged as additional security for all sums secured by this Security Instrument. If Borrower tenders to Lender the full payment of all such sums, Borrower's account shall be credited with the balance remaining for all installment items (a), (b), and (c) and any mortgage insurance premium installment that Lender has not become obligated to pay to the Secretary, and Lender shall promptly refund any excess funds to Borrower. Immediately prior to a foreclosure sale of the Property or its acquisition by Lender, Borrower's account shall be credited with any balance remaining for all installments for items (a), (b), and (c).

3. Application of Payments. All payments under paragraphs 1 and 2 shall be applied by Lender as follows:

First, to the mortgage insurance premium to be paid by Lender to the Secretary or to the monthly charge by the Secretary instead of the monthly mortgage insurance premium;

Second, to any taxes, special assessments, leasehold payments or ground rents, and fire, flood and other hazard insurance premiums, as required;

Third, to interest due under the Note;

Fourth, to amortization of the principal of the Note; and

Fifth, to late charges due under the Note.

4. Fire, Flood and Other Hazard Insurance. Borrower shall insure all improvements on the Property, whether now in existence or subsequently erected, against any hazards, casualties, and contingencies, including fire, for which Lender requires insurance. This insurance shall be maintained in the amounts and for the periods that Lender requires. Borrower shall also insure all improvements on the Property, whether now in existence or subsequently erected, against loss by floods to the extent required by the Secretary. All insurance shall be carried with companies approved by Lender. The insurance policies and any renewals shall be held by Lender and shall include loss payable clauses in favor of, and in a form acceptable to, Lender.

In the event of loss, Borrower shall give Lender immediate notice by mail. Lender may make proof of loss if not made promptly by Borrower. Each insurance company concerned is hereby authorized and directed to make payment for such loss directly to Lender, instead of to Borrower and to Lender jointly. All or any part of the insurance proceeds may be applied by Lender, at its option, either (a) to the reduction of the indebtedness under the Note and this Security Instrument, first to any delinquent amounts applied in the order in paragraph 3, and then to prepayment of principal, or (b) to the restoration or repair of the damaged Property. Any application of the proceeds to the principal shall not extend or postpone the due date of the monthly payments which are referred to in paragraph 2, or change the amount of such payments. Any excess insurance proceeds over an amount required to pay all outstanding indebtedness under the Note and this Security Instrument shall be paid to the entity legally entitled thereto.

In the event of foreclosure of this Security Instrument or other transfer of title to the Property that extinguishes the indebtedness, all right, title and interest of Borrower in and to insurance policies in force shall pass to the purchaser.

5. Occupancy, Preservation, Maintenance and Protection of the Property; Borrower's Loan Application; Leaseholds. Borrower shall occupy, establish, and use the Property as Borrower's principal residence within sixty days after the execution of this Security Instrument (or within sixty days of a later sale or transfer of the Property) and shall continue to occupy the Property as Borrower's principal residence for at least one year after the date of occupancy, unless Lender determines that requirement will cause undue hardship for Borrower, or unless extenuating circumstances exist which are beyond Borrower's control. Borrower shall notify Lender of any extenuating circumstances. Borrower shall not commit waste or destroy, damage or substantially change the Property or allow the Property to deteriorate, reasonable wear and tear excepted. Lender may inspect the Property if the Property is vacant or abandoned or the loan is in default. Lender may take reasonable action to protect and preserve such vacant or

BOOK 2155 PAGE 202

abandoned Property. Borrower shall also be in default if Borrower, during the loan application process, gave materially false or inaccurate information or statements to Lender (or failed to provide Lender with any material information) in connection with the loan evidenced by the Note, including, but not limited to, representations concerning Borrower's occupancy of the Property as a principal residence. If this Security Instrument is on a leasehold, Borrower shall comply with the provisions of the lease. If Borrower acquires fee title to the Property, the leasehold and fee title shall not be merged unless Lender agrees to the merger in writing. *

6. **Condemnation.** The proceeds of any award or claim for damages, direct or consequential, in connection with any condemnation or other taking of any part of the Property, or for conveyance in place of condemnation, are hereby assigned and shall be paid to Lender to the extent of the full amount of the indebtedness that remains unpaid under the Note and this Security Instrument. Lender shall apply such proceeds to the reduction of the indebtedness under the Note and this Security Instrument, first to any delinquent amounts applied in the order provided in paragraph 3, and then to prepayment of principal. Any application of the proceeds to the principal shall not extend or postpone the due date of the monthly payments, which are referred to in paragraph 2, or change the amount of such payments. Any excess proceeds over an amount required to pay all outstanding indebtedness under the Note and this Security Instrument shall be paid to the entity legally entitled thereto.

7. **Charges to Borrower and Protection of Lender's Rights in the Property.** Borrower shall pay all governmental or municipal charges, fines and impositions that are not included in paragraph 2. Borrower shall pay these obligations on time directly to the entity which is owed the payment. If failure to pay would adversely affect Lender's interest in the Property, upon Lender's request Borrower shall promptly furnish to Lender receipts evidencing these payments.

If Borrower fails to make these payments or the payments required by paragraph 2, or fails to perform any other covenants and agreements contained in this Security Instrument, or there is a legal proceeding that may significantly affect Lender's rights in the Property (such as a proceeding in bankruptcy, for condemnation or to enforce laws or regulations), then Lender may do and pay whatever is necessary to protect the value of the Property and Lender's rights in the Property, including payment of taxes, hazard insurance and other items mentioned in paragraph 2.

Any amounts disbursed by Lender under this paragraph shall become an additional debt of Borrower and be secured by this Security Instrument. These amounts shall bear interest from the date of disbursement, at the Note rate, and at the option of Lender, shall be immediately due and payable.

Borrower shall promptly discharge any lien which has priority over this Security Instrument unless Borrower: (a) agrees in writing to the payment of the obligation secured by the lien in a manner acceptable to Lender; (b) contests in good faith the lien by, or defends against enforcement of the lien in, legal proceedings which in the Lender's opinion operate to prevent the enforcement of the lien; or (c) secures from the holder of the lien an agreement satisfactory to Lender subordinating the lien to this Security Instrument. If Lender determines that any part of the Property is subject to a lien which may attain priority over this Security Instrument, Lender may give Borrower a notice identifying the lien. Borrower shall satisfy the lien or take one or more of the actions set forth above within 10 days of the giving of notice.

8. **Fees.** Lender may collect fees and charges authorized by the Secretary.

9. **Grounds for Acceleration of Debt.**

(a) **Default.** Lender may, except as limited by regulations issued by the Secretary, in the case of payment defaults, require immediate payment in full of all sums secured by this Security Instrument if:

- (i) Borrower defaults by failing to pay in full any monthly payment required by this Security Instrument prior to or on the due date of the next monthly payment, or
- (ii) Borrower defaults by failing, for a period of thirty days, to perform any other obligations contained in this Security Instrument.

(b) **Sale Without Credit Approval.** Lender shall, if permitted by applicable law (including Section 341(d) of the Garn-St. Germain Depository Institutions Act of 1982, 12 U.S.C. 1701j-3(d)) and with the prior approval of the Secretary, require immediate payment in full of all sums secured by this Security Instrument if:

|||

- (i) All or part of the Property, or a beneficial interest in a trust owning all or part of the Property, is sold or otherwise transferred (other than by devise or descent), and
- (ii) The Property is not occupied by the purchaser or grantee as his or her principal residence, or the purchaser or grantee does so occupy the Property but his or her credit has not been approved in accordance with the requirements of the Secretary.
- (c) **No Waiver.** If circumstances occur that would permit Lender to require immediate payment in full, but Lender does not require such payments, Lender does not waive its rights with respect to subsequent events.
- (d) **Regulations of HUD Secretary.** In many circumstances regulations issued by the Secretary will limit Lender's rights, in the case of payment defaults, to require immediate payment in full and foreclose if not paid. This Security Instrument does not authorize acceleration or foreclosure if not permitted by regulations of the Secretary.
- (e) **Mortgage Not Insured.** Borrower agrees that if this Security Instrument and the Note are not determined to be eligible for insurance under the National Housing Act within 60 days from the date hereof, Lender may, at its option, require immediate payment in full of all sums secured by this Security Instrument. A written statement of any authorized agent of the Secretary dated subsequent to 60 days from the date hereof, declining to insure this Security Instrument and the Note, shall be deemed conclusive proof of such ineligibility. Notwithstanding the foregoing, this option may not be exercised by Lender when the unavailability of insurance is solely due to Lender's failure to remit a mortgage insurance premium to the Secretary.

10. Reinstatement. Borrower has a right to be reinstated if Lender has required immediate payment in full because of Borrower's failure to pay an amount due under the Note or this Security Instrument. This right applies even after foreclosure proceedings are instituted. To reinstate the Security Instrument, Borrower shall tender in a lump sum all amounts required to bring Borrower's account current including, to the extent they are obligations of Borrower under this Security Instrument, foreclosure costs and reasonable and customary attorneys' fees and expenses properly associated with the foreclosure proceeding. Upon reinstatement by Borrower, this Security Instrument and the obligations that it secures shall remain in effect as if Lender had not required immediate payment in full. However, Lender is not required to permit reinstatement if: (i) Lender has accepted reinstatement after the commencement of foreclosure proceedings within two years immediately preceding the commencement of a current foreclosure proceeding, (ii) reinstatement will preclude foreclosure on different grounds in the future, or (iii) reinstatement will adversely affect the priority of the lien created by this Security Instrument.

11. Borrower Not Released; Forbearance By Lender Not a Waiver. Extension of the time of payment or modification of amortization of the sums secured by this Security Instrument granted by Lender to any successor in interest of Borrower shall not operate to release the liability of the original Borrower or Borrower's successor in interest. Lender shall not be required to commence proceedings against any successor in interest or refuse to extend time for payment or otherwise modify amortization of the sums secured by this Security Instrument by reason of any demand made by the original Borrower or Borrower's successors in interest. Any forbearance by Lender in exercising any right or remedy shall not be a waiver of or preclude the exercise of any right or remedy.

12. Successors and Assigns Bound; Joint and Several Liability; Co-Signers. The covenants and agreements of this Security Instrument shall bind and benefit the successors and assigns of Lender and Borrower, subject to the provisions of paragraph 9(b). Borrower's covenants and agreements shall be joint and several. Any Borrower who co-signs this Security Instrument but does not execute the Note: (a) is co-signing this Security Instrument only to mortgage, grant and convey that Borrower's interest in the Property under the terms of this Security Instrument; (b) is not personally obligated to pay the sums secured by this Security Instrument; and (c) agrees that Lender and any other Borrower may agree to extend, modify, forbear or make any accommodations with regard to the terms of this Security Instrument or the Note without that Borrower's consent.

13. **Notices.** Any notice to Borrower provided for in this Security Instrument shall be given by delivering it or by mailing it by first class mail unless applicable law requires use of another method. The notice shall be directed to the Property Address or any other address Borrower designates by notice to Lender. Any notice to Lender shall be given by first class mail to Lender's address stated herein or any address Lender designates by notice to Borrower. Any notice provided for in this Security Instrument shall be deemed to have been given to Borrower or Lender when given as provided in this paragraph.

14. **Governing Law; Severability.** This Security Instrument shall be governed by Federal law and the law of the jurisdiction in which the Property is located. In the event that any provision or clause of this Security Instrument or the Note conflicts with applicable law, such conflict shall not affect other provisions of this Security Instrument or the Note which can be given effect without the conflicting provision. To this end the provisions of this Security Instrument and the Note are declared to be severable.

15. **Borrower's Copy.** Borrower shall be given one conformed copy of the Note and of this Security Instrument.

16. **Hazardous Substances.** Borrower shall not cause or permit the presence, use, disposal, storage, or release of any Hazardous Substances on or in the Property. Borrower shall not do, nor allow anyone else to do, anything affecting the Property that is in violation of any Environmental Law. The preceding two sentences shall not apply to the presence, use, or storage on the Property of small quantities of Hazardous Substances that are generally recognized to be appropriate to normal residential uses and to maintenance of the Property.

Borrower shall promptly give Lender written notice of any investigation, claim, demand, lawsuit or other action by any governmental or regulatory agency or private party involving the Property and any Hazardous Substance or Environmental Law of which Borrower has actual knowledge. If Borrower learns, or is notified by any governmental or regulatory authority, that any removal or other remediation of any Hazardous Substances affecting the Property is necessary, Borrower shall promptly take all necessary remedial actions in accordance with Environmental Law.

As used in this paragraph 16, "Hazardous Substances" are those substances defined as toxic or hazardous substances by Environmental Law and the following substances: gasoline, kerosene, other flammable or toxic petroleum products, toxic pesticides and herbicides, volatile solvents, materials containing asbestos or formaldehyde, and radioactive materials. As used in this paragraph 16, "Environmental Law" means federal laws and laws of the jurisdiction where the Property is located that relate to health, safety or environmental protection.

NON-UNIFORM COVENANTS. Borrower and Lender further covenant and agree as follows:

17. **Assignment of Rents.** Borrower unconditionally assigns and transfers to Lender all the rents and revenues of the Property. Borrower authorizes Lender or Lender's agents to collect the rents and revenues and hereby directs each tenant of the Property to pay the rents to Lender or Lender's agents. However, prior to Lender's notice to Borrower of Borrower's breach of any covenant or agreement in the Security Instrument, Borrower shall collect and receive all rents and revenues of the Property as trustee for the benefit of Lender and Borrower. This assignment of rents constitutes an absolute assignment and not an assignment for additional security only.

If Lender gives notice of breach to Borrower: (a) all rents received by Borrower shall be held by Borrower as trustee for benefit of Lender only, to be applied to the sums secured by the Security Instrument; (b) Lender shall be entitled to collect and receive all of the rents of the Property; and (c) each tenant of the Property shall pay all rents due and unpaid to Lender or Lender's agent on Lender's written demand to the tenant.

Borrower has not executed any prior assignment of the rents and has not and will not perform any act that would prevent Lender from exercising its rights under this paragraph 17.

Lender shall not be required to enter upon, take control of or maintain the Property before or after giving notice of breach to Borrower. However, Lender or a judicially appointed receiver may do so at any time there is a breach. Any application of rents shall not cure or waive any default or invalidate any other right or remedy of Lender. This assignment of rents of the Property shall terminate when the debt secured by the Security Instrument is paid in full.

BY SIGNING BELOW, Borrower accepts and agrees to the terms contained in this Security Instrument and in any rider(s) executed by Borrower and recorded with it.
Witnesses:

_____	<u>Samuel M. Brothers</u> (Seal) SAMUEL M. BROTHERS -Borrower
_____	<u>Lora A. Brothers</u> (Seal) LORA A. BROTHERS -Borrower
_____ (Seal) -Borrower	_____ (Seal) -Borrower
_____ (Seal) -Borrower	_____ (Seal) -Borrower
_____ (Seal) -Borrower	_____ (Seal) -Borrower

STATE OF MISSISSIPPI, Washington

County ss:

On this 31st day of October, 2000, personally appeared before me, the undersigned authority in and for said County and State, the within named SAMUEL M. BROTHERS and LORA A. BROTHERS

that they signed and delivered the foregoing instrument on the day and year therein mentioned. , who acknowledged
Given under my hand and seal of office.

My Commission Expires: 2-11-2003

(Seal)

Theresa Palmer Moon
Notary Public
.....

2525 5502
Recorded in the Above
Deed of Trust Book & Page
05-13-2010 11:21:00 AM
Marilyn Karsell Chancery Clerk
Washington County

Prepared by:
Morris & Associates
2309 Oliver Road
Monroe, Louisiana 71201
Telephone: 318-330-9020

Return To:
Morris & Associates
2309 Oliver Road
Monroe, Louisiana 71201
Telephone: 318-330-9020

Grantor:
Realty Mortgage Corporation
7105 Corporate Drive
Plano, TX 75024
(318)-330-9020

Grantee:
The Bank of New York Mellon Trust Company, N.A.
7105 Corporate Drive
Plano, TX 75024
(318)-330-9020

Lot 18, Block 3, McCorkle Addition to the City of Greenville, Plat Book 5, Page 15, Washington County, MS

ASSIGNMENT OF DEED OF TRUST


FOR AND IN CONSIDERATION of the sum of TEN DOLLARS (\$10.00), cash in hand paid and other good and valuable considerations, the receipt of all of which is hereby acknowledged, the undersigned Realty Mortgage Corporation does hereby sell, convey, and assign to The Bank of New York Mellon fka The Bank of New York as Trustee for the Certificate Holders of CWMBS 2005-R1 their Successors and/or Assigns that certain Deed of Trust executed by Samuel M. Brothers and Lora A. Brothers, Husband and Wife for the use and benefit of Realty Mortgage Corporation, which Deed of Trust is recorded in Book 2155 at Page 199 and records of the Chancery Clerk of Washington County, Mississippi, together with the indebtedness secured thereby.

IN WITNESS WHEREOF, the said Realty Mortgage Corporation caused this conveyance to be signed by

Roberta Hook, its Assistant Vice President and its corporate seal to be hereto affixed, this the 5th day of May,

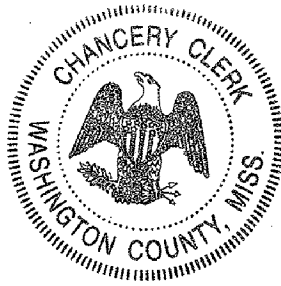
2010.

Realty Mortgage Corporation


By Roberta Hook, Assistant Vice President

2525 5503
Deed of Trust Book & Page

STATE OF TEXAS
COUNTY OF DALLAS

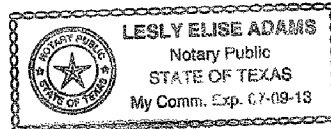


Washington County
I certify this instrument was filed on
05-13-2010 11:21:00 AM
and recorded in Deed of Trust Book
2525 at pages 5502 - 5503
Marilyn Hansell Chancery Clerk

This day personally appeared before me, the undersigned authority in and for the aforesaid jurisdiction,
Roberta Hook, who acknowledges that (s) he is the Assistant Vice President of Realty Mortgage Corporation and
that (s) he executed and delivered the above and foregoing instrument on the day and year therein mentioned, as the
act and deed of said corporation, after having first been duly authorized by said corporation, so to do.
GIVEN UNDER MY HAND AND OFFICIAL SEAL, this the 5th day of May, 2010.

Lesly Elise Adams
NOTARY

7-9-13
MY COMMISSION EXPIRES
B10-0183/mls



**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF MISSISSIPPI**

IN RE: SAMUEL M. BROTHERS
LORA BROTHERS
AKA LORIANN BROTHERS

CASE NO.: 10-10518-NPO
CHAPTER 13

**RESPONSE TO OBJECTION TO
SECURED CLAIM AND OTHER RELIEF**

NOW INTO COURT, through undersigned counsel, comes BAC Home Loans Servicing, LP f/k/a Countrywide Home Loans Servicing, LP, a secured creditor in the above entitled and numbered case, who respectfully represents as follows:

1.

Creditor is a secured creditor in the above entitled case by virtue of its holding a Note secured by a Deed of Trust affecting property of Debtors located at 668 W Mccorkle Cir, Greenville, MS. The Note and Deed of Trust is payable in monthly installments and the property affected by the mortgage is the home of the Debtors'.

2.

Trustee's Objection to Proof of Claim having been filed states that the Creditor filed a proof of claim (Clm. #9) with a pre-petition arrearage claim of \$19,934.12. Said arrearage claim includes an amount for escrow shortages in the amount of \$2,631.92. The Trustee demands strict proof of the components (i.e., principal, interest and escrow) of the pre-petition payments and post-petition payments, as well as strict proof of said escrow shortages as set forth in the proof of claim worksheet. Should the Creditor fail to provide strict proof, the Debtor's pre-petition arrearage claim should be reduced and escrow shortage in the total amount of \$2,631.92 should be removed from the arrearage claim.

3.

Counsel for Creditor would show that said information has been requested from the Creditor and is being provided to the Trustee for review. For the foregoing reasons, Creditor responds to the Objection to the Secured Claim and Other Relief proposed by the Debtors.

The undersigned files this pleading upon information and belief provided by Creditor.

WHEREFORE, CREDITOR PRAYS that Objection to the Secured Claim and Other Relief proposed by the Debtors herein be denied by the court.

MORRIS AND ASSOCIATES
2309 Oliver Road
Monroe, LA 71201
(318) 340-6487

/s/ MICHAEL JEDYNAK (Bar# 103014)
ATTORNEY FOR MOVER

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF MISSISSIPPI**

IN RE: SAMUEL M. BROTHERS
LORA BROTHERS
AKA LORIANN BROTHERS

CASE NO.: 10-10518-NPO
CHAPTER 13

CERTIFICATE OF SERVICE

I, Michael Jedynak, hereby certify that I have notified all interested parties of the Response to the Objection to the Secured Claim and Other Relief filed by BAC Home Loans Servicing, LP f/k/a Countrywide Home Loans Servicing, LP, who are listed as follows:

Samuel and Lora Brothers
668 W Mccorkle Cir
Greenville, MS 38701

Michael W. Boyd
Attorney at Law
boydlawoffice@yahoo.com

Locke D. Barkley
Trustee
sbeasley@barkley13.com

Office of U.S. Trustee
USTPRegion05.AB.ECF@usdoj.gov

by mailing a copy of the Response to the Objection to the Secured Claim and Other Relief filed herein by United States Mail, first class, postage prepaid and properly addressed, all on this the 10th day of June 2010.

MORRIS AND ASSOCIATES
2309 Oliver Road
Monroe, LA 71201
(318) 340-6487

/s/ MICHAEL JEDYNAK (Bar# 103014)
Attorney for Mover

**IN THE UNITED STATES BANKRUPTCY COURT FOR
THE NORTHERN DISTRICT OF MISSISSIPPI**

IN THE MATTER OF:

CHAPTER 13 CASE NO.:

**SAMUEL M. BROTHERS
LORA BROTHERS**

10-10518-NPO

ORDER RE: OBJECTION TO CLAIM OF BANK OF AMERICA (Dkt. #20)

THIS MATTER came before the Court on Trustee's Objection to Proof of Claim of BAC Home Loans Servicing, LP as servicer for the Bank of New York Mellon Trust Company, N.A. ("BAC") and BAC's response thereto after notice and an opportunity for hearing. The Court, having taken testimony and heard argument from counsel, does hereby find as follows:

1. Trustee's Objection to Proof of Claim of BAC is well taken and should be sustained.

2. BAC filed a secured claim (Clm#9-1) on behalf of Bank of New York Mellon f/k/a The Bank of New York as Trustee for the Certificateholders of CWMBS 2005-R1 ("CWMBS 2005-R1") on April 5, 2010. The claim was amended (Clm#9-2) on August 2, 2010.

3. Bank of New York Mellon f/k/a The Bank of New York as Trustee for the Certificateholders of CWMBS 2005-R1 is the holder of the underlying deed of trust executed by Debtors on October 31, 2000.

4. No evidence was offered to show that CWMBS 2005-R1 owns or otherwise holds the underlying promissory note, therefore, CWMBS 2005-R1 is not a creditor of Debtors.

IT IS THEREFORE ORDERED AND ADJUDGED, that the claim of BAC Home Loans Servicing, LP as servicer for the Bank of New York Mellon Trust Company, N.A. shall be and is hereby disallowed.

SO ORDERED

APPROVED AS TO FORM:

/s/ W. Jeffrey Collier
W. JEFFREY COLLIER – MSB#10645
ATTORNEY FOR TRUSTEE

/s/ Michael Alan Jedynak (w/ permission)
MICHAEL ALAN JEDYNAK
ATTORNEY FOR CREDITOR

Submitted by:
W. Jeffrey Collier, Esq.
Attorney for Trustee
Post Office Box 55829
Jackson, Miss. 39296
(601) 355-6661
ssmith@barkley13.com
MSB No. 10645

Copy: Debtor(s)

**IN THE UNITED STATES BANKRUPTCY COURT FOR
THE NORTHERN DISTRICT OF MISSISSIPPI**

IN THE MATTER OF:

CHAPTER 13 NO.:

SAMUEL M. BROTHERS and LORA BROTHERS

10-10518-NPO

LOCKE D. BARKLEY, Chapter 13 Trustee

PLAINTIFF

VS.

A. P. NO. _____

**TRUSTMARK NATIONAL BANK;
BAC HOME LOANS SERVICING, L.P.,
Individually and as Servicer for THE BANK
OF NEW YORK MELLON TRUST COMPANY, N.A.,
AS TRUSTEE FOR CERTIFICATEHOLDERS
OF CWMBS 2005-R1; THE BANK OF NEW YORK MELLON
TRUST COMPANY, N.A., individually and as Trustee for
CERTIFICATEHOLDERS OF CWMBS 2005-R1;
and UNKNOWN DEFENDANTS 1 through 10.**

DEFENDANTS

**COMPLAINT TO DETERMINE SECURED STATUS,
REMOVE CLOUD FROM TITLE, SANCTIONS, AND OTHER RELIEF**

COMES NOW Trustee, Locke D. Barkley, by and through counsel, and files this Complaint to Determine Secured Status, Remove Cloud from Title, Sanctions, and Other Relief and in support thereof states as follows:

JURISDICTION & VENUE

1. This is an adversary proceeding brought pursuant to Rule 7001 of the Federal Rules of Bankruptcy Procedure.
2. This Court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. §§ 157 and 1334 and 11 U.S.C. §§ 105 and 542.
3. This contested matter is a core proceeding as defined by 28 U.S.C. § 157.
4. Venue is proper under 29 U.S.C. § 1409.

PARTIES

5. Trustee, as Plaintiff, has standing to bring this action pursuant to 11 U.S.C. §§ 323, 1302, and 1330.

6. Defendant Trustmark National Bank is a National Bank and FDIC-Insured Subsidiary of Trustmark Corporation with its principal place of business located at 248 East Capitol Street, Jackson, MS 39201. Defendant may be served with process of this Court upon its registered agent, T. Harris Collier, III, 248 E. Capitol Street, Jackson, Mississippi 39201. Individually this defendant will be referred to as “TNB” herein below.

7. Defendant BAC Home Loans Servicing, L.P. is a subsidiary of Bank of America, N.A. with its principal place of business located at 6400 Legacy Drive, Plano, Texas 75024. Defendant may be served with process of this Court upon any officer of the corporation by mailing a copy of the summons and complaint to the principal place of business. Defendant is being sued in its individual capacity and as Servicer for The Bank of New York Mellon, N.A. as Trustee for Certificateholders of CWMBS 2005-R1. Individually this defendant will be referred to as “BAC” herein below.

8. Defendant The Bank of New York Mellon Trust Company, N.A. is a National Bank with its principal place of business located at 700 South Flower Street, Suite 200, Los Angeles, California 90017. Defendant may be served with process of this Court upon any officer of the corporation by mailing a copy of the summons and complaint to the principal place of business. Defendant is being sued in its individual capacity and as Trustee for Certificateholders of CWMBS 2005-R1. Individually this defendant will be referred to as “BONY” herein below.

9. Unknown Defendants 1 through 10 are corporate entities and/or individuals that may have a legal interest in the promissory notes, deed of trust,

assignments or the real property which is the subject of this proceeding and/or who may be responsible for the acts complained of herein.

10. Collectively the defendants named above will be referred to as “Defendants.”

FACTS

The Brothers’ Mortgage

11. On or about October 31, 2000, Debtors, Samuel M. Brothers and Lora Brothers (“Brothers” or “Debtors”), executed a promissory note (the “Note”) payable to Realty Mortgage Corporation¹ and a deed of trust (the “Deed of Trust”) conveying their certain real property to RMC in trust to secure repayment of the Note. The Deed of Trust was recorded in the land records of Washington County, Mississippi in Book 2155 at Page 199. The Note and Deed of Trust are attached hereto as Exhibits “A” and “B,” respectively.

12. The subject real property is more particularly described as follows:

Lot 18 of Block 3 of the McCorkle Addition to the City of Greenville, Washington County, Mississippi, according to a map or plat of said addition, recorded at plat book 5 at page 15 of the land records of Washington County.

13. On or about October 31, 2000, the Note was endorsed by RMC without recourse to Trustmark National Bank.

14. The Deed of Trust was assigned by RMC to Trustmark National Bank by virtue of an assignment dated October 31, 2000, and recorded in Book 2155, Page 300 of the land records of Washington County, Mississippi. Such assignment is attached hereto as Exhibit “C.”

¹ Realty Mortgage Corporation (RMC) is a Mississippi corporation which was engaged in the business of mortgage origination and lending. RMC filed a petition for chapter 11 bankruptcy relief on February 7, 2009, in the United States Bankruptcy Court for the Southern District of Mississippi, case number 09-00544-NPO. The bankruptcy case remains active as of the filing of this complaint.

15. Several years after the execution of the Note, Debtors were asked and did execute a promissory note which was payable to Countrywide Home Loans, Inc. (referred to as "Countrywide") in the principal amount of \$68,244.81.

16. The promissory note was titled "Amended and Restated Note." Said promissory note stated that "[i]n return for a loan received from Lender [Countrywide], Borrower promises to pay the principal sum of ... \$68,244.81 ... plus interest, to the order of Lender." A copy of the Amended and Restated Note is attached hereto as Exhibit "D." Trustee alleges that no loan proceeds were received by the Borrowers/Debtors from Countrywide.

17. The Amended and Restated Note was dated October 31, 2000, however, the first payment due under the promissory note was January 1, 2007. Trustee alleges that the Amended and Restated Note was purposefully misdated, but executed in late 2006.

18. On December 28, 2009, a document entitled "Corporation Assignment of Deed of Trust/Mortgage" was executed by Courtney Bullard who was represented to be an Assistant Secretary of Trustmark National Bank. The document purportedly assigned the Deed of Trust to The Bank of New York Mellon fka The Bank of New York as Trustee for the Certificateholders of CWMBs 2005-R1 (the "Trustmark-BONY Assignment"). Said document was recorded in the land records of Washington County, Mississippi, on December 30, 2009, in Book 2524 at Page 30369. A copy of the assignment is attached hereto as Exhibit "E."

19. The trust is controlled by and subject to the *Pooling and Servicing Agreement Dated as of March 1, 2005*, for "CWMBs Repperforming Loan REMIC Trust Certificates, Series 2005-R1, between CWMBs, Inc., Depositor, Countrywide Home Loans, Inc., Seller, Countrywide Home Loans Servicing LP, Master Servicer, and the Bank of New York, Trustee and Custodian." A true and correct copy of the

fully executed Pooling and Servicing Agreement (“PSA”) is attached hereto as Exhibit “F.”

20. Article I of the PSA defines the term Cut-off Date as March 1, 2005, and Closing Date as March 31, 2005.² Section 2.01(a) states that “The Seller [Countrywide Home Loans, Inc.], concurrently with the execution and delivery hereof, hereby sells, transfers, assigns, sets over and otherwise conveys to the Depositor [CWMBBS, Inc.], without recourse, all of the right, title and interest of the Seller in and to (i) the Mortgage Loans”³

21. The Trustmark-BONY Assignment was not executed and delivered prior to the Cut-off Date, or any possible contractual extension thereof.

The Brothers’ Bankruptcy

22. Debtors filed a chapter 13 petition and related schedules on February 3, 2010. The plan proposed, *inter alia*, that the pre-petition arrears and a continuing mortgage payment would be paid to Bank of America.

23. On April 5, 2010, BAC caused to be filed a proof of claim (Clm. #9-1) in the bankruptcy case. Said proof of claim identified the creditor as BAC Home Loans Servicing, L.P. as Servicer for The Bank of New York Mellon, N.A. The claim was signed by Michael Jedynak an attorney with the Louisiana law firm of Morris & Associates. A copy of the proof of claim is attached hereto as Exhibit “G.”

24. Attached to the proof of claim were the Note, the Amended and Restated Note, and the Deed of Trust. From the proof of claim and its attachments, it was unclear who held the underlying debt or the Deed of Trust.

² See Ex. “F,” pages 23 and 19.

³ See Ex. “F,” page 51.

25. On April 19, 2010, Trustee filed an Objection to Proof of Claim of BAC. In the objection Trustee alleged that BAC caused to be filed a proof of claim which included and attempted to recover duplicate amounts for escrow shortages.

26. A hearing was scheduled for June 23, 2010; however, on the *ore tenus* motion of counsel for BAC it was continued and rescheduled for August 18, 2010.

27. BAC, by and through Michael Jedynak and Morris & Associates, filed an Amended Proof of Claim (Clm. #9-2) herein on August 2, 2010. A copy of the Amended Proof of Claim is attached hereto as Exhibit "H."

28. Attached to the Amended Proof of Claim was a document entitled "Assignment of Deed of Trust" which had been executed by Roberta Hook who presented herself as an Assistant Vice President of RMC. The document was dated May 5, 2010, and recorded in the land records of Washington County, Mississippi, in Book 2525 at Page 5502.

29. Said document purported to assign the Deed of Trust from RMC to The Bank of New York Mellon f/k/a The Bank of New York as Trustee for the Certificateholders of CWMBS 2005-R1. The document was executed and recorded after the date of the petition, the original proof of claim and the objection by the Trustee. The purported assignment set forth in the document did not occur before the Cut-off Date of the PSA, or any contractual extension thereof. Furthermore, RMC had nothing to assign as of May 5, 2010.

30. Based upon the Amended Proof of Claim and the "assignment" by RMC, Trustee filed an Amended Objection to Proof of Claim alleging among other things that BAC lacked standing as a secured creditor to file the Proof of Claim or Amended Proof of Claim.

31. On August 18, 2010, a hearing was held by this Court where the Trustee presented the objection and amended objection to the proof of claim. In

support thereof, Trustee offered documents which were entered into evidence. Defendant offered the testimony of Joy Mason, litigation specialist employed by BAC, and certain documents which were allowed and entered into evidence.

32. Having considered all matters properly presented the Court ruled that BAC failed to prove that BONY held both the Note and the Deed of Trust, therefore, it was not a secured creditor and did not have standing to file a secured claim in this matter.

COUNT I - DETERMINATION OF SECURED STATUS

33. The allegations set forth in paragraphs 1 through 32 above are incorporated herein by reference.

34. As determined by this Court following an evidentiary hearing on Trustee's Amended Objection to Proof of Claim, neither BAC nor BONY hold a perfected secured claim upon Debtor's residence.

35. In addition to this Court's prior findings, the Note and Deed of Trust were not transferred into the Trust prior to the Cut-off Date, or any contractual extension thereof, as set forth in the PSA.

36. At no time relevant hereto did BONY or the CWMBS Reperforming Loan REMIC Trust Certificates, Series 2005-R1 hold both the Note and Deed of Trust. Therefore, the loan could not have been serviced by Countrywide or its successor BAC, and BAC did not have standing to file the Proof of Claim or Amended Proof of Claim.

37. Pursuant to 11 U.S.C. § 506(d) the lien is void. Therefore, any claim of Defendants should be deemed unsecured and the deed of trust void and/or satisfied.

COUNT II - REMOVE CLOUD FROM TITLE

38. The allegations set forth in paragraphs 1 through 37 above are incorporated herein by reference.

39. Based upon the foregoing allegations, Trustee alleges that the Deed of Trust recorded at Page 2155, Book 199, in the land records of Washington County, Mississippi secures nothing for its alleged holder BONY and, is therefore, a cloud on the title.

40. Trustee requests an order of this Court finding that the Deed of Trust is a cloud upon the title of Debtors and that it shall be stricken from the land records of Washington County, Mississippi. Further, Trustee requests such other relief to which she or this bankruptcy estate may be entitled.

COUNT III - VIOLATION OF THE AUTOMATIC STAY

41. The allegations set forth in paragraphs 1 through 40 above are incorporated herein by reference.

42. Despite having its claim disallowed by this Court, BAC continues to attempt to collect the underlying indebtedness from Debtors. Such collection would come from the property of the estate.

43. The automatic stay of 11 U.S.C. § 362 has neither been terminated nor otherwise modified with respect to any of the Defendants or property of the estate.

44. BAC's efforts to collect the underlying debt is a prior and continuing violation of the automatic stay.

45. Trustee is entitled to an award of actual damages in the amount of any funds wrongfully collected from the estate, punitive damages in an amount sufficient to punish BAC and the costs associated with this action, including reasonable attorneys' fees.

COUNT IV - FRAUD UPON THE COURT

46. The allegations set forth in paragraphs 1 through 45 above are incorporated herein by reference.

47. On August 2, 2010, with the intent to defraud this Court, the Trustee and the Debtors, BAC caused to be filed an Amended Proof of Claim (Clm. #9-2), in which it included, as an attachment, a document which it hoped would support its claim as being secured. Said document was a purported Assignment of Deed of Trust executed by Roberta Hook who misrepresented herself to be an Assistant Vice President of RMC. Said assignment was executed on May 5, 2010, and purported to assign to BONY the underlying deed of trust and the indebtedness secured thereby.

48. Roberta Hook is not and has never been employed by RMC. Upon information and belief, Roberta Hook was employed by BAC as of May 5, 2010.

49. The assignment was prepared by Morris & Associates, a Louisiana law firm. The addresses for the Grantor, RMC, and Grantee, BONY were stated as being the same, being 7105 Corporate Drive, Plano, Texas 75024, which is an office location of BAC.

50. At the hearing on Trustee's objection to proof of claim, counsel for BAC, Michael Jedynak of Morris & Associates, identified this assignment as a "wildcard assignment." As Mr. Jedynak described, the "wildcard assignments" were created by his firm and used for the benefit of their clients when his firm received a file from the lender or servicer where the client was not identified as the beneficiary under the deed of trust or assignee under any assignment of deed of trust.

51. As agents and counsel of BAC, Michael Jedynak and Morris & Associates, presented to this Court a paper (i.e. the proof of claim) which was signed by Mr. Jedynak and who, in doing so, certified "that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, - (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; (2) the claims, defenses, and other legal contentions therein are warranted by existing

law ...; and (3) the allegations and other factual contentions have evidentiary support”⁴

52. However, as stated by Mr. Jedynak at the hearing on Trustee’s objection to proof of claim, his firm did not conduct (and do not regularly conduct) searches of the land records to determine the status of the underlying mortgage obligation.

53. Trustee requests that Court invoke its powers granted to it by 11 U.S.C. § 105(1) and issue such order, process or judgment necessary to address the fraud of BAC and BONY and to prevent any future fraud or abuse of process.

WHEREFORE, PREMISES CONSIDERED, Trustee, Locke D. Barkley, prays that this Court enter its order granting judgment for the following:

A. A determination that neither BAC nor BONY hold both the Note and Deed of Trust;

B. A finding that the Deed of Trust is either void or satisfied and an order to the clerk to strike it from the land records;

C. A finding that BAC has violated the automatic stay of 11 U.S.C. § 362 and order an award of actual damages in the amount of any funds wrongfully collected from the estate, punitive damages in an amount sufficient to punish BAC and the costs associated with this action, including reasonable attorneys’ fees;

D. A finding that BAC and BONY purposefully committed fraud upon this Court and order such sanctions and other remedies necessary to address such fraud and to prevent any future fraud or abuse of process; and

E. Such other relief to which the Trustee and this bankruptcy estate may be entitled.

⁴ Fed. R. Bankr. P. 9011(b).

Dated: January 7, 2011

Respectfully submitted,
LOCKE D. BARKLEY, TRUSTEE

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CWMBS, INC.,
Depositor

COUNTRYWIDE HOME LOANS, INC.,
Seller

COUNTRYWIDE HOME LOANS SERVICING LP,
Master Servicer

and

THE BANK OF NEW YORK,
Trustee and Custodian

POOLING AND SERVICING AGREEMENT
Dated as of March 1, 2005

CWMBS REPERFORMING LOAN REMIC TRUST
CERTIFICATES, SERIES 2005-R1

Table of Contents

	<u>Page</u>
ARTICLE I DEFINITIONS	11
ARTICLE II CONVEYANCE OF MORTGAGE LOANS; REPRESENTATIONS AND WARRANTIES	50
Section 2.01 Conveyance of Mortgage Loans	51
Section 2.02 Acceptance by the Custodian of the Mortgage Loans.	54
Section 2.03 Representations, Warranties and Covenants of the Seller and Master Servicer.	55
Section 2.04 Representations and Warranties of the Depositor as to the Mortgage Loans.	57
Section 2.05 Delivery of Opinion of Counsel in Connection with Substitutions.	58
Section 2.06 Execution and Delivery of Certificates.	58
Section 2.07 REMIC Matters.	59
Section 2.08 Covenants of the Master Servicer.	59
ARTICLE III ADMINISTRATION AND SERVICING OF MORTGAGE LOANS	60
Section 3.01 Master Servicer to Service Mortgage Loans.	60
Section 3.02 Subservicing; Enforcement of the Obligations of Servicers.	61
Section 3.03 Rights of the Depositor and the Trustee in Respect of the Master Servicer.	62
Section 3.04 Trustee to Act as Master Servicer.	62
Section 3.05 Collection of Mortgage Loan Payments; Collection Account; Distribution Account.	63
Section 3.06 Collection of Taxes, Assessments and Similar Items; Escrow Accounts.	65
Section 3.07 Access to Certain Documentation and Information Regarding the Mortgage Loans.	66
Section 3.08 Permitted Withdrawals from the Collection Account and the Distribution Account.	66
Section 3.09 Maintenance of Hazard Insurance.	68
Section 3.10 Enforcement of Due-on-Sale Clauses; Assumption Agreements.	69
Section 3.11 Realization Upon Defaulted Mortgage Loans; Repurchase of Certain Mortgage Loans.	70
Section 3.12 Custodians to Cooperate; Release of Mortgage Files.	73
Section 3.13 Documents, Records and Funds in Possession of Master Servicer to be Held for the Trustee.	73
Section 3.14 Servicing Compensation.	74
Section 3.15 Access to Certain Documentation.	74
Section 3.16 Annual Statement as to Compliance.	75

Section 3.17	Annual Independent Public Accountants' Servicing Statement; Financial Statements.	75
Section 3.18	Errors and Omissions Insurance; Fidelity Bonds.....	76
Section 3.19	Reports of Foreclosure and Abandonment of Mortgaged Properties.	76
ARTICLE IV DISTRIBUTIONS AND ADVANCES BY THE MASTER SERVICER		77
Section 4.01	Advances.....	77
Section 4.02	Obligations of the Master Servicer in Respect of Prepayment Interest Shortfalls.....	78
Section 4.03	Priorities of Distribution.	78
Section 4.04	Allocation of Realized Losses; Subsequent Recoveries.	81
Section 4.05	Net WAC Rate Carryover Reserve Account.	83
Section 4.06	Monthly Statements to Certificateholders.	83
Section 4.07	Distributions on the REMIC I Interests.	86
ARTICLE V THE CERTIFICATES		88
Section 5.01	The Certificates.....	88
Section 5.02	Certificate Register; Registration of Transfer and Exchange of Certificates.	89
Section 5.03	Mutilated, Destroyed, Lost or Stolen Certificates.	95
Section 5.04	Persons Deemed Owners.	95
Section 5.05	Access to List of Certificateholders' Names and Addresses.	95
Section 5.06	Maintenance of Office or Agency.....	96
ARTICLE VI THE DEPOSITOR AND THE MASTER SERVICER		97
Section 6.01	Respective Liabilities of the Depositor and the Master Servicer.....	97
Section 6.02	Merger or Consolidation of the Depositor or the Master Servicer.	97
Section 6.03	Limitation on Liability of the Depositor, the Master Servicer and Others.	97
Section 6.04	Limitation on Resignation of Master Servicer.....	98
Section 6.05	Rights of the Trustee in Respect of the Master Servicer.	98
ARTICLE VII DEFAULT		100
Section 7.01	Events of Default.	100
Section 7.02	Trustee to Act; Appointment of Successor.	102
Section 7.03	Notification to Certificateholders.	103
Section 7.04	Waiver of Master Servicer Events of Termination.	103
ARTICLE VIII CONCERNING THE TRUSTEE		105
Section 8.01	Duties of Trustee.....	105
Section 8.02	Certain Matters Affecting the Trustee.	106
Section 8.03	Trustee Not Liable for Certificates or Mortgage Loans.....	107
Section 8.04	Trustee May Own Certificates.....	107

Section 8.05	Trustee's Fees and Expenses.	107
Section 8.06	Eligibility Requirements for Trustee.	108
Section 8.07	Resignation and Removal of Trustee.	109
Section 8.08	Successor Trustee.	109
Section 8.09	Merger or Consolidation of Trustee.	110
Section 8.10	Appointment of Co-Trustee or Separate Trustee.	110
Section 8.11	Tax Matters.	112
Section 8.12	[Reserved].	114
Section 8.13	Compliance With National Housing Act of 1934.	114
Section 8.14	Appointment of Custodian.	114
Section 8.15	Representations and Warranties of the Custodian.	116

ARTICLE IX TERMINATION 117

Section 9.01	Termination upon Liquidation or Purchase of all Mortgage Loans.	117
Section 9.02	Final Distribution on the Certificates.	117
Section 9.03	Additional Termination Requirements.	118

ARTICLE X MISCELLANEOUS PROVISIONS 120

Section 10.01	Amendment.	120
Section 10.02	Recordation of Agreement; Counterparts.	121
Section 10.03	Governing Law.	121
Section 10.04	Intention of Parties.	122
Section 10.05	Notices.	122
Section 10.06	Severability of Provisions.	123
Section 10.07	Assignment.	123
Section 10.08	Limitation on Rights of Certificateholders.	124
Section 10.09	Inspection and Audit Rights.	124
Section 10.10	Certificates Nonassessable and Fully Paid.	125
Section 10.11	[Reserved].	125
Section 10.12	Protection of Assets.	125

SCHEDULES

Schedule I:	Mortgage Loan Schedule
Schedule II:	Representations and Warranties of the Seller
Schedule III:	Representations and Warranties of the Seller as to the Mortgage Loans
Schedule IV:	Representations and Warranties of the Master Servicer
Schedule V:	Form of Monthly Master Servicer Report
Schedule VI:	Reserved
Schedule VII:	Mortgage Loans

EXHIBITS

Exhibit A:	Form of Senior Certificate (excluding Notional Amount Certificates)
Exhibit B:	Form of Subordinate Certificate
Exhibit C:	Form of Residual Certificate
Exhibit D:	Form of Notional Certificate
Exhibit E:	Form of Reverse of Certificates
Exhibit F:	Form of Initial Certification of Custodian
Exhibit G:	Form of Delay Delivery Certification of Custodian
Exhibit H:	Form of Final Certification of Custodian
Exhibit I:	Form of Transfer Affidavit
Exhibit J:	Form of Transferor Certificate
Exhibit K:	[Reserved]
Exhibit L:	Form of Rule 144A Letter
Exhibit M:	Form of Request for Release (for Custodian)
Exhibit N:	Form of Request for Release of Documents
Exhibit O:	Form of Cap Contract
Exhibit P:	[Reserved]
Exhibit Q:	Form of Loan Data Remittance Report
ANNEX I	Cap Contract Scheduled Notional Balances

THIS POOLING AND SERVICING AGREEMENT, dated as of March 1, 2005, among CWMBS, INC., a Delaware corporation, as depositor (the “Depositor”), COUNTRYWIDE HOME LOANS, INC., a New York corporation, as seller (the “Seller”), COUNTRYWIDE HOME LOANS SERVICING LP, a Texas limited partnership, as master servicer (the “Master Servicer”) and THE BANK OF NEW YORK, a New York banking corporation, as trustee (the “Trustee”) and as custodian (the “Custodian”).

WITNESSETH THAT

In consideration of the mutual agreements herein contained, the parties hereto agree as follows:

PRELIMINARY STATEMENT

The Depositor intends to sell pass-through certificates (collectively, the “Certificates”), to be issued hereunder in multiple classes, which in the aggregate will evidence the entire beneficial ownership interest in the Trust Fund created hereunder. The Certificates will consist of fifteen classes of certificates, designated as (i) the Class 1A-F1 Certificates, (ii) the Class 1A-F2 Certificates, (iii) the Class 1A-S Certificates, (iv) the Class 2A-1 Certificates, (v) the Class 2A-2 Certificates, (vi) the Class 2A-PO Certificates, (vii) the Class 2A-IO Certificates, (viii) the Class M Certificates, (ix) the Class B-1 Certificates, (x) the Class B-2 Certificates, (xi) the Class B-3 Certificates, (xii) the Class B-4 Certificates, (xiii) the Class B-5 Certificates, (xvi) the Class RM Certificates and (xv) the Residual Certificates.

REMIC I

As provided herein, the Trustee will make an election to treat the segregated pool of assets consisting of the Mortgage Loans and certain other related assets subject to this Agreement (exclusive of the Net WAC Rate Carryover Reserve Account and the Cap Contracts) as a real estate mortgage investment conduit (a “REMIC”) for federal income tax purposes, and such segregated pool of assets will be designated as “REMIC I.” The Class R-I Interest will represent the sole class of “residual interests” in REMIC I for purposes of the REMIC Provisions under federal income tax law. The following table irrevocably sets forth the designation, the Uncertificated REMIC I Pass-Through Rate, the initial Uncertificated Principal Balance, and for purposes of satisfying Treasury regulation Section 1.860G-1(a)(4)(iii), the “latest possible maturity date” for each of the REMIC I Regular Interests. None of the REMIC I Regular Interests will be certificated.

Designation	REMIC I Pass-Through Rate	Initial Uncertificated Principal Balance	Latest Possible Maturity Date ⁽¹⁾
LT1-1	(2)	\$499,716,927.00	March 25, 2035
LT1-2	(2)	\$44,612,225.32	March 25, 2035
LT1-3	(2)	\$44,080,957.27	March 25, 2035
LT1-IO	(2)	(3)	March 25, 2035
LT1-PO	0.00%	\$1,755,298.73	March 25, 2035
LT1-RM	(2)	(3)	March 25, 2035

(1) For purposes of Section 1.860G-1(a)(4)(iii) of the Treasury regulations, the Distribution Date that is the 360th Distribution Date has been designated as the “latest possible maturity date” for each REMIC I Regular Interest.

(2) Calculated in accordance with the definition of “Uncertificated REMIC I Pass-Through Rate” herein.

(3) Calculated in accordance with the definition of “Uncertificated Notional Amount” herein.

REMIC II

As provided herein, the Trustee shall make an election to treat the segregated pool of assets consisting of the Uncertificated REMIC I Regular Interests as a REMIC for federal income tax purposes, and such segregated pool of assets will be designated as “REMIC II.” The Class R-II Interest will represent the sole class of “residual interests” in REMIC II for purposes of the REMIC Provisions. The following table irrevocably sets forth the designation, the Uncertificated REMIC II Pass-Through Rate, the initial Uncertificated Principal Balance, and solely for purposes of satisfying Treasury regulation Section 1.860G-1(a)(4)(iii), the “latest possible maturity date” for each of the REMIC II Regular Interests. None of the REMIC II Regular Interests will be certificated.

Designation	REMIC II Pass-Through Rate	Initial Uncertificated Principal Balance	Latest Possible Maturity Date ⁽¹⁾
LT2-F1	(2)	\$385,474,000.00	March 25, 2035
LT2-F2	(2)	\$100,000,000.00	March 25, 2035
LT2-1SUB	(2)	\$14,242,927.00	March 25, 2035
LT2-2SUB	6.00%	\$1,322,225.32	March 25, 2035
LT2-2SEN	6.00%	\$43,290,000.00	March 25, 2035
LT2-3SUB	6.50%	\$1,256,957.27	March 25, 2035
LT2-3SEN	6.50%	\$42,824,000.00	March 25, 2035
LT2-IO	(2)	(3)	March 25, 2035
LT2-PO	0.00%	\$1,755,298.73	March 25, 2035
LT2-RM	(2)	(4)	March 25, 2035

(1) For purposes of Section 1.860G-1(a)(4)(iii) of the Treasury regulations, the Distribution Date that is the 360th Distribution Date has been designated as the “latest possible maturity date” for each REMIC II Regular Interest.

- (2) Calculated in accordance with the definition of “Uncertificated REMIC II Pass-Through Rate” herein.
- (3) Calculated in accordance with the definition of “Uncertificated Notional Amount” herein.
- (4) For federal income tax purposes, REMIC II Regular Interest LT2-RM will not accrue interest on an uncertificated notional amount, but will be entitled to 100% of amounts distributed on REMIC I Regular Interest LT1-RM.

REMIC III

As provided herein, the Trustee shall make an election to treat the segregated pool of assets consisting of the Uncertificated REMIC II Regular Interests as a REMIC for federal income tax purposes, and such segregated pool of assets will be designated as “REMIC III.” The Class R-III Interest will represent the sole class of “residual interests” in REMIC III for purposes of the REMIC Provisions. As provided herein, the (i) Class A Certificates (ii) Class M Certificates, (iv) Class B Certificates and Class RM Certificates, represent all of the “regular interests” in REMIC III for purposes of the REMIC Provisions. The following table irrevocably sets forth the designation, the Pass-Through Rate, the original Class Certificate Balance, and solely for purposes of satisfying Treasury regulation Section 1.860G-1(a)(4)(iii), the “latest possible maturity date” for each Class of Certificates that represents one or more of the “regular interests” in REMIC III.

Class Designation	Pass-Through Rate	Original Class Certificate Balance or Notional Amount	Latest Possible Maturity Date ⁽¹⁾
Class 1A-F1	(2)	\$385,474,000.00	March 25, 2035
Class 1A-F2	(2)	\$100,000,000.00	March 25, 2035
Class 1A-S	(3)	\$499,716,927.00	March 25, 2035
Class 2A-1	(2)	\$43,290,000.00	March 25, 2035
Class 2A-2	(2)	\$42,824,000.00	March 25, 2035
Class 2A-PO	(2)	\$1,755,298.00	March 25, 2035
Class 2A-IO	(3)	\$90,448,481.00	March 25, 2035
Class M	(4)	\$3,838,000.00	March 25, 2035
Class B-1	(4)	\$2,951,000.00	March 25, 2035
Class B-2	(4)	\$2,656,000.00	March 25, 2035
Class B-3	(4)	\$2,360,000.00	March 25, 2035
Class B-4	(4)	\$2,066,000.00	March 25, 2035
Class B-5	(4)	\$2,951,110.59	March 25, 2035
Class RM	(2)	(3)	March 25, 2035

⁽¹⁾ Solely for purposes of Section 1.860G-1(a)(4)(iii) of the Treasury regulations, the Distribution Date that is the 360th Distribution Date has been designated as the “latest possible maturity date” for each class of certificates.

⁽²⁾ Calculated in accordance with the definition of “Pass-Through Rate” herein.

⁽³⁾ The Class 1A-S, Class 2A-IO and Class RM Certificates will accrue interest based upon a notional amount. For federal income tax purposes, the Class RM Certificates will not accrue interest on a notional amount, but will be entitled to 100% of amounts distributed on REMIC II Regular Interest LT2-RM.

⁽⁴⁾ The Pass-Through Rate for the Class M Certificates, Class B-1 Certificates, the Class B-2 Certificates, the Class B-3 Certificates, the Class B-4 Certificates and the Class B-5 shall be subject to a cap equal to the Subordinate Net WAC.

Set forth below are designations of Classes of Certificates for the categories used herein:

Book-Entry Certificates.Class 1A-F1, Class 1A-F2, Class 1A-S, Class 2A-1, Class 2A-2, Class 2A-PO, Class 2A-IO, Class M, Class B-1 and Class B-2 Certificates.

Class A Certificates.....Class 1A-F1, Class 1A-F2, Class 1A-S, Class 2A-1, Class 2A-2, Class 2A-PO and Class 2A-IO Certificates.

Class B Certificates.....Class B-1, Class B-2, Class B-3, Class B-4 and Class B-5 Certificates.

Class 1A-F CertificatesClass 1A-F1 and Class 1A-F2 Certificates.

Class A Principal CertificatesClass 1A-F1, Class 1A-F2, Class 2A-1 and Class 2A-2 Certificates.

Interest Only Certificates.Class 1A-S Certificates and Class 2A-IO Certificates.

Physical Certificates.....Class B-3, Class B-4, Class B-5, Class RM and the Residual Certificates.

Variable Rate CertificatesClass 1A-F1, Class 1A-F2, Class 1A-S and Class 2A-IO Certificates.

Private Certificates.....All Classes of Certificates.

Rating AgenciesS&P and Moody's.

Regular Certificates.All Classes of Certificates, other than the Residual Certificates.

Residual CertificatesClass R Certificates.

Category 1 CertificatesClass 1A-F1, Class 1A-F2 and Class 1A-S Certificates.

Category 2 CertificatesClass 2A-1, Class 2A-2, Class 2A-IO and Class 2A-PO Certificates.

Senior Certificates.....Class 1A-F1, Class 1A-F2, Class 1A-S, Class 2A-1, Class 2A-2, Class 2A-IO, Class 2A-PO Certificates.

Subordinate CertificatesClass M, Class B-1, Class B-2, Class B-3, Class B-4, Class B-5 Certificates.

Non-Investment
Grade CertificatesClass B-3, Class B-4 and Class B-5 Certificates.

ComponentsWith respect to the Class RM Certificate: Class RM-1
Component and Class RM-2 Component.

Defined terms and provisions herein relating to statistical rating agencies not designated above as
Rating Agencies shall be of no force or effect.

For purposes of determining certain payments due or losses allocated to a class of
Certificates, the Class 1A-F Certificates and the Class RM-1 Component shall relate to the
Category 1 Mortgage Loans and the Class 2A-1 Certificates, the Class 2A-2 Certificates, the
Class 2A-PO Certificates and Class RM-2 Component shall relate to the Category 2 Mortgage
Loans.

ARTICLE I

DEFINITIONS

Whenever used in this Agreement, the following words and phrases, unless the context otherwise requires, shall have the following meanings:

Agency Insurance Agreements: Collectively, the FHA Insurance Contracts, VA Guarantee Agreements and RHS Guaranty Agreements.

Aggregate Senior Percentage: With respect to any Distribution Date and the Certificates, the percentage equivalent of a fraction, the numerator of which is the Certificate Principal Balance of the Class 1A-F Certificates, Class 2A-1 Certificates and Class 2A-2 Certificates immediately prior to such Distribution Date, and the denominator of which is the sum of the Non-PO Percentages of the Scheduled Principal Balances of all the Mortgage Loans as of the first day of the related Due Period.

Agreement: This Pooling and Servicing Agreement and all amendments or supplements hereto.

Allocated Realized Loss Amount: With respect to a Class of Certificates (other than the Interest Only Certificates and the Residual Certificates) and any Distribution Date, (a) the sum of (i) any Realized Losses allocated to such Class of Certificates on any Distribution Date pursuant to Section 4.04 and (ii) the amount of any Allocated Realized Loss Amount for such Class of Certificates remaining unpaid from the previous Distribution Date minus (b) the amount of Subsequent Recoveries allocated to such Class of Certificates pursuant to Section 4.04.

Amount Held for Future Distribution: As to any Distribution Date, the aggregate amount held in the Collection Account at the close of business on the related Determination Date on account of (i) Principal Prepayments received after the related Prepayment Period, (ii) Liquidation Proceeds received in the month of such Distribution Date and (iii) all Monthly Payments due after the related Due Date.

Appraised Value: With respect to any Mortgage Loan, the Appraised Value of the related Mortgaged Property shall be: (i) with respect to a Mortgage Loan other than a Refinancing Mortgage Loan, the lesser of (a) the value of the Mortgaged Property based upon the appraisal made at the time of the origination of such Mortgage Loan and (b) the sales price of the Mortgaged Property at the time of the origination of such Mortgage Loan; (ii) with respect to a Refinancing Mortgage Loan other than a Streamlined Documentation Mortgage Loan, the value of the Mortgaged Property based upon the appraisal made at the time of the origination of such Refinancing Mortgage Loan; and (iii) with respect to a Streamlined Documentation Mortgage Loan, (a) if the loan-to-value ratio with respect to the Original Mortgage Loan at the time of the origination thereof was 90% or less, the value of the Mortgaged Property based upon the appraisal made at the time of the origination of the Original Mortgage Loan and (b) if the loan-to-value ratio with respect to the Original Mortgage Loan at the time of the origination thereof was greater than 90%, the value of the Mortgaged Property based upon the appraisal

(which may be a drive-by appraisal) made at the time of the origination of such Streamlined Documentation Mortgage Loan.

Arrearages: With respect to a Mortgage Loan, any unreimbursed arrearage amounts representing principal, interest and other amounts advanced by the servicer of such Mortgage Loan prior to the Cut-off Date.

Available Distribution Amount: With respect to any Distribution Date, will equal (without duplication) (a) the sum of (i) the balance in or credited to the Collection Account on the related Determination Date, (ii) an amount equal to any Monthly Advances made by the Master Servicer on or before any previous Distribution Date, to the extent such Monthly Advances were made from Amounts Held for Future Distribution, which shall be paid by the Master Servicer from its own funds to the extent funds on deposit in the Collection Account are less than amounts required to be deposited into the Distribution Account on such Distribution Date, (iii) all Monthly Advances made by the Master Servicer with respect to such Distribution Date and (iv) all Compensating Interest paid by the Master Servicer with respect to such Distribution Date, reduced by (b) the sum of (i) Monthly Payments collected but due after the related Due Period, (ii) reinvestment income on the balance of funds, if any, in the Collection Account, to the extent included in clause (a) above, (iii) all amounts reimbursable with respect to such Distribution Date to the Master Servicer, (iv) the Servicing Fee payable to the Master Servicer for such Distribution Date, (v) any prepayments, including payoffs, amounts in respect of liquidations and partial prepayments, received after the Prepayment Period relating to such Distribution Date and (vi) amounts received or recovered in respect of Arrearages.

Bankruptcy Code: The United States Bankruptcy Reform Act of 1978, as amended.

Bankruptcy Loss: With respect to any Mortgage Loan, a Deficient Valuation or Debt Service Reduction; provided, however, that a Bankruptcy Loss shall not be deemed a Bankruptcy Loss hereunder so long as the Master Servicer has notified the Trustee in writing that the Master Servicer is diligently pursuing any remedies that may exist in connection with the related Mortgage Loan and either (A) the related Mortgage Loan is not in default with regard to payments due thereunder or (B) delinquent payments of principal and interest under the related Mortgage Loan and any related escrow payments in respect of such Mortgage Loan are being advanced on a current basis by the Master Servicer, in either case without giving effect to any Debt Service Reduction or Deficient Valuation.

Book-Entry Certificates: As specified in the Preliminary Statement.

Business Day: Any day other than (i) a Saturday or a Sunday, or (ii) a day on which the banking institutions in the State of New York, California, Delaware, Texas or the city in which the Corporate Trust Office of the Trustee is located are authorized or obligated by law or executive order to be closed.

Cap Contracts: The interest rate cap contracts between Bear Stearns Financial Products, Inc. and Countrywide Home Loans, Inc., each dated as of March 31, 2005, assigned to the Trustee pursuant to the novation agreement, dated as of March 31, 2005, among Bear Stearns

Financial Products, Inc., Countrywide Home Loans, Inc. and the Trustee, forms of which are attached hereto as Exhibit O.

Cap Contract Ceiling Rate: For each Distribution Date and (i) the Cap Contract related to the Class 1A-F1 Certificates, an amount equal to 9.140% or (ii) the Cap Contract related to the Class 1A-F2 Certificates an amount equal to 7.640%.

Cap Contract Counterparty: Bear Stearns Financial Products, Inc., and its permitted successors and assigns.

Cap Contract Strike Rate: For each Distribution Date and (i) the Cap Contract related to the Class 1A-F1 Certificates will be 6.141% or (ii) the Cap Contract related to the Class 1A-F2 Certificates will be 6.141%.

Cap Contract Notional Balance: For each Cap Contract and each Distribution Date, the lesser of (i) the notional balance described in the table set forth in Annex I and (ii) the Certificate Principal Balance of the related Class 1A-F Certificate.

Cap Payments: The amounts payable by the Cap Counterparty for the benefit of the Trust under each Cap Contract on each Distribution Date, equal to the product of :

- (i) the excess (if any) of (x) the lesser of (A) One-Month LIBOR (as determined by the Cap Contract Counterparty) and (B) the Cap Contract Ceiling Rate for such Distribution Date over (y) the applicable Cap Contract Strike Rate for such Distribution Date,
- (ii) the applicable Cap Contract Notional Balance, and
- (iii) 30 divided by 360.

Category: Any of Category 1, Category 2, Category 2A, Category 2B or Category 2C, as applicable.

Category 1 Collateral Deficiency: With respect to any Distribution Date, the excess, if any, of (i) the aggregate outstanding Class Certificate Balance of the Class 1A-F Certificates for such Distribution Date (after giving effect on that date to the application thereto clauses (a)(i) and (ii) of the definition of Category 1 Senior Principal Distribution Amount) *over* (ii) the sum of the Scheduled Principal Balances, as of the last day of the related Due Period, of the Category 1 Mortgage Loans.

Category 1 Collateral Excess: With respect to any Distribution Date, the lesser of (i) the excess, if any, of (1) the sum of the Scheduled Principal Balances, as of the last day of the related Due Period, of the Category 1 Mortgage Loans *over* (2) the aggregate outstanding Class Certificate Balance of the Class 1A-F Certificates for such Distribution Date (after giving effect on that date to the application thereto of clauses (a)(i) and (ii) of the definition of Category 1 Senior Principal Distribution Amount) and (ii) the aggregate of items (a)(i) and (ii) of the definition of Category 1 Senior Principal Distribution Amount for such Distribution Date.

Category 1 Cross Payment Addition: With respect to any Distribution Date, an amount equal to the lesser of (i) the Category 1 Collateral Deficiency for such Distribution Date, (ii) the product of (x) the sum of the Collateral Group 1 Collateral Excess and the Collateral Group 2 Collateral Excess and (y) a fraction, the numerator of which is the Category 1 Collateral Deficiency for such Distribution Date and the denominator of which is the sum of the Collateral Group 1 Collateral Deficiency, the Collateral Group 2 Collateral Deficiency and the Category 1 Collateral Deficiency.

Category 1 Cross Payment Reduction: With respect to any Distribution Date, the lesser of (i) the Category 1 Collateral Excess for such Distribution Date, and (ii) the product of (x) the sum of the Collateral Group 1 Collateral Deficiency and the Collateral Group 2 Collateral Deficiency for such Distribution Date and (y) a fraction the numerator of which is the Category 1 Collateral Excess for such Distribution Date and the denominator of which is the sum of the Collateral Group 1 Collateral Excess, the Collateral Group 2 Collateral Excess and the Category 1 Collateral Excess for such Distribution Date.

Category 1 Net WAC Rate: With respect to any Distribution Date and the Category 1 Mortgage Loans, the weighted average of the Net Mortgage Rates as of the Cut-off Date of the Category 1 Mortgage Loans, weighted on the basis of their Scheduled Principal Balances as of the first day of the related Due Period.

Category 2C Net WAC Rate: With respect to any Distribution Date and the Category 2C Mortgage Loans, the weighted average of the Net Mortgage Rates as of the Cut-off Date of the Category 2C Mortgage Loans, weighted on the basis of their Scheduled Principal Balances as of the first day of the related Due Period.

Category 2A Mortgage Loans: Each Category 2 Mortgage Loan having a Cut-off Date Net Mortgage Rate less than 6.000% per annum.

Category 2B Mortgage Loan: Each Category 2 Mortgage Loan having a Cut-off Date Net Mortgage Rate greater than or equal to 6.00% per annum and less than 6.500% per annum.

Category 2C Mortgage Loan: Each Category 2 Mortgage Loan having a Cut-off Date Net Mortgage Rate greater than or equal to 6.50% per annum.

Category 1 Senior Principal Distribution Amount: With respect to any Distribution Date, (a) the sum of the following amounts:

- (i) the applicable Senior Percentage for Category 1 multiplied by the sum of all amounts described in clause (a) of the definition of Principal Distributable Amount for each Category 1 Mortgage Loan;
- (ii) the applicable Senior Prepayment Percentage for Category 1 multiplied by the sum of all amounts described in clauses (b) through (f) of the definition of Principal Distributable Amount for each Category 1 Mortgage Loan;
- (iii) the Category 1 Cross Payment Addition for such Distribution Date, if any;

minus (b) the Category 1 Cross Payment Reduction for such Payment Date, if any;

provided, however, that on any Distribution Date on which the certificate principal balance of the Class 2A-1 and Class 2A-2 Certificates have been reduced to zero, the Category 1 Senior Principal Distribution Amount shall be calculated pursuant to clauses (a) (i) and (ii) the above formula based on all the mortgage loans in the mortgage pool as opposed to the Category 1 Mortgage Loans.

Category 1 Subordinate Principal Distribution Amount: With respect to any Distribution Date, the sum of the following amounts:

(i) the applicable Subordinate Percentage for Category 1 multiplied by the sum of all amounts described in clause (a) of the definition of Principal Distributable Amount for each Category 1 Mortgage Loan; and

(ii) the applicable Subordinate Prepayment Percentage for Category 1 multiplied by the sum of all amounts described in clauses (b) through (f) of the definition of Principal Distributable Amount for each Category 1 Mortgage Loan;

provided, however, that on any Distribution Date on which the Certificate Principal Balances of the Class A Principal Certificates related to Collateral Group 1 and Collateral Group 2 have been reduced to zero, the Category 1 Subordinate Principal Distribution Amount shall be calculated pursuant to clauses (i) and (ii) of the above formula based on all the Mortgage Loans in the mortgage pool as opposed to the Category 1 Mortgage Loans.

Category 1 Subordination Balance: For any Distribution Date, the excess, if any, of the aggregate Scheduled Principal Balance of the Category 1 Mortgage Loans as of the first day of the related Due Period over the sum of Certificates Principal Balance of the Class 1A-F Certificates on the day immediately prior to such Distribution Date.

Category 2 Subordination Balance: For any Distribution Date, the sum of the Collateral Group 1 Subordination Balance and the Collateral Group 2 Subordination Balance.

Category 1 Weighted Average Excess Rate: With respect to any Distribution Date, a rate equal to the product of (i) the weighted average of the Excess Rates of the Category 1 Mortgage Loans that are Rate-Increased Mortgage Loans, weighted on the basis of the Scheduled Principal Balance of such Mortgage Loans as of the first day of the related Due Period and (ii) a fraction, the numerator of which is the aggregate Scheduled Principal Balance of the Category 1 Mortgage Loans that are Rate-Increased Mortgage Loans and the denominator of which is the aggregate Scheduled Principal Balance of all Category 1 Mortgage Loans outstanding, in each case as of the first day of the related Due Period.

Category 2 Weighted Average Excess Rate: For any Distribution Date, a rate equal to the product of (i) the weighted average of the Excess Rates of the Category 2 Mortgage Loans that are Rate-Increased Mortgage Loans, weighted on the basis of the Scheduled Principal Balance of such Mortgage Loans as of the first day of the related Due Period and (ii) a fraction, the numerator of which is the aggregate Scheduled Principal Balance of the Category 2 Mortgage

Loans that are Rate-Increased Mortgage Loans and the denominator of which is the aggregate Scheduled Principal Balance of all Category 2 Mortgage Loans outstanding, in each case as of the first day of the related Due Period.

Certificate: Any one of the Certificates executed and authenticated by the Trustee in substantially the forms attached hereto as exhibits.

Certificate Principal Balance: With respect to any Distribution Date, a class of Certificates, other than the Interest Only Certificates, the Class RM Certificates and Class R Certificates, the aggregate principal balance of such class of Certificates on the Closing Date reduced by the sum of (i) all amounts previously distributed to holders of such class of Certificates as payments of principal (excluding payments reimbursing allocated Realized Losses to the Certificates) and (ii) the amount of any Realized Losses allocated to such class (taking into account any increases in the Certificate Principal Balance thereof due to the receipt of Subsequent Recoveries).

Certificate Owner: With respect to a Book-Entry Certificate, the Person who is the beneficial owner of such Book-Entry Certificate.

Certificate Register: The register maintained pursuant to Section 5.02 hereof.

Certificateholder or Holder: The person in whose name a Certificate is registered in the Certificate Register, except that, solely for the purpose of giving any consent pursuant to this Agreement, any Certificate registered in the name of the Depositor or any affiliate of the Depositor shall be deemed not to be an Outstanding Certificate and the Percentage Interest evidenced thereby shall not be taken into account in determining whether the requisite amount of Percentage Interests necessary to effect such consent has been obtained; provided, however, that if any such Person (including the Depositor) owns 100% of the Percentage Interests evidenced by a Class of Certificates, such Certificates shall be deemed to be an Outstanding Certificate for purposes of any provision hereof (other than the second sentence of Section 10.01 hereof) that requires the consent of the Holders of Certificates of a particular Class as a condition to the taking of any action hereunder. The Trustee is entitled to rely conclusively on a certification of the Depositor or any affiliate of the Depositor in determining which Certificates are registered in the name of an affiliate of the Depositor.

Class: All Certificates bearing the same class designation as set forth in the Preliminary Statement.

Class B Specified Subordinate Principal Distribution Amount: With respect to a Class of Class B Certificates and any Distribution Date, the product of (i) a fraction, the numerator of which is the Class Certificate Balance of such Class of Class B Certificates immediately preceding such Distribution Date and the denominator of which is the aggregate Class Certificate Balances of all the Subordinate Certificates immediately preceding such Distribution Date and (ii) the Subordinate Principal Distribution Amount for such Distribution Date.

Class Certificate Balance: With respect to any Class and as to any date of determination, the aggregate of the Certificate Principal Balances of all Certificates of such Class as of such date.

Class Interest Shortfall Carryforward Amount: With respect to any Distribution Date and a Class of Certificates, other than the Class RM Certificates and the Residual Certificates, the amount by which the Interest Distribution Amount for such Class for the immediately preceding Distribution Date exceeded the amount of interest actually distributed on such Class on such Distribution Date pursuant to Section 4.03 hereof.

Class 1A-S Interest Distribution Amount: With respect to the Class 1A-S Certificate and any Distribution Date, the sum of (i) interest accrued during the related Interest Accrual Period at one-twelfth of the Pass-Through Rate for the Class 1A-S Certificates on such Distribution Date multiplied by the Notional Amount thereof for such Distribution Date, less (ii) the interest shortfall amount allocated to such Class on such Distribution Date as provided in Section 4.03(b), plus (iii) any such accrued and unpaid interest from prior Distribution Dates.

Class 2A-IO Interest Distribution Amount: With respect to the Class 2A-IO Certificate and any Distribution Date, the sum of (i) interest accrued during the related Interest Accrual Period at one-twelfth of the Pass-Through Rate for the Class 2A-IO Certificates on such Distribution Date multiplied by the Notional Amount thereof for such Distribution Date, less (ii) the interest shortfall amount allocated to such Class on such Distribution Date as provided in Section 4.03(b), plus (iii) any such accrued and unpaid interest from prior Distribution Dates.

Class M Specified Subordinate Principal Distribution Amount: With respect to the Class M Certificates and any Distribution Date, the product of (i) a fraction, the numerator of which is the Certificate Principal Balance of the Class M Certificates immediately preceding such Distribution Date and the denominator of which is the aggregate Certificate Principal Balance of all the Subordinate Certificates immediately preceding such Distribution Date and (ii) the Subordinate Principal Distribution Amount for such Distribution Date.

Class 2A-1 Percentage: With respect to any Distribution Date and (i) a Category 2A Mortgage Loan, the related Cut-off Date Net Mortgage Rate, divided by 6.00%, or (ii) a Category 2B Mortgage Loan, 6.500% minus the related Net Mortgage Rate in effect as of the Cut-off Date, divided by 0.500%.

Class 2A-2 Percentage: With respect to any Distribution Date and (i) a Category 2B Mortgage Loan, the positive difference, expressed as a percentage, between (x) 1.00 and (y) 6.500% minus the related Cut-off Date Net Mortgage Rate, divided by 0.500% and (ii) a Category 2C Mortgage Loan, 100%.

Class PO Deferred Amount: With respect to any Distribution Date, the sum of (i) the amount, if any, by which (x) the applicable Class PO Percentage of the outstanding principal balances of each Category 2A Mortgage Loan that became a liquidated mortgage loan during the related Prepayment Period exceeds (y) the applicable Class PO Percentage of the principal portion of the net liquidation proceeds collected with respect to such Category 2A Mortgage Loans and (ii) any unpaid Class PO Deferred Amounts from previous Distribution Dates.

Class PO Percentage: With respect to (i) each Category 2A Mortgage Loan, 6.00% minus the related Net Mortgage Rate in effect as of the Cut-off Date, divided by 6.00% and (ii) any Mortgage Loan other than a Category 2A Mortgage Loan, 0%.

Class PO Principal Distribution Amount: With respect to any Distribution Date, the sum of the following with respect to each Category 2A Mortgage Loan: the product of (x) the applicable Class PO Percentage for such Category 2A Mortgage Loan and (y) all amounts described in the definition of Principal Distributable Amount attributable to such Category 2A Mortgage Loan.

Class R Certificate: Any one of the Class R Certificates evidencing the ownership of the Class R-I Interest, the Class R-II Interest and the Class R-III Interest.

Class R-I Interest: The uncertificated Residual Interest in REMIC I.

Class R-II Interest: The uncertificated Residual Interest in REMIC II.

Class R-III Interest: The uncertificated Residual Interest in REMIC IV.

Class RM Certificate: Any one of the Class RM Certificates evidencing the ownership of the Class RM-1 Component and the Class RM-2 Component.

Class RM-1 Component: The interest bearing component of the Class RM Certificates which relates to the Category 1 Mortgage Loans.

Class RM-2 Component: The interest bearing component of the Class RM Certificates which relates to the Category 2 Mortgage Loans.

Class RM Interest Distribution Amount: For any Distribution Date and a Component of the Class RM Certificates, the sum of (i) one-twelfth of the Pass-Through Rate for such Component of Class RM Certificates on such Distribution Date multiplied by the Notional Amount for such Component for such Distribution Date, plus (ii) any such accrued and unpaid interest from prior Distribution Dates.

Class 2A-1 Senior Principal Distribution Amount: With respect to any Distribution Date, (a) the sum of the following amounts:

(i) the Senior Percentage for Collateral Group 1 for such Distribution Date multiplied by the sum of all amounts described in clause (a) of the definition of Principal Distributable Amount for the portion of each each Category 2 Mortgage Loan included in Collateral Group 1;

(ii) the Senior Prepayment Percentage for Collateral Group 1 for such Distribution Date multiplied by the sum of all amounts described in clauses (b) through (f) of the definition of Principal Distributable Amount for the portion of each Category 2 Mortgage Loan included in Collateral Group 1;

(iii) any Collateral Group 1 Cross Payment Addition for such Distribution Date;

minus

- (b) any Collateral Group 1 Cross Payment Reduction for such Distribution Date;

provided, however, that on any Distribution Date on which the certificate principal balance of the Class 1A-F and Class 2A-2 Certificates have been reduced to zero, the Class 2A-1 Senior Principal Distribution Amount shall be calculated pursuant to clauses (i) and (ii) of the above formula based on all the mortgage loans in the mortgage pool as opposed to the Category 2 Mortgage Loans included in Collateral Group 1.

Class 2A-2 Senior Principal Distribution Amount: With respect to any Distribution Date, (a) the sum of the following amounts:

- (i) the applicable Senior Percentage for Collateral Group 2 multiplied by the sum of all amounts described in clause (a) of the definition of Principal Distributable Amount for each Category 2 Mortgage Loan or portion thereof included in Collateral Group 2;
- (ii) the Senior Prepayment Percentage for Collateral Group 2 multiplied by the sum of all amounts described in clauses (b) through (f) of the definition of Principal Distributable Amount for each Category 2 Mortgage Loan or portion thereof included in Collateral Group 2;
- (iii) any Collateral Group 2 Cross Payment Addition for such Distribution Date;

minus

- (b) any Collateral Group 2 Cross Payment Reduction for such Distribution Date;

provided, however, that on any Distribution Date on which the certificate principal balance of the Class 1A-F and Class 2A-1 Certificates have been reduced to zero, the Class 2A-2 Senior Principal Distribution Amount shall be calculated pursuant to clauses (i) and (ii) of the above formula based on all the mortgage loans in the mortgage pool as opposed to the Category 2 Mortgage Loans include in Collateral Group 2.

Closing Date: March 31, 2005.

Code: The Internal Revenue Code of 1986, as amended.

Collection Account: The separate Eligible Account or Accounts created and maintained by the Master Servicer pursuant to Section 3.05 with a depository institution in the name of the Master Servicer for the benefit of the Trustee on behalf of Certificateholders and designated "Countrywide Home Loans, Inc. in trust for the registered holders of CWMBS Reperforming Loan REMIC Trust 2005-R1 Certificates, Series 2005-R1".

Collateral Group: Collateral Group P, Collateral Group 1 or Collateral Group 2, as the context requires.

Collateral Group P: With respect to any Distribution Date, the portion of each Category 2A Mortgage Loan equal to the related Class PO Percentage thereof.

Collateral Group 1: With respect to any Distribution Date, the portion of each Category 2A Mortgage Loan equal to the related Class 2A-1 Percentage thereof and the portion of each Category 2B Mortgage Loan equal to the related Class 2A-1 Percentage thereof.

Collateral Group 2: With respect to any Distribution Date, the portion of each Category 2B Mortgage Loan equal to the related Class 2A-2 Percentage thereof and the portion of each Category 2C Mortgage Loan equal to the related Class 2A-2 Percentage thereof.

Collateral Group 1 Collateral Deficiency: With respect to any Distribution Date, the excess, if any, of (i) the aggregate outstanding Class Certificate Balance of the Class 2A-1 Certificates for such Distribution Date (after giving effect on that date to the application thereto clauses (a)(i) and (ii) of the definition of Class 2A-1 Senior Principal Distribution Amount) *over* (ii) the sum of the Scheduled Principal Balances, as of the last day of the related Due Period, of the portions of the Category 2 Mortgage Loans include in Collateral Group 1.

Collateral Group 2 Collateral Deficiency: With respect to any Distribution Date, the excess, if any, of (i) the aggregate outstanding Class Certificate Balance of the Class 2A-2 Certificates for such Distribution Date (after giving effect on that date to the application thereto clauses (a)(i) and (ii) of the definition of Class 2A-2 Senior Principal Distribution Amount) *over* (ii) the sum of the Scheduled Principal Balances, as of the last day of the related Due Period, of the portions of the Category 2 Mortgage Loans included in Collateral Group 2.

Collateral Group 1 Collateral Excess: With respect to any Distribution Date, the lesser of (i) the excess, if any, of (1) the sum of the Scheduled Principal Balances, as of the last day of the related Due Period, of the portions of the Category 2 Mortgage Loans included in Collateral Group 1 *over* (2) the aggregate outstanding Class Certificate Balance of the Class 2A-1 Certificates for such Distribution Date (after giving effect on that date to the application thereto of clauses (a)(i) and (ii) of the definition of Class 2A-1 Senior Principal Distribution Amount) and (ii) the aggregate of items (a)(i) and (ii) of the definition of Class 2A-1 Senior Principal Distribution Amount for such Distribution Date.

Collateral Group 2 Collateral Excess: With respect to any Distribution Date, the lesser of (i) the excess, if any, of (1) the sum of the Scheduled Principal Balances, as of the last day of the related Due Period, of the portions of the Category 2 Mortgage Loans included in Collateral Group 2 *over* (2) the aggregate outstanding Class Certificate Balance of the Class 2A-2 Certificates for such Distribution Date (after giving effect on that date to the application thereto of clauses (a)(i) and (ii) of the definition of Class 2A-2 Senior Principal Distribution Amount) and (ii) the aggregate of items (a)(i) and (ii) of the definition of Class 2A-2 Senior Principal Distribution Amount for such Distribution Date.

Collateral Group 1 Cross Payment Addition: With respect to any Distribution Date, an amount equal to the lesser of (i) the Collateral Group 1 Collateral Deficiency for such Distribution Date, and (ii) the product of (x) the sum of the Collateral Group 2 Collateral Excess

and the Category 1 Collateral Excess and (y) a fraction, the numerator of which is the Collateral Group 1 Collateral Deficiency for such Distribution Date and the denominator of which is the sum of the Collateral Group 1 Collateral Deficiency, the Collateral Group 2 Collateral Deficiency and the Category 1 Collateral Deficiency.

Collateral Group 2 Cross Payment Addition: With respect to any Distribution Date, an amount equal to the lesser of (i) the Collateral Group 2 Collateral Deficiency for such Distribution Date, and (ii) the product of (x) the sum of the Collateral Group 1 Collateral Excess and the Category 1 Collateral Excess and (y) a fraction, the numerator of which is the Collateral Group 2 Collateral Deficiency for such Distribution Date and the denominator of which is the sum of the Collateral Group 1 Collateral Deficiency, the Collateral Group 2 Collateral Deficiency and the Category 1 Collateral Deficiency.

Collateral Group 1 Cross Payment Reduction: With respect to any Distribution Date, the lesser of (i) the Collateral Group 1 Collateral Excess for such Distribution Date, and (ii) the product of (x) the sum of the Collateral Group 2 Collateral Deficiency and the Category 1 Collateral Deficiency for such Distribution Date and (y) a fraction the numerator of which is the Collateral Group 1 Collateral Excess for such Distribution Date and the denominator of which is the sum of the Collateral Group 1 Collateral Excess, the Collateral Group 2 Collateral Excess and the Category 1 Collateral Excess for such Distribution Date.

Collateral Group 2 Cross Payment Reduction: With respect to any Distribution Date, the lesser of (i) the Collateral Group 2 Collateral Excess for such Distribution Date, and (ii) the product of (x) the sum of the Collateral Group 1 Collateral Deficiency and the Category 1 Collateral Deficiency for such Distribution Date and (y) a fraction the numerator of which is the Collateral Group 2 Collateral Excess for such Distribution Date and the denominator of which is the sum of the Collateral Group 1 Collateral Excess, the Collateral Group 2 Collateral Excess and the Category 1 Collateral Excess for such Distribution Date.

Collateral Group 1 Subordinate Principal Distribution Amount: With respect to any Distribution Date, the sum of the following amounts:

(i) the Subordinate Percentage for Collateral Group 1 for such Distribution Date multiplied by all amounts described in clause (a) of the definition of Principal Distributable Amount for each portion of the Category 2 Mortgage Loans included in Collateral Group 1;

(ii) the Subordinate Prepayment Percentage for Collateral Group 1 for such Distribution Date multiplied by all amounts described in clauses (b) through (f) of the definition of Principal Distributable Amount for each each portion of the Category 2 Mortgage Loans included in Collateral Group 1;

provided, however, that on any Distribution Date on which the Certificate Principal Balances of the Class A Principal Certificates related to Category 1 and Collateral Group 2 have been reduced to zero, the Collateral Group 1 Subordinate Principal Distribution Amount shall be calculated pursuant to clauses (i) and (ii) of the above formula based on all the Mortgage Loans

in the mortgage pool as opposed to the Category 2 Mortgage Loans included in Collateral Group 1.

Collateral Group 2 Subordinate Principal Distribution Amount: With respect to any Distribution Date, the sum of the following amounts:

(i) the applicable Subordinate Percentage for Collateral Group 2 multiplied by the sum of all amounts described in clause (a) of the definition of Principal Distributable Amount for each Category 2 Mortgage Loan included in Collateral Group 2;

(ii) the Subordinate Prepayment Percentage for Collateral Group 2 multiplied by the sum of all amounts described in clauses (b) through (f) of the definition of Principal Distributable Amount for each Category 2B Mortgage Loan included in Collateral Group 2;

provided, however, that on any Distribution Date on which the Certificate Principal Balances of the Class A Principal Certificates related to Category 1 and Collateral Group 1 have been reduced to zero, the Collateral Group 2 Subordinate Principal Distribution Amount shall be calculated pursuant to clauses (i) and (ii) of the above formula based on all the Mortgage Loans in the mortgage pool as opposed to the Category 2 Mortgage Loans included in Collateral Group 2.

Collateral Group 1 Subordination Balance: For any Distribution Date, the excess, if any, of the aggregate Scheduled Principal Balance of the Category 2 Mortgage Loans or portions thereof included in Collateral Group 1 as of the first day of the related Due Period over the Certificates Principal Balance of the Class 2A-1 Certificates on the day immediately prior to such Distribution Date.

Collateral Group 2 Subordination Balance: For any Distribution Date, the excess, if any, of the aggregate Scheduled Principal Balance of the Category 2 Mortgage Loans or portions thereof included in Collateral Group 2 as of the first day of the related Due Period over the Certificates Principal Balance of the Class 2A-2 Certificates on the day immediately prior to such Distribution Date.

Compensating Interest: With respect to any Distribution Date, payments as defined in Section 4.02.

Corporate Trust Office: The designated office of the Trustee at which at any particular time its corporate trust business with respect to this Agreement shall be administered, which office at the date of the execution of this Agreement is for Certificate transfer purposes, at 101 Barclay Street, Floor 8 West, New York, New York 10286, Attn: Corporate Trust, MBS Administration-CWMBS Repperforming Loan REMIC Trust Certificates, Series 2005-R1.

Corresponding Certificate: With respect to REMIC II Regular Interest LT2-F1 and REMIC II Regular Interest LT2-F2, the Class 1A-F1 Certificates and the Class 1A-F2 Certificates, respectively.

Countrywide: Countrywide Home Loans, Inc., a New York corporation and its successors and assigns.

Countrywide Servicing: Countrywide Home Loans Servicing LP and its successors and assigns.

Custodian: The Bank of New York or, if a successor is appointed to either, such successor.

Cut-off Date: March 1, 2005.

Cut-off Date Net Mortgage Rate: With respect to any Mortgage Loan (or related REO Property), the Net Mortgage Rate thereof in effect as of the Cut-off Date.

Cut-off Date Pool Principal Balance: \$590,165,408.32

Cut-off Date Principal Balance: With respect to any Mortgage Loan, the unpaid principal balance of that Mortgage Loan as specified in the amortization schedule at the Cut-off Date (before any adjustment to such amortization schedule by reason of any moratorium or similar waiver or grace period) after giving effect to the payment of principal due on the Cut-off Date, irrespective of any delinquency in payment by the related mortgagor, and any previous unscheduled payments received allocable to principal (other than with respect to any liquidated mortgage loan).

Debt Service Reduction: With respect to any Mortgage Loan, a reduction by a court of competent jurisdiction in a proceeding under the Bankruptcy Code in the Monthly Payment for such Mortgage Loan which became final and non-appealable, except such a reduction resulting from a Deficient Valuation or any reduction that results in a permanent forgiveness of principal.

Defective Mortgage Loan: Any Mortgage Loan that is required to be repurchased pursuant to Section 2.02 or 2.03.

Deficient Valuation: With respect to any Mortgage Loan, a valuation by a court of competent jurisdiction of the Mortgaged Property in an amount less than the then-outstanding indebtedness under the Mortgage Loan, or any reduction in the amount of principal to be paid in connection with any Monthly Payment that results in a permanent forgiveness of principal, which valuation or reduction results from an order of such court which is final and non-appealable in a proceeding under the Bankruptcy Code.

Definitive Certificates: Any Certificate evidenced by a Physical Certificate and any Certificate issued in lieu of a Book-Entry Certificate pursuant to Section 5.02(e).

Delay Delivery Certification: As defined in Section 2.02(a) hereof.

Delay Delivery Mortgage Loans: As defined in Section 2.01(c) hereof.

Deleted Mortgage Loan: As defined in Section 2.03(c) hereof.

Denomination: With respect to each Certificate, the amount set forth on the face thereof as the “Initial Certificate Principal Balance of this Certificate” or the “Initial Notional Amount of this Certificate” or, if neither of the foregoing, the Percentage Interest appearing on the face thereof.

Depositor: CWMBS, Inc., a Delaware corporation, or its successor in interest.

Depository: The initial Depository shall be The Depository Trust Company, the nominee of which is Cede & Co., as the registered Holder of the Book-Entry Certificates. The Depository shall at all times be a “clearing corporation” as defined in Section 8-102(a)(5) of the Uniform Commercial Code of the State of New York.

Depository Participant: A broker, dealer, bank or other financial institution or other Person for whom from time to time a Depository affects book-entry transfers and pledges of securities deposited with the Depository.

Determination Date: With respect to any Distribution Date, the close of business on the 1st day of the calendar month in which such Distribution Date occurs or, if such 1st day is not a Business Day, the Business Day immediately succeeding such 1st day.

Distribution Account: The separate Eligible Account created and maintained by the Trustee pursuant to Section 3.05 in the name of the Trustee for the benefit of the Certificateholders and designated “The Bank of New York, in trust for registered holders of CWMBS Reperforming Loan REMIC Trust Certificates, Series 2005-R1.” Funds in the Distribution Account shall be held in trust for the Certificateholders for the uses and purposes set forth in this Agreement.

Distribution Date: The 25th day of each calendar month after the initial issuance of the Certificates, or if such 25th day is not a Business Day, the next succeeding Business Day, commencing in April 2005.

Due Date: With respect to any Distribution Date, the first day of the month in which the related Distribution Date occurs.

Due Period: With respect to any Distribution Date, the period commencing on the second day of the month preceding the month in which such Distribution Date occurs and ending on the first day of the month in which such Distribution Date occurs.

Eligible Account: Any of (i) an account or accounts maintained with a federal or state chartered depository institution or trust company the short-term unsecured debt obligations of which (or, in the case of a depository institution or trust company that is the principal subsidiary of a holding company, the debt obligations of such holding company) have the highest short-term ratings of each Rating Agency at the time any amounts are held on deposit therein, or (ii) a trust account or accounts maintained with (a) the trust department of a federal or state chartered depository institution or (b) a trust company, acting in its fiduciary capacity or (iii) any other account acceptable to each Rating Agency. Eligible Accounts may bear interest, and may include, if otherwise qualified under this definition, accounts maintained with the Trustee.

ERISA: The Employee Retirement Income Security Act of 1974, as amended.

Escrow Account: The Eligible Account or Accounts established and maintained pursuant to Section 3.06(a) hereof.

Event of Default: As defined in Section 7.01 hereof.

Excess Proceeds: With respect to a Prepayment Period, the amount, if any, by which the sum of all Liquidation Proceeds received during such Prepayment Period net of any amounts previously reimbursed to the Master Servicer as Nonrecoverable Advance(s) pursuant to Section 3.08(a)(xi) with respect to the Mortgage Loans that became Liquidated Mortgage Loans during such Prepayment Period, exceeds (i) the aggregate unpaid principal balance (as of the Due Date in the month in which such Mortgage Loans became a Liquidated Mortgage Loans) of the Liquidated Mortgage Loans that became Liquidated Mortgage Loans during such Prepayment Period plus (ii) accrued interest at the related Mortgage Rate from the Due Date as to which interest was last paid or advanced (and not reimbursed) to Certificateholders up to the Due Date applicable to the Distribution Date immediately following the calendar month during which such liquidation occurred.

Excess Rate: With respect to any Rate-Increased Mortgage Loan and a Distribution Date, the positive difference, if any, of (i) the Net Mortgage Rate of such Mortgage Loan as of the first day of the related Due Period over (ii) the Net Mortgage Rate of such Mortgage Loan as of the Cut-off Date.

FDIC: The Federal Deposit Insurance Corporation, or any successor thereto.

FHA: The Federal Housing Administration, an agency within HUD.

FHA Approved Mortgagee: Those institutions that are approved by FHA to act as servicer and mortgagee of record pursuant to FHA Regulations.

FHA Insurance Contract or FHA Insurance: The contractual obligation of FHA respecting the insurance of an FHA Loan pursuant to the National Housing Act, as amended.

FHA Loan: A Mortgage Loan that is the subject of an FHA Insurance Contract as evidenced by a Mortgage Insurance Certificate.

FHA Regulations: Regulations promulgated by HUD under the National Housing Act, codified in 24 Code of Federal Regulations, and other HUD issuances relating to FHA Loans, including the related handbooks, circulars, notices and mortgagee letters.

FHLMC: The Federal Home Loan Mortgage Corporation, a corporate instrumentality of the United States created and existing under Title III of the Emergency Home Finance Act of 1970, as amended, or any successor thereto.

Final Certification: As defined in Section 2.02(a) hereof.

FIRREA: The Financial Institutions Reform, Recovery, and Enforcement Act of 1989.

GNMA: The Government National Mortgage Association.

HUD: The United States Department of Housing and Urban Development, or any successor thereto and including the Federal Housing Commissioner and the Secretary of Housing and Urban Development where appropriate under the FHA Regulations.

Indirect Participant: A broker, dealer, bank or other financial institution or other Person that clears through or maintains a custodial relationship with a Depository Participant.

Initial Aggregate Senior Percentage: 97.1410909983%

Initial Certification: As defined in Section 2.02(a) hereof.

Initial Purchaser: Countrywide Securities Corporation.

Insurance Policy: With respect to any Mortgage Loan included in the Trust Fund, any insurance policy, including all riders and endorsements thereto in effect, including any replacement policy or policies for any insurance policies and the related Agency Insurance Agreements.

Insurance Proceeds: Proceeds paid by an insurer pursuant to any Insurance Policy, in each case other than any amount included in such Insurance Proceeds in respect of Insured Expenses.

Insured Expenses: Expenses covered by an Insurance Policy or any other insurance policy with respect to the Mortgage Loans.

Interest Accrual Period: With respect to any Distribution Date and (i) each Class of Certificates (other than the Class 1A-F Certificates, the Class 2A-PO Certificates and the Residual Certificates), the calendar month prior to the month of such Distribution Date or (ii) the Class 1A-F Certificates, the period beginning with the 25th day of the month prior to the month in which such Distribution Date occurs and ending on the 24th day of the month of such Distribution Date. Interest on all classes of interest-bearing Certificates shall be calculated based on a 360-day year consisting of twelve 30-day months.

Interest Distributable Amount: With respect to any Distribution Date and a Category of Mortgage Loans, that portion of the Available Distribution Amount for such Distribution Date allocable to interest collected or advanced in respect of the Mortgage Loans of such Category less the Trustee Fee with respect to such Category of Mortgage Loans for such Distribution Date and the Class RM Interest Distribution Amount for such Distribution Date related to the Component of the Class RM Certificates related to such Category of Mortgage Loans.

Interest Distribution Amount: With respect to a Class of interest-bearing Certificates and a Distribution Date, the Senior Interest Distribution Amount, the Class 1A-S Interest Distribution Amount, the Class 2A-IO Interest Distribution Amount, the Class RM Interest Distribution Amount or the Subordinate Interest Distribution Amount, as applicable, payable to such Class on such Distribution Date.

Interest Only Certificates: As specified in the Preliminary Statement.

Interest Rate: With respect to each Subsidiary REMIC Interest, the applicable rate set forth or calculated in the manner described in the Preliminary Statement.

Latest Possible Maturity Date: The Distribution Date in March 2035 that is the 360th Distribution Date.

LIBOR: The one month rate which appears on the Moneyline Telerate System, page 3750 or such comparable system as is used to quote LIBOR, as of 11:00 a.m., London time on the related LIBOR Determination Date as determined by the Trustee. If such rate is not provided, LIBOR shall mean the rate determined by the Trustee (or a calculation agent on its behalf) in accordance with the following procedure:

- (i) The Trustee on the LIBOR Determination Date will request the principal London offices of each of four major reference banks in the London interbank market, as selected by the Trustee, to provide the Trustee with its offered quotation for deposits in United States dollars for the upcoming one-month period, commencing on the second LIBOR Business Day immediately following such LIBOR Determination Date, to prime banks in the London interbank market at approximately 11:00 a.m. London time on such LIBOR Determination Date and in a principal amount that is representative for a single transaction in United States dollars in such market at such time. If at least two such quotations are provided, LIBOR determined on such LIBOR Determination Date will be the arithmetic mean of such quotations.
- (ii) If fewer than two quotations are provided, LIBOR determined on such LIBOR Determination Date will be the arithmetic mean of the rates quoted at approximately 11:00 a.m. in New York City on such LIBOR Determination Date by three major banks in New York City selected by the Trustee for one-month United States dollar loans to lending European banks, in a principal amount that is representative for a single transaction in United States dollars in such market at such time; provided, however, that if the banks so selected by the Trustee are not quoting as mentioned in this sentence, LIBOR determined on such LIBOR Determination Date will continue to be LIBOR as then currently in effect on such LIBOR Determination Date.

LIBOR Business Day: Any day on which banks in London and New York are open for conducting transactions in currencies and exchange.

LIBOR Determination Date: With respect to any Distribution Date, the second LIBOR Business Day before the first day of the related Interest Accrual Period of the Class 1A-F Certificates.

LIBOR Rate: With respect to any Distribution Date, one-month LIBOR for such Distribution Date plus 0.36%.

Liquidated Mortgage Loan: With respect to any Distribution Date, a defaulted Mortgage Loan (including any REO Property) which was liquidated in the calendar month preceding the month of such Distribution Date and as to which the Master Servicer has determined (in accordance with this Agreement) that it has received all amounts it expects to receive in connection with the liquidation of such Mortgage Loan, including the final disposition of an REO Property.

Liquidation Proceeds: Amounts, including Insurance Proceeds, received in connection with the partial or complete liquidation of defaulted Mortgage Loans, whether through trustee's sale, foreclosure sale or otherwise or amounts received in connection with any condemnation or partial release of a Mortgaged Property, any other proceeds received in connection with any REO Property, any Chase Payments and any GMAC Payments, less the sum of related unreimbursed Servicing Fees, Servicing Advances and Monthly Advances and after giving effect to payment of unreimbursed liquidation expenses and payment in full of any outstanding arrearages in connection with such Mortgage Loan.

Loan Data Remittance Date: The 15th day of each calendar month, or if such 15th day is not a Business Day, the next succeeding Business Day.

Loan Guaranty Certificate: The certificate evidencing a VA Guaranty Agreement.

Loan-to-Value Ratio: With respect to any Mortgage Loan and as to any date of determination, the fraction (expressed as a percentage) the numerator of which is the principal balance of the related Mortgage Loan at such date of determination and the denominator of which is the Appraised Value of the related Mortgaged Property.

Lost Mortgage Note: Any Mortgage Note the original of which was permanently lost or destroyed and has not been replaced.

Majority in Interest: As to any Class of Regular Certificates, the Holders of Certificates of such Class evidencing, in the aggregate, at least 51% of the Percentage Interests evidenced by all Certificates of such Class.

Master Serviced Mortgage Loan: Each Mortgage Loan that is directly serviced by a servicer other than the Master Servicer.

Master Servicer: Countrywide Home Loans Servicing LP, a Texas limited partnership, and its successors and assigns, in its capacity as master servicer hereunder.

Master Servicer Remittance Date: The 24th day of each month or, if such 24th day is not a Business Day, the preceding Business Day.

Master Servicing Fee Rate: With respect to each Master Serviced Mortgage Loan, 0.000% per annum.

MERS: Mortgage Electronic Registration Systems, Inc., a corporation organized and existing under the laws of the State of Delaware, or any successor thereto.

MERS Mortgage Loan: Any Mortgage Loan registered with MERS on the MERS® System.

MERS® System: The system of recording transfers of mortgages electronically maintained by MERS.

MIN: The Mortgage Identification Number for any MERS Mortgage Loan.

Missing Document: As defined in Section 2.01

Monthly Advance: As to any Distribution Date, the payment required to be made by the Master Servicer with respect to any Distribution Date pursuant to Section 4.01, the amount of any such payment being equal to the aggregate of payments of principal and interest (net of the Servicing Fee and net of any net income in the case of any REO Property) on the Mortgage Loans that were due on the immediately preceding Due Date and not received by the Master Servicer, as of the close of business on the related Determination Date, less the aggregate amount of any such delinquent payments that the Master Servicer has determined would constitute a Nonrecoverable Advance if advanced.

Monthly Payment: The scheduled monthly payment on a Mortgage Loan due on any Due Date allocable to principal and/or interest on such Mortgage Loan which, unless otherwise specified herein, shall give effect to any related Debt Service Reduction and any Deficient Valuation that effects the amount of the monthly payment due on such Mortgage Loan.

Monthly Statement: The statement delivered to the Certificateholders pursuant to Section 4.06.

Moody's: Moody's Investors Service, Inc., or any successor thereto. If Moody's is designated as a Rating Agency in the Preliminary Statement, for purposes of Section 10.05(b) the address for notices to Moody's shall be Moody's Investors Service, Inc., 99 Church Street, New York, New York 10007, Attention: Residential Pass-Through Monitoring, or such other address as Moody's may hereafter furnish to the Depositor or the Master Servicer.

Mortgage: The mortgage, deed of trust or other instrument creating a first lien on an estate in fee simple or leasehold interest in real property securing a Mortgage Note.

Mortgage File: The mortgage documents listed in Section 2.01 hereof pertaining to a particular Mortgage Loan and any additional documents delivered to the Trustee (or the Custodian on its behalf) to be added to the Mortgage File pursuant to this Agreement.

Mortgage Insurance Certificate: The certificate evidencing an FHA Insurance Contract.

Mortgage Loans: Such of the mortgage loans transferred and assigned to the Trustee pursuant to the provisions hereof as from time to time are held as a part of the Trust Fund (including any REO Property), the mortgage loans so held being identified in the Mortgage Loan Schedule, notwithstanding foreclosure or other acquisition of title of the related Mortgaged Property.

Mortgage Loan Schedule: The list of Mortgage Loans (as from time to time amended by the Master Servicer to reflect the addition of Substitute Mortgage Loans and the deletion of Deleted Mortgage Loans pursuant to the provisions of this Agreement) transferred to the Trustee as part of the Trust Fund and from time to time subject to this Agreement, attached hereto as Schedule I, setting forth the following information with respect to each Mortgage Loan:

- (i) the loan number;
- (ii) the Mortgagor's name and the street address of the Mortgaged Property, including the zip code;
- (iii) the date of origination;
- (iv) the first Due Date;
- (v) the stated maturity date;
- (vi) the original principal balance;
- (vii) the Cut-off Date Principal Balance;
- (viii) the mortgage loan product type;
- (ix) the Monthly Payment in effect as of the Cut-off Date;
- (x) the interest "paid to date" of the mortgage loan as of the Cut-off Date;
- (xi) the lien position;
- (xii) the Loan-to-Value Ratio at origination;
- (xiii) a code indicating whether the residential dwelling at the time of origination was represented to be owner-occupied;
- (xiv) a code indicating whether the residential dwelling is either (a) a detached single family dwelling (b) a dwelling in a de minimis PUD, (c) a condominium unit or PUD (other than a de minimis PUD), (d) a two- to four-unit residential property or (e) a cooperative unit;
- (xv) the Mortgage Rate;
- (xvi) the purpose for the Mortgage Loan;
- (xvii) the type of documentation program pursuant to which the Mortgage Loan was originated, if available;
- (xviii) a code indicating whether the Mortgage Loan is a MERS Mortgage Loan;

(xix) a code indicating whether the Mortgage Loan is conventional, insured by the FHA, guaranteed by the VA or guaranteed by the RHS;

(xx) the original months to maturity and the remaining months to maturity;

(xxi) the delinquency status as of the Cut-off Date;

(xxii) the number of years the prepayment penalty, if any, is in effect;

(xxiii) the MIN;

(xxiv) the Servicing Fee Rate;

(xxv) the Trustee Fee Rate;

(xxvi) the sub-servicer or primary servicer of the Mortgage Loan;

(xxvii) the name of the originator or seller to the Seller of the Mortgage Loan;

(xxviii) the amount of any Arrearage, if any;

(xxix) a code indicating if the Mortgage File with respect to such Mortgage Loan has a Missing Document; and

(xxx) a code indicating in which Category the Mortgage Loan will be included.

Such schedule shall also set forth the total of the amounts described under (vi) and (vii) above for all of the Mortgage Loans.

Mortgage Note: The original executed note or other evidence of indebtedness of a Mortgagor under a Mortgage Loan.

Mortgage Pool: The aggregate of the Mortgage Loans identified in the Mortgage Loan Schedule.

Mortgage Rate: The annual rate of interest borne by a Mortgage Note from time to time, net of any interest premium charged by the mortgagee to obtain or maintain any primary insurance policy.

Mortgaged Property: The underlying property securing a Mortgage Loan.

Mortgagor: The obligor(s) on a Mortgage Note.

Net Prepayment Interest Shortfalls: As to any Distribution Date and the Mortgage Loans, the amount by which the aggregate of Prepayment Interest Shortfalls with respect to such Mortgage Loans during the related Prepayment Period exceeds an amount equal to the Compensating Interest (or allocable portion thereof) payable on such Distribution Date with respect to such Mortgage Loans.

Net Mortgage Rate: With respect to any Mortgage Loan (or the related REO Property), as of any date of determination, a per annum rate of interest equal to the then applicable Mortgage Rate for such Mortgage Loan as of the first day of the month preceding the month in which the Distribution Date occurs minus the sum of (i) the Servicing Fee Rate, (ii) the Master Servicing Fee Rate and (iii) the Trustee Fee Rate.

Net WAC Rate Carryover Amount: With respect to each of the Class 1A-F1 and Class 1A-F2 Certificates and any Distribution Date, the sum of (A) the positive excess of (i) the amount of interest accrued on such Class 1A-F Certificates on such Distribution Date calculated at the related Pass-Through Rate, without giving effect to clause (ii) of the definition thereof, over (ii) the amount of interest accrued on such Class 1A-F Certificates at the Net WAC rate for such Distribution Date (such excess, the “Net WAC Shortfall”) and (B) any Net WAC Shortfall for any previous Distribution Date not previously paid, together with interest thereon at a rate equal to the related Pass-Through Rate (without giving effect to the applicable Net WAC rate) for such Class 1A-F Certificates for such Distribution Date and for such Interest Accrual Period.

Net WAC Rate Carryover Reserve Account: The account established and maintained pursuant to Section 4.05.

Non-PO Percentage: With respect to (i) each Category 1 Mortgage Loan, 100% and (ii) each Category 2 Mortgage Loan, 100% minus the related Class PO Percentage.

Nonrecoverable Advance: Any portion of a Monthly Advance or Servicing Advance made or proposed to be made by the Master Servicer that, in the good faith judgment of the Master Servicer, will not be ultimately recoverable by the Master Servicer from the related Mortgagor, related Liquidation Proceeds, related Insurance Proceeds, related Condemnation Proceeds or otherwise.

Notice of Final Distribution: The notice to be provided pursuant to Section 9.02 to the effect that final distribution on any of the Certificates shall be made only upon presentation and surrender thereof.

Notional Amount: With respect to any Distribution Date and (i) the Class 1A-S Certificates, the sum of the Certificate Principal Balance of the Class 1A-F Certificates as of the day immediately preceding such Distribution Date and the Category 1 Subordination Amount for such Distribution Date, (ii) the Class 2A-IO Certificates, sum of the outstanding principal balances of the Category 2 Mortgage Loans, as of the first day of the related Due Period, (iii) the Class RM-1 Component, the sum of the Scheduled Principal Balances of the Category 1 Mortgage Loans as of the first day of the related Due Period, (iv) the Class RM-2 Component, the sum of the Scheduled Principal Balances of the Category 2 Mortgage Loans as of the first day of the related Due Period. The Notional Amount for the first Distribution Date will be approximately \$499,716,927 with respect to the Class 1A-S Certificates, \$90,448,481 with respect to the Class 2A-IO Certificates and approximately \$499,716,927 with respect to the Class RM-1 Component and approximately \$90,448,481 with respect to the Class RM-2 Component. For federal income tax purposes, the Class 1A-S Certificates will accrue interest on a Notional Amount equal to (1) the Uncertificated Principal Balance of REMIC II Regular Interest LT2-F1, (2) the Uncertificated Principal Balance of REMIC II Regular Interest LT2-F2 and (3) the

Uncertificated Principal Balance of REMIC I Regular Interest LT2-1SUB. For federal income tax purposes, the Class 2A-IO Certificates will accrue interest on a Notional Amount equal to (1) the Uncertificated Principal Balance of REMIC II Regular Interest LT2-2SUB and (2) the Uncertificated Principal Balance of REMIC II Regular Interest LT2-3SUB. For federal income tax purposes, the Class RM Certificates will not have a Notional Amount, but will be entitled to 100% of amounts distributed on REMIC II Regular Interest LT2-RM.

Notional Amount Certificates: The Class 1A-S, Class 2A-IO and Class RM Certificates, as applicable.

Offering Memorandum: The Offering Memorandum, dated March [___], 2005 relating to CWMBBS, Inc., CWMBBS Reperforming Loan REMIC Trust Certificates, Series 2005-R1.

Officer's Certificate: A certificate (i) in the case of the Depositor, signed by the Chairman of the Board, the Vice Chairman of the Board, the President, a Managing Director, a Vice President (however denominated), an Assistant Vice President, the Treasurer, the Secretary, or one of the Assistant Treasurers or Assistant Secretaries of the Depositor or the Master Servicer, (ii) in the case of the Master Servicer, signed by the President, an Executive Vice President, a Vice President, an Assistant Vice President, the Treasurer, or one of the Assistant Treasurers or Assistant Secretaries of Countrywide GP, Inc., its general partner or (iii) if provided for in this Agreement, signed by a Servicing Officer, as the case may be, and delivered to the Depositor and the Trustee, as the case may be, as required by this Agreement.

Opinion of Counsel: A written opinion of counsel, who may be counsel for the Depositor or the Master Servicer, including, in-house counsel, reasonably acceptable to the Trustee; provided, however, that with respect to the interpretation or application of the REMIC Provisions, such counsel must (i) in fact be independent of the Depositor and the Master Servicer, (ii) not have any direct financial interest in the Depositor or the Master Servicer or in any affiliate of either and (iii) not be connected with the Depositor or the Master Servicer as an officer, employee, promoter, underwriter, trustee, partner, director or person performing similar functions.

Optional Termination: The termination of the trust created hereunder in connection with the purchase of the Mortgage Loans pursuant to Section 9.01(a) hereof.

Original Mortgage Loan: The mortgage loan refinanced in connection with the origination of a Refinancing Mortgage Loan.

Original Subordinate Principal Balance: The aggregate of the Class Certificate Balances of the Subordinate Certificates as of the Closing Date which shall equal \$16,822,109.59.

OTS: The Office of Thrift Supervision.

Outstanding Certificate: As of any date of determination, all Certificates theretofore executed and authenticated under this Agreement except:

- (i) Certificates theretofore canceled by the Trustee or delivered to the Trustee for cancellation; and
- (ii) Certificates in exchange for which or in lieu of which other Certificates have been executed and delivered by the Trustee pursuant to this Agreement.

Outstanding Mortgage Loan: As of any Due Date, a Mortgage Loan with a Scheduled Principal Balance greater than zero, which was not the subject of a Principal Prepayment in Full prior to such Due Date and which did not become a Liquidated Mortgage Loan prior to such Due Date.

Ownership Interest: As to any Residual Certificate, any ownership interest in such Certificate including any interest in such Certificate as the Holder thereof and any other interest therein, whether direct or indirect, legal or beneficial.

Pass-Through Rate: For each interest bearing Class of Certificates and any Distribution Date, the following per annum rate:

- (i) with respect to the Class 1A-F1 Certificates, the least of (i) One-Month LIBOR Rate for such Distribution Date, (ii) the Category 1 Net WAC Rate for such Distribution Date and (iii) 9.500%;
- (ii) with respect to the Class 1A-F2 Certificates, the least of (i) the LIBOR Rate for such Distribution Date, (ii) the Category 1 Net WAC Rate with respect for such Distribution Date and (iii) 8.000%;
- (iii) with respect to the Class 1A-S, the sum of:
 - (a) the product of (a) the positive difference, if any, of the Category 1 Net WAC Rate for such Distribution Date over the lesser of (x) the LIBOR Rate for such Distribution Date and (y) 9.500% and (b) a fraction, the numerator of which is the Certificate Principal Balance of the Class 1A-F1 Certificates as of the day immediately prior to such Distribution Date and the denominator of which is the sum of the Certificate Principal Balances of the Class 1A-F Certificates as of the day immediately prior to such Distribution Date and the Category 1 Subordination Balance for such Distribution Date,
 - (b) the product of (a) the positive difference, if any, of the Category 1 Net WAC Rate for such Distribution Date over the lesser of (x) the LIBOR Rate for such Distribution Date and (y) 8.000% and (b) a fraction, the numerator of which is the Certificate Principal Balance of the Class 1A-F2 Certificates as of the day immediately prior to such Distribution Date and the denominator of which is the sum of the Certificate Principal Balances of the Class 1A-F Certificates as of the day immediately prior to such Distribution Date and the Category 1 Subordination Balance for such Distribution Date, and

(c) the product of (a) the difference, not less than zero, between the Category 1 Net WAC Rate for such Distribution Date and 5.500% and (b) a fraction, the numerator of which is the Category 1 Subordination Balance for such Distribution Date and the denominator of which is the sum of the Certificate Principal Balances of the Class 1A-F Certificates as of the day immediately prior to such Distribution Date and the Category 1 Subordination Balance for such Distribution Date;

For federal income tax purposes, the equivalent of the foregoing shall be expressed as (1) the excess, if any, of (i) the Uncertificated REMIC II Pass-Through Rate on REMIC II Regular Interest LT2-F1 over (ii) the Pass-Through Rate on the Class IA-F1 Certificates, (2) the excess, if any, of (i) the Uncertificated REMIC II Pass-Through Rate on REMIC II Regular Interest LT2-F2 over (ii) the Pass-Through Rate on the Class IA-F2 Certificates and (3)) the excess, if any, of (i) the Uncertificated REMIC II Pass-Through Rate on REMIC II Regular Interest LT2-1SUB over (ii) 5.50% per annum.

- (iv) with respect to the Class 2A-1 Certificates, 6.000%;
- (v) with respect to the Class 2A-2 Certificates, 6.500%;
- (vi) with respect to the Class 2A-IO Certificates, the sum of the following :
 - (i) the product of (x) the excess, if any, of the Category 2C Net WAC Rate for such Distribution Date over 6.50% per annum and (y) a fraction, the numerator of which is equal to the sum of the Scheduled Principal Balances of the Category 2C Mortgage Loans and the denominator of which is equal to the the sum of the Scheduled Principal Balances of the Category 2 Mortgage Loans, in each case as of the first day of the related Due Period,
 - (ii) the product of (x) 0.50% and (y) a fraction, the numerator of which is equal to the Collateral Group 1 Subordination Balance for such Distribution Date and the denominator of which is equal to the the sum of the Scheduled Principal Balances of the Category 2 Mortgage Loans as of the first day of the related Due Period and
 - (iii) the product of (x) 1.00% and (y) a fraction, the numerator of which is equal to the Collateral Group 2 Subordination Balance for such Distribution Date and the denominator of which is equal to the the sum of the Scheduled Principal Balances of the Category 2 Mortgage Loans as of the first day of the related Due Period.

For federal income tax purposes, the equivalent of the foregoing shall be expressed as (1) 0.50% per annum and (2) 1.00% per annum and 100% of amounts distributed on REMIC II Regular Interest LT2-IO.

- (iv) with respect to the Subordinate Certificates, the lesser of (i) 5.500% per annum and (ii) the Subordinate Net WAC Rate on such Distribution Date;
- (v) with respect to the Class RM Certificates and (a) the Class RM-1 Component; the Category 1 Weighted Average Excess Rate, and (b) the Class RM-2 Component; the Category 2 Weighted Average Excess Rate.

Percentage Interest: As to any Certificate, the percentage interest evidenced thereby in distributions required to be made on the related Class, such percentage interest being set forth on the face thereof or equal to the percentage obtained by dividing the Denomination of such Certificate by the aggregate of the Denominations of all Certificates of the same Class.

Permitted Investments: At any time, any one or more of the following obligations and securities:

- (i) direct obligations of, or obligations fully guaranteed as to principal and interest by, the United States or any agency or instrumentality thereof, provided such obligations are backed by the full faith and credit of the United States;
- (ii) repurchase obligations (the collateral for which is held by a third party or the Trustee) with respect to any security described in clause (i) above; provided that the long-term unsecured obligations of the party agreeing to repurchase such obligations are at the time rated by each Rating Agency in one of its two highest rating categories and the short-term unsecured obligations of such party are rated "A-1+" by S&P;
- (iii) certificates of deposit, time deposits, and bankers' acceptances of any bank or trust company (including the Trustee) incorporated under the laws of the United States or any state; provided that the long-term unsecured debt obligations of such bank or trust company at the date of acquisition thereof have been rated by each of S&P and Moody's in one of its respective two highest rating categories and the short-term debt obligations of such bank or trust company at the date of acquisition thereof have been rated "A-1+" by S&P ;
- (iv) commercial paper (having original maturities of not more than 270 days) of any corporation incorporated under the laws of the United States or any state thereof which on the date of acquisition has been rated by each Rating Agency in its highest short-term unsecured debt rating; and
- (v) any other demand, money market or time deposit account or obligation (including those managed or advised by the Trustee or its affiliates), or

interest-bearing or other security or investment, which is rated in the highest rating category by any rating agency or would not affect the then-current rating of the Certificates by the Rating Agency;

provided, that Permitted Investments may not include (i) “stripped certificates,” which evidence the right to receive primarily interest, or (ii) any instrument that evidences the right to receive principal and interest payments derived from obligations underlying such instrument if the interest and principal payments with respect to such instrument provide a yield to maturity at par greater than 120% of the yield to maturity at par of the underlying obligations.

Permitted Transferee: Any Person other than (i) the United States, any State or political subdivision thereof, or any agency or instrumentality of any of the foregoing, (ii) a foreign government, International Organization or any agency or instrumentality of either of the foregoing, (iii) an organization (except certain farmers’ cooperatives described in section 521 of the Code) which is exempt from tax imposed by Chapter 1 of the Code (including the tax imposed by section 511 of the Code on unrelated business taxable income) on any excess inclusions (as defined in section 860E(c)(1) of the Code) with respect to any Residual Certificate, (iv) rural electric and telephone cooperatives described in section 1381(a)(2)(C) of the Code, (v) an “electing large partnership” as defined in Section 775 of the Code, (vi) a Person that is not a citizen or resident of the United States, a corporation, partnership, or other entity created or organized in or under the laws of the United States, any state thereof or the District of Columbia, or an estate or trust whose income from sources without the United States is includible in gross income for United States federal income tax purposes regardless of its connection with the conduct of a trade or business within the United States or a trust if a court within the United States is able to exercise primary supervision over the administration of the trust and one or more United States persons have the authority to control all substantial decisions of the trust unless such Person has furnished the transferor and the Trustee with a duly completed Internal Revenue Service Form W-8ECI or any applicable successor form, and (vii) any other Person so designated by the Depositor based upon an Opinion of Counsel that the Transfer of an Ownership Interest in a Residual Certificate to such Person may cause any REMIC hereunder to fail to qualify as a REMIC at any time that the Certificates are outstanding. The terms “United States,” “State” and “International Organization” shall have the meanings set forth in section 7701 of the Code or successor provisions. A corporation will not be treated as an instrumentality of the United States or of any State or political subdivision thereof for these purposes if all of its activities are subject to tax and, with the exception of the Federal Home Loan Mortgage Corporation, a majority of its board of directors is not selected by such government unit.

Person: Any individual, corporation, partnership, joint venture, association, limited liability company, joint-stock company, trust, unincorporated organization or government, or any agency or political subdivision thereof.

Physical Certificate: As specified in the Preliminary Statement.

Plan: Any employee benefit plan subject to ERISA or a plan or arrangement subject to section 4975 of the Code.

Pool Scheduled Principal Balance: As to any Distribution Date, the aggregate of the Scheduled Principal Balances of the Mortgage Loans which were Outstanding Mortgage Loans on the Due Date in the month preceding the month of such Distribution Date.

Prepayment Assumption: As defined in the Offering Memorandum.

Prepayment Interest Excess: With respect to any Distribution Date and any Principal Prepayment received during the related Prepayment Period, all amounts paid by the related Mortgagor in respect of interest on such Principal Prepayment in excess of one month's interest on the related Mortgage Loan.

Prepayment Interest Shortfall: As to any Distribution Date and any Mortgage Loan for which a Principal Prepayment was received during the related Prepayment Period, the amount, if any, by which one month's interest at the related Mortgage Rate, net of the Servicing Fee Rate, on such Principal Prepayment exceeds the amount of interest paid in connection with such Principal Prepayment.

Prepayment Period: With respect to any Distribution Date, the period commencing on the second day of the month preceding the month in which such Distribution Date occurs and ending on the first day of the month in which such Distribution Date occurs.

Prime Rate: The prime rate of United States money center commercial banks as published in *The Wall Street Journal*.

Principal Collections: With respect to any Distribution Date and a Category of Mortgage Loans, that portion of the Available Distribution Amount attributable to such Category of Mortgage Loans for such Distribution Date *minus* the Interest Distributable Amount for such Category of Mortgage Loans and such Distribution Date.

Principal Distributable Amount: With respect to any Distribution Date and a Category or Collateral Group of Mortgage Loans, the sum of the following amounts:

- (a) all monthly payments of scheduled principal due on each Mortgage Loan or portion thereof in such Category or Collateral Group during the related Due Period, *plus*
- (b) the principal portion of the purchase price of each Mortgage Loan or portion thereof in such Category or Collateral Group that the Seller or Master Servicer repurchases with respect to that Distribution Date, *plus*
- (c) the Substitution Adjustment Amount received in connection with any Mortgage Loan or portion thereof in such Category or Collateral Group with respect to that Distribution Date, *plus*
- (d) any Insurance Proceeds or Liquidation Proceeds received during the related Prepayment Period that are allocable to recoveries of principal of the Mortgage Loans or portion thereof in such Category or Collateral Group that are not yet Liquidated Loans, *plus*

- (e) for each Mortgage Loan or portion thereof in such Category or Collateral Group that became a Liquidated Loan during the related Prepayment Period, the Scheduled Principal Balance of that Mortgage Loan to the extent recovered, *plus*
- (f) all partial and full principal prepayments received during the related Prepayment Period from the borrowers on each Mortgage Loan or portion thereof in such Category or Collateral Group.

Principal Prepayment: Any payment of principal by a Mortgagor on a Mortgage Loan that is received in advance of its scheduled Due Date and is not accompanied by an amount representing scheduled interest due on any date or dates in any month or months subsequent to the month of prepayment. Partial Principal Prepayments shall be applied by the Master Servicer in accordance with the terms of the related Mortgage Note.

Principal Prepayment in Full: Any Principal Prepayment made by a Mortgagor of the entire principal balance of a Mortgage Loan.

Private Certificate: As specified in the Preliminary Statement.

PUD: Planned Unit Development.

Purchase Price: With respect to any Mortgage Loan required to be purchased by the Seller pursuant to Section 2.02 or 2.03 hereof or purchased by the Master Servicer pursuant to Section 3.11, 3.20 or 8.11, an amount equal to the sum of (i) 100% of the unpaid principal balance of the Mortgage Loan on the date of such purchase, (ii) accrued interest thereon at the applicable Mortgage Rate (or at the applicable Net Mortgage Rate if the purchaser is the Master Servicer and, with respect to a Reduced-Rate Mortgage Loan, at the Mortgage Rate or Net Mortgage Rate prior to such rate modification) from the date through which interest was last paid by the Mortgagor to the Due Date in the month in which the Purchase Price is to be distributed to Certificateholders, (iii) in the case of a Mortgage Loan required to be purchased pursuant to Section 2.03, expenses reasonably incurred or to be incurred by the Master Servicer or the Trustee in respect of the breach or defect giving rise to the purchase obligation and (iv) costs and damages incurred by the Trust Fund in connection with a repurchase pursuant to Section 2.03 hereof that arises out of a violation of any predatory or abusive lending law with respect to the related Mortgage Loan.

Qualified Insurer: A mortgage guaranty insurance company duly qualified as such under the laws of the state of its principal place of business and each state having jurisdiction over such insurer in connection with the insurance policy issued by such insurer, duly authorized and licensed in such states to transact a mortgage guaranty insurance business in such states and to write the insurance provided by the insurance policy issued by it, approved as a FHLMC-approved mortgage insurer and having a claims paying ability rating of at least "AA" or equivalent rating by a nationally recognized statistical rating organization. Any replacement insurer with respect to a Mortgage Loan must have at least as high a claims paying ability rating as the insurer it replaces had on the Closing Date.

Rate-Increased Mortgage Loans: A Mortgage Loan, the Mortgage Rate of which has been increased pursuant to a modification by the Master Servicer or a primary servicer after the Cut-off Date.

Rating Agency: Each of the Rating Agencies specified in the Preliminary Statement. If any such organization or a successor is no longer in existence, "Rating Agency" shall be such nationally recognized statistical rating organization, or other comparable Person, as is designated by the Depositor, notice of which designation shall be given to the Trustee. References herein to a given rating category of a Rating Agency shall mean such rating category without giving effect to any modifiers.

Realized Loss: With respect to each Liquidated Mortgage Loan, an amount (not less than zero or more than the Scheduled Principal Balance of the Mortgage Loan) as of the date of such liquidation, equal to (i) the Scheduled Principal Balance of the Liquidated Mortgage Loan as of the date of such liquidation, *minus* (ii) Liquidation Proceeds, if any, received during the month in which such liquidation occurred, to the extent applied as recoveries of principal of the Liquidated Mortgage Loan. With respect to each Mortgage Loan which has become the subject of a Deficient Valuation, if the principal amount due under the related Mortgage Note has been reduced, the difference between the principal balance of the Mortgage Loan outstanding immediately prior to such Deficient Valuation and the principal balance of the Mortgage Loan as reduced by the Deficient Valuation. With respect to each Mortgage Loan that has become the subject of a Debt Service Reduction and any Distribution Date, the amount, if any, by which the principal portion of the related Monthly Payment has been reduced.

Record Date: With respect to any Distribution Date and (i) each Class of Certificates other than the Class 2A-PO Certificates, the close of business on the last day of the related Interest Accrual Period or (ii) the Class 2A-PO Certificates, the last Business Day of the month preceding the month in which such Distribution Date occurs.

Reduced-Rate Mortgage Loan: A Mortgage Loan the Mortgage Rate of which has been reduced pursuant to a modification by the Master Servicer or a primary servicer after the Cut-off Date.

Refinancing Mortgage Loan: Any Mortgage Loan originated in connection with the refinancing of an existing mortgage loan.

Regular Certificates: As specified in the Preliminary Statement.

Relief Act: The Servicemembers Civil Relief Act of 1940, as amended.

Relief Act Reductions: With respect to any Distribution Date and any Mortgage Loan as to which there has been a reduction in the amount of interest collectible thereon for the most recently ended calendar month as a result of the application of the Relief Act, the amount, if any, by which (i) interest collectible on such Mortgage Loan for the most recently ended calendar month is less than (ii) interest accrued thereon for such month pursuant to the Mortgage Note.

REMIC: A “real estate mortgage investment conduit” within the meaning of section 860D of the Code.

REMIC Change of Law: Any proposed, temporary or final regulation, revenue ruling, revenue procedure or other official announcement or interpretation relating to REMICs and the REMIC Provisions issued after the Closing Date.

REMIC I: The corpus of the trust created hereunder consisting of (i) the Category 1 Mortgage Loans and all interest and principal received on or with respect thereto after the Cut-off Date to the extent not applied in computing the Cut-off Date Principal Balance thereof and excluding all Arrearages; (ii) the Collection Account, the Distribution Account, and all amounts deposited therein (with respect to Category 1 Mortgage Loans) pursuant to the applicable provisions of this Agreement; (iii) property that secured a Category 1 Mortgage Loan and has been acquired by foreclosure, deed-in-lieu of foreclosure or otherwise; and (iv) all proceeds of the conversion, voluntary or involuntary, of any of the foregoing. Notwithstanding the foregoing, however, a REMIC election will not be made with respect to the Net WAC Rate Carryover Reserve Account and the Cap Contracts.

REMIC I Regular Interest: Any of REMIC I Regular Interest LT1-1, REMIC I Regular Interest LT1-2, REMIC I Regular Interest LT1-3, REMIC I Regular Interest LT1-IO, REMIC I Regular Interest LT1-PO and REMIC I Regular Interest LT1-RM.

REMIC I Regular Interest LT1-1: One of the separate non-certificated beneficial ownership interests in REMIC I issued hereunder and designated as a Regular Interest in REMIC I. REMIC I Regular Interest LT1-1 shall accrue interest at the related Uncertificated REMIC I Pass-Through Rate in effect from time to time, and shall be entitled to distributions of principal, subject to the terms and conditions hereof, in an aggregate amount equal to its initial Uncertificated Principal Balance as set forth in the Preliminary Statement hereto.

REMIC I Regular Interest LT1-2: One of the separate non-certificated beneficial ownership interests in REMIC I issued hereunder and designated as a Regular Interest in REMIC I. REMIC I Regular Interest LT1-2 shall accrue interest at the related Uncertificated REMIC I Pass-Through Rate in effect from time to time, and shall be entitled to distributions of principal, subject to the terms and conditions hereof, in an aggregate amount equal to its initial Uncertificated Principal Balance as set forth in the Preliminary Statement hereto.

REMIC I Regular Interest LT1-3: One of the separate non-certificated beneficial ownership interests in REMIC I issued hereunder and designated as a Regular Interest in REMIC I. REMIC I Regular Interest LT1-3 shall accrue interest at the related Uncertificated REMIC I Pass-Through Rate in effect from time to time, and shall be entitled to distributions of principal, subject to the terms and conditions hereof, in an aggregate amount equal to its initial Uncertificated Principal Balance as set forth in the Preliminary Statement hereto.

REMIC I Regular Interest LT1-IO: One of the separate non-certificated beneficial ownership interests in REMIC I issued hereunder and designated as a Regular Interest in REMIC I. REMIC I Regular Interest LT1-IO shall accrue interest at the related Uncertificated REMIC I Pass-Through Rate in effect from time to time, subject to the terms and conditions hereof.

REMIC I Regular Interest LT1-PO: One of the separate non-certificated beneficial ownership interests in REMIC I issued hereunder and designated as a Regular Interest in REMIC I. REMIC I Regular Interest LT1-PO shall be entitled to distributions of principal, subject to the terms and conditions hereof, in an aggregate amount equal to its initial Uncertificated Principal Balance as set forth in the Preliminary Statement hereto.

REMIC I Regular Interest LT1-RM: One of the separate non-certificated beneficial ownership interests in REMIC I issued hereunder and designated as a Regular Interest in REMIC I. REMIC I Regular Interest LT1-RM shall accrue interest at the related Uncertificated REMIC I Pass-Through Rate in effect from time to time, subject to the terms and conditions hereof.

REMIC II: The segregated pool of assets consisting of all of the REMIC I Regular Interests conveyed in trust to the Trustee, for the benefit of the Holders of the REMIC II Regular Interests, and the Class R Certificateholders, as holders of the Class R-II Interest, pursuant to Article II hereunder, and all amounts deposited therein, with respect to which a separate REMIC election is to be made.

REMIC II Regular Interest: Any of REMIC II Regular Interest LT2-F1, REMIC II Regular Interest LT2-F2, REMIC II Regular Interest LT2-1SUB, REMIC II Regular Interest LT2-2SUB, REMIC II Regular Interest LT2-2SEN, REMIC II Regular Interest LT2-3SUB, REMIC II Regular Interest LT2-3SEN, REMIC II Regular Interest LT2-IO, REMIC II Regular Interest LT2-PO and REMIC II Regular Interest LT2-RM.

REMIC II Regular Interest LT2-F1: One of the separate non-certificated beneficial ownership interests in REMIC I issued hereunder and designated as a Regular Interest in REMIC II. REMIC II Regular Interest LT2-F1 shall accrue interest at the related Uncertificated REMIC II Pass-Through Rate in effect from time to time, and shall be entitled to distributions of principal, subject to the terms and conditions hereof, in an aggregate amount equal to its initial Uncertificated Principal Balance as set forth in the Preliminary Statement hereto.

REMIC II Regular Interest LT2-F2: One of the separate non-certificated beneficial ownership interests in REMIC I issued hereunder and designated as a Regular Interest in REMIC II. REMIC II Regular Interest LT2-F2 shall accrue interest at the related Uncertificated REMIC II Pass-Through Rate in effect from time to time, and shall be entitled to distributions of principal, subject to the terms and conditions hereof, in an aggregate amount equal to its initial Uncertificated Principal Balance as set forth in the Preliminary Statement hereto.

REMIC II Regular Interest LT2-1SUB: One of the separate non-certificated beneficial ownership interests in REMIC I issued hereunder and designated as a Regular Interest in REMIC II. REMIC II Regular Interest LT2-1SUB shall accrue interest at the related Uncertificated REMIC II Pass-Through Rate in effect from time to time, and shall be entitled to distributions of principal, subject to the terms and conditions hereof, in an aggregate amount equal to its initial Uncertificated Principal Balance as set forth in the Preliminary Statement hereto.

REMIC II Regular Interest LT2-2SUB: One of the separate non-certificated beneficial ownership interests in REMIC I issued hereunder and designated as a Regular Interest in REMIC II. REMIC II Regular Interest LT2-2SUB shall accrue interest at the related Uncertificated

REMIC II Pass-Through Rate in effect from time to time, and shall be entitled to distributions of principal, subject to the terms and conditions hereof, in an aggregate amount equal to its initial Uncertificated Principal Balance as set forth in the Preliminary Statement hereto.

REMIC II Regular Interest LT2-2SEN: One of the separate non-certificated beneficial ownership interests in REMIC I issued hereunder and designated as a Regular Interest in REMIC II. REMIC II Regular Interest LT2-2SEN shall accrue interest at the related Uncertificated REMIC II Pass-Through Rate in effect from time to time, and shall be entitled to distributions of principal, subject to the terms and conditions hereof, in an aggregate amount equal to its initial Uncertificated Principal Balance as set forth in the Preliminary Statement hereto.

REMIC II Regular Interest LT2-3SUB: One of the separate non-certificated beneficial ownership interests in REMIC I issued hereunder and designated as a Regular Interest in REMIC II. REMIC II Regular Interest LT2-3SUB shall accrue interest at the related Uncertificated REMIC II Pass-Through Rate in effect from time to time, and shall be entitled to distributions of principal, subject to the terms and conditions hereof, in an aggregate amount equal to its initial Uncertificated Principal Balance as set forth in the Preliminary Statement hereto.

REMIC II Regular Interest LT2-3SEN: One of the separate non-certificated beneficial ownership interests in REMIC I issued hereunder and designated as a Regular Interest in REMIC II. REMIC II Regular Interest LT2-3SEN shall accrue interest at the related Uncertificated REMIC II Pass-Through Rate in effect from time to time, and shall be entitled to distributions of principal, subject to the terms and conditions hereof, in an aggregate amount equal to its initial Uncertificated Principal Balance as set forth in the Preliminary Statement hereto.

REMIC II Regular Interest LT2-IO: One of the separate non-certificated beneficial ownership interests in REMIC II issued hereunder and designated as a Regular Interest in REMIC II. REMIC II Regular Interest LT2- shall be entitled to 100% of amounts distributed on REMIC I Regular Interest LT1-IO, subject to the terms and conditions hereof.

REMIC II Regular Interest LT2-PO: One of the separate non-certificated beneficial ownership interests in REMIC II issued hereunder and designated as a Regular Interest in REMIC II. REMIC II Regular Interest LT2-PO shall be entitled to distributions of principal, subject to the terms and conditions hereof, in an aggregate amount equal to its initial Uncertificated Principal Balance as set forth in the Preliminary Statement hereto.

REMIC II Regular Interest LT2-RM: One of the separate non-certificated beneficial ownership interests in REMIC II issued hereunder and designated as a Regular Interest in REMIC II. REMIC I Regular Interest LT2-RM shall be entitled to 100% of amounts distributed on REMIC I Regular Interest LT1-RM, subject to the terms and conditions hereof.

REMIC III: The segregated pool of assets consisting of all of the REMIC II Regular Interests conveyed in trust to the Trustee, for the benefit of the Holders of the Regular Certificates, as holders of the Regular Interests in REMIC III, and the Class R Certificateholders, as holders of the Class R-III Interest, pursuant to Article II hereunder, and all amounts deposited therein, with respect to which a separate REMIC election is to be made.

REMIC Provisions: Provisions of the federal income tax law relating to REMICs which appear at Section 860A through 860G of Subchapter M of Chapter 1 of the Code, and related provisions, and regulations and rulings promulgated thereunder, as the foregoing may be in effect from time to time.

REMIC Regular Interest: Any REMIC I Regular Interest or REMIC II Regular Interest.

REO Property: A Mortgaged Property acquired by the Trust Fund through foreclosure or deed-in-lieu of foreclosure in connection with a defaulted Mortgage Loan.

Request for Release: The Request for Release submitted by the Master Servicer to the Custodian, in the form of (or substantially to the effect of) Exhibit M or Exhibit N.

Required Insurance Policy: With respect to any Mortgage Loan, any Insurance Policy that is required to be maintained from time to time under this Agreement.

Residual Certificates: As specified in the Preliminary Statement.

Responsible Officer: When used with respect to the Trustee, any Vice President, any Assistant Vice President, the Secretary, any Assistant Secretary, any Trust Officer or any other officer of the Trustee customarily performing functions similar to those performed by any of the above designated officers and also to whom, with respect to a particular matter, such matter is referred because of such officer's knowledge of and familiarity with the particular subject.

RHS: Rural Housing Service of the U.S. Department of Agriculture.

RHS Guaranty Agreements: With respect to an RHS Loan, the agreements evidencing the guaranty of such Mortgage Loan by the RHS.

RHS Loan: A Mortgage Loan guaranteed by the RHS.

S&P: Standard & Poor's Ratings Services, a division of The McGraw-Hill Companies, Inc., or any successor thereto. If S&P is designated as a Rating Agency in the Preliminary Statement, for purposes of Section 10.05(b) the address for notices to S&P shall be Standard and Poor's Ratings Services, a division of the McGraw-Hill Companies, Inc., 55 Water Street, New York, New York 10007, Attention: Residential Pass-Through Monitoring, or such other address as S&P may hereafter furnish to the Depositor or the Master Servicer.

Scheduled Principal Balance: With respect to any Mortgage Loan at any date of determination, the Cut-off Date Principal Balance of such Mortgage Loan after giving effect to the payment of principal due on each due date following the Cut-off Date and prior to such date of determination and irrespective of any delinquency in payment by the related mortgagor.

Securities Act: The Securities Act of 1933, as amended.

Seller: Countrywide Home Loans, Inc., a New York corporation, and its successors and assigns, in its capacity as seller of the Mortgage Loans to the Depositor.

Senior Certificates: As specified in the Preliminary Statement.

Senior Interest Distribution Amount: With respect to any Distribution Date and any Class of Class 1A-F, Class 2A-1 and Class 2A-2 Certificates, the sum of (i) interest accrued during the related Interest Accrual Period at one twelfth of the Pass Through Rate for such Class on the related Class Certificate Balance less (ii) the interest shortfall amount allocated to such Class on such Distribution Date as provided in Section 4.03(b) plus (iii) any Class Interest Shortfall Carryforward Amount for such Class and such Distribution Date.

Senior Percentage: As to any of Category 1, Collateral Group 1 or Collateral Group 2 and any Distribution Date, the lesser of (i) 100% and (ii) the percentage equivalent of a fraction, the numerator of which is the aggregate of the Class Certificate Balances of the related Class A Principal Certificates immediately prior to such distribution date and the denominator of which is the sum of the Scheduled Principal Balance of each Mortgage Loan or portion thereof in that Category or Collateral Group as of the first day of the related Due Period.

Senior Prepayment Percentage: As to any of Category 1, Collateral Group 1 or Collateral Group 2 and any Distribution Date, during the five years beginning on the first Distribution Date, 100%. The Senior Prepayment Percentage for any of Category 1, Collateral Group 1 or Collateral Group 2 and any Distribution Date occurring on or after the fifth anniversary of the first Distribution Date will, except as provided herein, be as follows: for any Distribution Date in the first year thereafter, the related Senior Percentage plus 70% of the Subordinate Percentage for such Distribution Date; for any Distribution Date in the second year thereafter, the related Senior Percentage plus 60% of the Subordinate Percentage for such Distribution Date; for any Distribution Date in the third year thereafter, the related Senior Percentage plus 40% of the Subordinate Percentage for such Distribution Date; for any Distribution Date in the fourth year thereafter, the related Senior Percentage plus 20% of the Subordinate Percentage for such Distribution Date; and for any Distribution Date thereafter, the related Senior Percentage for such Distribution Date; provided, however, that on any Distribution Date on which the Aggregate Senior Percentage exceeds the Initial Aggregate Senior Percentage as of the Closing Date, the Senior Prepayment Percentage for each of Category 1, Collateral Group 1 or Collateral Group 2 and Distribution Date shall be equal to 100%.

Notwithstanding the foregoing, no decrease in the Senior Prepayment Percentage with respect to any of Category 1, Collateral Group 1 or Collateral Group 2 will occur unless the Senior Step Down Condition for such Distribution Date is satisfied.

Senior Principal Distribution Amount: With respect to any Distribution Date, the Category 1 Senior Principal Distribution Amount, the Class 2A-1 Senior Principal Distribution Amount or the Class 2A-2 Senior Principal Distribution Amount, as applicable.

Senior Step Down Condition: With respect to any Distribution Date, cumulative Realized Losses on the Mortgage Loans in the aggregate do not exceed: (a) for each Distribution Date on or after the fifth but prior to the sixth anniversary of the first Distribution Date, 30% of the Original Subordinate Principal Balance, (b) for each Distribution Date on or after the sixth but prior to the seventh anniversary of the first Distribution Date, 35% of the Original Subordinate Principal Balance, (c) for each Distribution Date on or after the seventh but prior to the eighth

anniversary of the first Distribution Date, 40% of the Original Subordinate Principal Balance, (d) for each Distribution Date on or after the eighth but prior to the ninth anniversary of the first Distribution Date, 45% of the Original Subordinate Principal Balance, and (e) for each Distribution Date on or after the ninth anniversary of the first Distribution Date, 50% of the Original Subordinate Principal Balance.

Servicer Remittance Date: The Master Servicer Remittance Date.

Servicing Advances: All customary, reasonable and necessary “out of pocket” costs and expenses incurred by the Master Servicer in the performance of its servicing obligations, including, but not limited to, the cost of (i) the preservation, restoration and protection of a Mortgaged Property, (ii) any expenses reimbursable to the Master Servicer pursuant to Section 3.11 and any enforcement or judicial proceedings, including foreclosures, (iii) the management and liquidation of any REO Property and (iv) compliance with the obligations under Section 3.09.

Servicing Fee: As to each Mortgage Loan and any Distribution Date, an amount payable out of each full payment of interest received on such Mortgage Loan and equal to the sum of (i) one-twelfth of the Servicing Fee Rate multiplied by the Scheduled Principal Balance of such Mortgage Loan as of the Due Date in the month of such Distribution Date plus, (ii) with respect to each Master Serviced Mortgage Loan, one twelfth of the Master Servicing Fee Rate multiplied by the Scheduled Principal Balance of such Mortgage Loan as of the Due Date in the month of such Distribution Date (in each case prior to giving effect to any Monthly Payments due on such Mortgage Loan on such Due Date), subject to reduction as provided in Section 3.14.

Servicing Fee Rate: With respect to each Mortgage Loan, the rate per annum set forth on the Mortgage Loan Schedule as the servicing fee rate for such Mortgage Loan.

Servicing Officer: Any officer of the Master Servicer involved in, or responsible for, the administration and servicing of the Mortgage Loans whose name and facsimile signature appear on a list of servicing officers furnished to the Trustee by the Master Servicer on the Closing Date pursuant to this Agreement, as such list may from time to time be amended.

Servicing Transfer Costs: All reasonable costs and expenses incurred by the Trustee in connection with the transfer of servicing from a predecessor master servicer, including without limitation, any reasonable costs or expenses associated with the complete transfer of all servicing data and the completion, correction or manipulation of such servicing data as may be required by the Trustee to correct any errors or insufficiencies in the servicing data or otherwise to enable the Trustee (as successor Master Servicer) to service the Mortgage Loans in accordance with this Agreement.

Startup Day: The Closing Date.

Streamlined Documentation Mortgage Loan: Any Mortgage Loan originated pursuant to the Seller’s Streamlined Loan Documentation Program then in effect.

Subordinate Certificates: As specified in the Preliminary Statement.

Subordinate Interest Distribution Amount: With respect to any Distribution Date and a Class of Subordinate Certificates, the sum of (i) interest accrued during the related Interest Accrual Period at one-twelfth of the Pass-Through Rate for such Class on the related Class Certificate Balance, less (ii) the interest shortfall allocated to such Class on such Distribution Date as provided in Section 4.03(b) plus (iii) any Class Interest Shortfall Carryforward Amount for such Class.

Subordinate Net WAC Rate: With respect to a Distribution Date, means the weighted average of (i) the lesser of Category 1 Net WAC Rate for such Distribution Date and 5.500% and (ii) 5.500%, weighted on the basis of the Category 1 Subordination Balance and the Category 2 Subordination Balance, respectively, for such Distribution Date. For federal income tax purposes, the equivalent of the foregoing shall be expressed as the weighted average of the REMIC II Remittance Rates on REMIC II Regular Interest LT2-1SUB, REMIC II Regular Interest LT2-2SUB and REMIC II Regular Interest LT2-3SUB, weighted on the basis of the Uncertificated Principal Balance of each such REMIC II Regular Interest.

Subordinate Percentage: For any Distribution Date and any of Category 1, Collateral Group 1 or Collateral Group 2, 100% minus the related Senior Percentage for such Distribution Date; except that following the Distribution Date on which the Certificate Principal Balances of the Class A Principal Certificates related to such Category or Collateral Group have been reduced to zero and only one class of the Class A Principal Certificates related to the other Category or Collateral Groups are outstanding, the Subordinate Percentage for such Category or Collateral Group shall be zero.

Subordinate Prepayment Percentage: For any Distribution Date and any of Category 1, Collateral Group 1 or Collateral Group 2, 100% minus the related Senior Prepayment Percentage for such Distribution Date.

Subordinate Principal Distribution Amount: With respect to any Distribution Date, the sum of the Category 1 Subordinate Principal Distribution Amount, the Collateral Group 1 Subordinate Principal Distribution Amount and the Collateral Group 2 Subordinate Principal Distribution Amount.

Subsequent Recoveries: With respect to any Distribution Date and the Mortgage Loans, unanticipated amounts received on a Liquidated Mortgage Loan that resulted in a Realized Loss in a prior month and was allocated to a related Certificate on a prior Distribution Date.

Subservicer: Any person to whom the Master Servicer has contracted for servicing of all or a portion of the Mortgage Loans pursuant to Section 3.02 hereof.

Substitute Mortgage Loan: A Mortgage Loan substituted by the Seller for a Deleted Mortgage Loan which must, on the date of such substitution, as confirmed in a Request for Release, (i) have a Scheduled Principal Balance, after deduction of the principal portion of the Monthly Payment due in the month of substitution, not in excess of, and not more than 10% less than the Scheduled Principal Balance of the Deleted Mortgage Loan; (ii) be accruing interest at a rate no lower than and not more than 1% per annum higher than, that of the Deleted Mortgage Loan; (iii) have a remaining term to maturity no greater than (and not more than one year less

than that of) the Deleted Mortgage Loan; (iv) comply with each representation and warranty set forth in Section 2.03 hereof; (v) have FHA insurance, a VA guaranty or an RHS guaranty in good standing; (vi) be an FHA insured Mortgage Loan, if the Deleted Mortgage Loan was an FHA insured Mortgage Loan; (vii) not have Arrearages and outstanding Advances materially in excess of Arrearages and outstanding Advances with respect to the Deleted Mortgage Loan; (viii) not be in bankruptcy if the Deleted Mortgage Loan was not a loan subject to a bankruptcy plan; (ix) not have a delinquency status greater than the delinquency status of the Deleted Mortgage Loan; (x) not cause the geographic distribution of the Mortgage Loans to materially differ from the geographic distribution of the Mortgage Loans on the Closing Date; and (xi) have had an original principal balance which conformed to Freddie Mac loan limits.

Substitution Adjustment Amount: The meaning ascribed to such term pursuant to Section 2.03.

Tax Matters Person: The Person designated as “tax matters person” in the manner provided under Treasury regulation § 1.860F-4(d) and temporary Treasury regulation § 301.6231(a)(7)1T. Initially, the Tax Matters Person shall be the holder of the largest percentage of the Residual Certificates and the Trustee is hereby appointed to act as its agent.

Transfer: Any direct or indirect transfer or sale of any Ownership Interest in a Residual Certificate.

Trustee: The Bank of New York, and its successors and, if a successor trustee is appointed hereunder, such successor.

Trustee Fee: As to each Mortgage Loan and any Distribution Date, an amount payable out of each full payment of interest received on such Mortgage Loan and equal to one-twelfth of the Trustee Fee Rate multiplied by the Scheduled Principal Balance of such Mortgage Loan as of the first day of the related Due Period.

Trustee Fee Rate: With respect to each Mortgage Loan, the rate per annum set forth on the related Mortgage Loan Schedule as the trustee fee rate for such Mortgage Loan which shall not exceed 0.009% per annum.

Trustee Remittance Report: As defined in Section 4.09.

Trust Fund: All of the assets of CWMBS Reperforming Loan REMIC Trust Certificates, Series 2005-R1, which is the trust created hereunder consisting of REMIC I, REMIC II, REMIC III, the Net WAC Rate Carryover Reserve Account and the Cap Contracts.

Uncertificated Notional Amount: With respect to REMIC I Regular Interest LT1-RM, the aggregate Scheduled Principal Balance of the Mortgage Loans as of the first day of the related Due Period. With respect to REMIC I Regular Interest LT1-IO, the aggregate Scheduled Principal Balance of the Category 2 Mortgage Loans. REMIC II Regular Interest LT2-RM will not have an Uncertificated Notional Amount, but will be entitled to 100% of amounts distributed on REMIC I Regular Interest LT1-RM. REMIC II Regular Interest LT2-IO will not have an

Uncertificated Notional Amount, but will be entitled to 100% of amounts distributed on REMIC I Regular Interest LT1-IO.

Uncertificated Principal Balance: With respect to each REMIC Regular Interest (other than REMIC I Regular Interest LT1-RM, REMIC I Regular Interest LT1-IO, REMIC II Regular Interest LT2-IO and REMIC I Regular Interest LT1-RM), the amount of such REMIC Regular Interest outstanding as of any date of determination. As of the Closing Date, the Uncertificated Principal Balance of each REMIC Regular Interest shall equal the amount set forth in the Preliminary Statement hereto as its initial Uncertificated Principal Balance. On each Distribution Date, the Uncertificated Principal Balance of each REMIC Regular Interest shall be reduced by all distributions of principal made on such REMIC Regular Interest on such Distribution Date pursuant to Section 4.07 and, if and to the extent necessary and appropriate, shall be further reduced on such Distribution Date by Realized Losses as provided in Section 4.07. The Uncertificated Principal Balance of each REMIC Regular Interest that has an Uncertificated Principal Balance shall never be less than zero.

Uncertificated REMIC Accrued Interest: With respect to each Distribution Date, as to each REMIC Regular Interest (other than REMIC I Regular Interest LT1-PO and REMIC II Regular Interest LT2-PO), an amount equal to the aggregate amount of Accrued Certificate Interest that would result under the terms of the definition thereof on each such uncertificated interest, if the Pass-Through Rate on such uncertificated interest were equal to the related Uncertificated REMIC Pass-Through Rate, and the certificate balance or notional amount of such uncertificated interest were equal to the related Uncertificated Principal Balance or Uncertificated Notional Amount.

Uncertificated REMIC I Pass-Through Rate: With respect to REMIC I Regular Interest LT1-1, the Category 1 Net WAC Rate. With respect to REMIC I Regular Interest LT1-2, 6.00% per annum. With respect to REMIC I Regular Interest LT1-3, 6.50% per annum. With respect to REMIC I Regular Interest LT1-PO, 0.00% per annum. With respect to REMIC Regular Interest LT1-IO, the weighted average of the excess, if any, of the Net Mortgage Rate on each Category 2C Mortgage Loan over 6.50% per annum. With respect to REMIC I Regular Interest LT1-RM, the Weighted Average Excess Rate.

Uncertificated REMIC II Pass-Through Rate: With respect to REMIC II Regular Interest LT2-F1, the least of (i) the One-Month LIBOR Rate for such Distribution Date, (ii) the Uncertificated REMIC I Pass-Through Rate on REMIC I Regular Interest LT1-1 and (iii) 9.500%. With respect to REMIC II Regular Interest LT2-F2, the least of (i) the One-Month LIBOR Rate for such Distribution Date, (ii) the Uncertificated REMIC I Pass-Through Rate on REMIC I Regular Interest LT1-1 and (iii) 8.000%. With respect to REMIC II Regular Interest LT2-1SUB, the Uncertificated REMIC I Pass-Through Rate on REMIC I Regular Interest LT1-1. With respect to REMIC II Regular Interest LT2-2SUB and LT2-2SEN, 6.00% per annum. With respect to REMIC II Regular Interest LT2-3SUB and LT2-3SEN, 6.50% per annum. With respect to REMIC II Regular Interest LT2-PO, 0.00% per annum. REMIC II Regular Interest LT2-IO and REMIC II Regular Interest LT2-RM will not have an Uncertificated REMIC Pass-Through Rate, but will be entitled to 100% of amounts distributed on REMIC I Regular Interest LT1-IO and REMIC I Regular Interest LT1-RM, respectively.

Uncertificated REMIC I Pass-Through Rate: The Uncertificated REMIC I Pass-Through Rate and the Uncertificated REMIC II Pass-Through Rate.

Underwriter's Exemption: Prohibited Transaction Exemption 2002-41, 65 Fed. Reg. 54487 (2002), as amended (or any successor thereto), or any substantially similar administrative exemption granted by the U.S. Department of Labor.

VA: The United States Department of Veterans Affairs.

VA Approved Lender: Those institutions that are approved by the VA to act as servicer and mortgagee of record pursuant to VA Regulations.

VA Guaranty Agreements: With respect to a VA Loan, the agreements evidencing the guaranty of such Mortgage Loan by the VA.

VA Loan: A Mortgage Loan guaranteed by the VA.

VA Regulations: Any and all regulations promulgated by the VA under the Servicemen's Readjustment Act of 1944, as amended.

Voting Rights: The portion of the voting rights of all of the Certificates which is allocated to any Certificate. As of any date of determination, (a) 1% of all Voting Rights shall be allocated to each Class of Interest Only Certificates and the Class RM Certificates, if any (such Voting Rights to be allocated among the holders of Certificates of each such Class in accordance with their respective Percentage Interests), (b) 1% of all Voting Rights shall be allocated to the Residual Certificates (such Voting Rights to be allocated among the holders of Certificates of each such Class in accordance with their respective Percentage Interests), and (c) the remaining Voting Rights shall be allocated among Holders of the remaining Classes of Certificates in proportion to the Certificate Principal Balances of their respective Certificates on such date.

Weighted Average Excess Rate: With respect to any Distribution Date, a rate equal to the product of (i) the weighted average of the Excess Rates of the Mortgage Loans that are Rate-Increased Mortgage Loans, weighted on the basis of the Scheduled Principal Balance of such Mortgage Loans as of the first day of the related Due Period and (ii) a fraction, the numerator of which is the aggregate Scheduled Principal Balance of the Mortgage Loans that are Rate-Increased Mortgage Loans and the denominator of which is the aggregate Scheduled Principal Balance of all Mortgage Loans outstanding, in each case as of the first day of the related Due Period.

ARTICLE II

CONVEYANCE OF MORTGAGE LOANS; REPRESENTATIONS AND WARRANTIES

Section 2.01 Conveyance of Mortgage Loans

(a) The Seller, concurrently with the execution and delivery hereof, hereby sells, transfers, assigns, sets over and otherwise conveys to the Depositor, without recourse, all the right, title and interest of the Seller in and to (i) the Mortgage Loans, including all interest and principal received or receivable by the Seller on or with respect to the Mortgage Loans after the Cut-off Date and all interest and principal payments on the Mortgage Loans received prior to the Cut-off Date in respect of installments of interest and principal due thereafter, but not including (a) payments of principal and interest due and payable on the Mortgage Loans on or before the Cut-off Date and (b) all Arrearages, (ii) property which secures each such Mortgage Loan and which has been acquired by foreclosure or deed in lieu of foreclosure, (iii) its interest in any Insurance Policies in respect of the Mortgage Loans and (iv) all of the Seller's right, title and other ownership interest in and to the Cap Contracts. On or prior to the Closing Date, the Seller shall deliver to the Depositor or, at the Depositor's direction, to the Trustee (or the Custodian) or other designee of the Depositor, the Mortgage File for each Mortgage Loan listed in the Mortgage Loan Schedule (except that, in the case of the Delay Delivery Mortgage Loans, such delivery may take place within thirty (30) days following the Closing Date). Such delivery of the Mortgage Files shall be made against payment by the Depositor of the purchase price, previously agreed to by the Seller and Depositor, for the Mortgage Loans. On or prior to the Closing Date the Seller will remit to the Trustee, for deposit into the Distribution Account, the Cash Deposit.

(b) Immediately upon the conveyance of the Mortgage Loans referred to in clause (a), the Depositor sells, transfers, assigns, sets over and otherwise conveys to the Trustee, for the benefit of the Certificateholders, without recourse, all the right, title and interest of the Depositor in and to the Trust Fund together with the Depositor's right to require the Seller to cure any breach of a representation or warranty made herein by the Seller or to repurchase or substitute for any affected Mortgage Loan in accordance herewith. The Seller, the Depositor and the Trustee intend that the assignment and transfers herein contemplated constitute a sale of the Mortgage Loans, conveying good title thereto free and clear of any liens and encumbrances, from the Seller to the Depositor and from the Depositor to the Trustee and that such property not be part of the Seller's estate or property of the Seller in the event of any insolvency by the Seller. In the event that such conveyance is deemed to be, or to be made as security for, a loan, the parties intend that the Depositor shall be deemed to have granted and does hereby grant to the Trustee, on behalf of the Trust, the Certificateholders a first priority perfected security interest in all of the Depositor's right, title and interest in and to the Mortgage Loans, and that this Agreement shall constitute a security agreement under applicable law.

(c) In connection with the transfer and assignment set forth in clause (b) above, the Depositor has delivered or caused to be delivered to the Custodian on or before the Closing Date (or, in the case of the Delay Delivery Mortgage Loans, will deliver or cause to be delivered to the Custodian within thirty (30) days following the Closing Date) for the benefit of the Certificateholders the following documents or instruments with respect to each Mortgage Loan so assigned:

(i) (A) the original Mortgage Note endorsed by manual or facsimile signature in blank in the following form: "Pay to the order of _____ without

recourse,” with all intervening endorsements showing a complete chain of endorsement from the originator to the Person endorsing the Mortgage Note (each such endorsement being sufficient to transfer all right, title and interest of the party so endorsing, as noteholder or assignee thereof, in and to that Mortgage Note); or (B) with respect to any Lost Mortgage Note, a lost note affidavit from the Seller stating that the original Mortgage Note was lost or destroyed, together with a copy of such Mortgage Note;

(ii) in the case of each Mortgage Loan that is not a MERS Mortgage Loan, a duly executed assignment of the Mortgage (which may be included in a blanket assignment or assignments) either in blank or to CWMBS Reperforming Loan REMIC Trust 2005-R1, The Bank of New York, a New York banking corporation, as trustee under the Pooling and Servicing Agreement, dated as of March 1, 2005; provided that, if the related Mortgage has not been returned from the applicable public recording office, such assignment of the Mortgage may exclude the information to be provided by the recording office; provided, further, that such assignment of Mortgage need not be delivered in the case of a Mortgage for which the related Mortgaged Property is located in the Commonwealth of Puerto Rico; and

(iii) except as provided below and if available, the original or copies of each assumption, modification, written assurance or substitution agreement, if any.

In addition, in connection with the assignment of any MERS Mortgage Loan, the Seller agrees that it will cause, at its expense, the MERS® System to indicate that such Mortgage Loans have been assigned by the Seller to the Trustee in accordance with this Agreement for the benefit of the Certificateholders by including (or deleting, in the case of Mortgage Loans which are repurchased in accordance with this Agreement) in such computer files the information required by the MERS® System to identify the series of the Certificates issued in connection with such Mortgage Loans. The Seller further agrees that it will not, and will not permit the Master Servicer to, and the Master Servicer agrees that it will not, alter the information referenced in this paragraph with respect to any Mortgage Loan during the term of this Agreement unless and until such Mortgage Loan is repurchased in accordance with the terms of this Agreement.

The Depositor shall forward or cause to be forwarded to the Custodian (a) from time to time additional original documents evidencing an assumption or modification of a Mortgage Loan and (b) any other documents required to be delivered by the Depositor or the Master Servicer to the Trustee. In the event that the original Mortgage is not delivered and in connection with the payment in full of the related Mortgage Loan the public recording office requires the presentation of a “lost instruments affidavit and indemnity” or any equivalent document, because only a copy of the Mortgage can be delivered with the instrument of satisfaction or reconveyance, the Master Servicer shall execute and deliver or cause to be executed and delivered such a document to the public recording office.

In the case of Mortgage Loans that have been prepaid in full as of the Closing Date, the Depositor, in lieu of delivering the above documents to the Custodian, will deposit in the

Collection Account the portion of such payment that is required to be deposited in the Collection Account pursuant to Section 3.05 hereof.

With respect to up to 50% of the Mortgage Loans, the Depositor may deliver all or a portion of each related Mortgage File to the Trustee (or the Custodian on its behalf) not later than thirty days after the Closing Date (such Mortgage Loans for which all or a portion of the related Mortgage File is not delivered to the Trustee or the Custodian on its behalf on the Closing Date the ("Delay Delivery Mortgage Loans"). To the extent that Countrywide Servicing shall be in possession of any Mortgage Files with respect to any Delay Delivery Loan, until delivery of such Mortgage File to the Trustee (or the Custodian on its behalf) as provided in this Section 2.01, Countrywide Servicing shall hold such files as Master Servicer hereunder, as agent and in trust for the Trustee on behalf of the Trust and the Certificateholders. Notwithstanding anything to the contrary in this Agreement, within thirty days after the Closing Date, the Seller shall either (i) deliver to the Depositor, or at the Depositor's direction, to the Trustee (or the Custodian on its behalf) or other designee of the Depositor the Mortgage File as required pursuant to this Section 2.01 for each Delay Delivery Mortgage Loan or (ii) (A) substitute a Substitute Mortgage Loan for the Delay Delivery Mortgage Loan or (B) repurchase the Delayed Delivery Mortgage Loan, which substitution or repurchase shall be accomplished in the manner and subject to the conditions set forth in Section 2.03 (treating each Delay Delivery Mortgage Loan as a Deleted Mortgage Loan for purposes of such Section 2.03); provided, however, that if the Seller fails to deliver a Mortgage File for any Delay Delivery Mortgage Loan within the thirty-day period provided in the prior sentence, the Seller shall use its best reasonable efforts to effect a substitution, rather than a repurchase of, such Deleted Mortgage Loan and provided further that the cure period provided for in Section 2.02 or in Section 2.03 shall not apply to the initial delivery of the Mortgage File for such Delay Delivery Mortgage Loan, but rather the Seller shall have thirty (30) days to cure such failure to deliver. At the end of the initial thirty-day period the Trustee (or the Custodian on its behalf) shall send a Delay Delivery Certification for the Delay Delivery Mortgage Loans delivered during such thirty-day period in accordance with the provisions of Section 2.02.

The parties acknowledge that the Mortgage Files with respect to certain of the Mortgage Loans are missing endorsements of the related Mortgage Note, assignments of the related Mortgage, modification agreements and/or assumption agreements (each such document, a "Missing Document") as noted on the Mortgage Loan Schedule. The Custodian shall list each such Mortgage File in its Final Certification, or Trust Receipt, as applicable, but, notwithstanding anything in this Agreement to the contrary, such Missing Document shall not be considered a defect nor shall the Seller be required to repurchase or substitute for such Mortgage loan; provided, however, that, in the event that the Master Servicer or the Trustee, as applicable, is unable to exercise a remedy with respect to any such Mortgage Loan due to the absence of a Missing Document, the Seller shall repurchase the Mortgage Loan from the Trust at the Purchase Price and shall indemnify the Trust for any loss suffered by the Certificateholders in connection with such Mortgage Loan.

The Depositor hereby directs the Trustee to execute, deliver and perform its obligations under the Cap Contracts on the Closing Date and thereafter on behalf of the Holders of the Class 1A-F1 Certificates and Class 1A-F2 Certificates, as applicable. The Depositor, the Servicer and the Holders of the Class 1A-F1 Certificates, and Class 1A-F2 Certificates, as

applicable, by their acceptance of such Certificates, acknowledge and agree that the Trustee shall execute, deliver and perform its obligations under the Cap Contracts and shall do so solely in its capacity as Trustee of the Trust Fund and not in its individual capacity.

Section 2.02 Acceptance by the Custodian of the Mortgage Loans.

(a) The Custodian pursuant to this Agreement acknowledges receipt of the documents identified in the Initial Certification, and declares that it holds and will hold such documents and the other documents delivered to it constituting the Mortgage Files, and that it holds or will hold such other assets as are included in the Trust Fund, in trust for the exclusive use and benefit of the Trustee and all present and future Certificateholders.

The Bank of New York, as Custodian, agrees to execute and deliver on the Closing Date to the Depositor, the Master Servicer, the Trustee and the Seller an “Initial Certification” in the form annexed hereto as Exhibit F with respect to the Mortgage Loans. The Custodian shall be under no duty or obligation to inspect, review or examine said documents, instruments, certificates or other papers.

No later than the thirtieth (30th) day after the Closing Date, the Custodian shall deliver to the Depositor, the Master Servicer, the Trustee and the Seller a “Delay Delivery Certification” with respect to the Mortgage Loans in the form annexed hereto as Exhibit G, with any applicable exceptions noted thereon.

Not later than 90 days after the Closing Date, the Custodian shall deliver to the Depositor, the Master Servicer, the Trustee and the Seller a Final Certification with respect to the Mortgage Loans in the form annexed hereto as Exhibit H, with any applicable exceptions noted thereon. At any time thereafter, upon request, the Custodian shall deliver to the Depositor, the Master Servicer, the Trustee and the Seller an updated schedule of open exceptions, in electronic or written form.

If, in the course of such review, the Custodian finds any document constituting a part of a Mortgage File with respect to a related Mortgage Loan which does not meet the requirements of Section 2.01, the Custodian shall list such as an exception in the Final Certification or Trust Receipt, as applicable; provided, however that the Custodian shall not make any determination as to whether (i) any endorsement is sufficient to transfer all right, title and interest of the party so endorsing, as noteholder or assignee thereof, in and to that Mortgage Note or (ii) any assignment is in recordable form or is sufficient to effect the assignment of and transfer to the assignee thereof under the mortgage to which the assignment relates. The Seller shall promptly correct or cure such defect within 90 days from the date it was so notified of such defect and, if the Seller does not correct or cure such defect within such period, the Seller shall either (a) substitute for the related Mortgage Loan a Substitute Mortgage Loan, which substitution shall be accomplished in the manner and subject to the conditions (including any time restrictions) set forth in Section 2.03, or (b) purchase such Mortgage Loan from the Trust Fund within 90 days from the date the Seller was notified of such defect in writing at the Purchase Price of such Mortgage Loan; provided, however, that in no event shall such substitution or purchase occur more than 540 days from the Closing Date, except that if the substitution or purchase of a Mortgage Loan pursuant to this provision is required by reason of a delay in delivery of any documents by the

appropriate recording office, and there is a dispute between either the Master Servicer or the Seller and the Custodian over the location or status of the recorded document, then such substitution or purchase shall occur within 720 days from the Closing Date. The Custodian shall deliver written notice to each Rating Agency within 270 days from the Closing Date indicating each Mortgage Loan with respect to which there is a dispute as to location or status of the related Mortgage Note. Such notice shall be delivered every 90 days thereafter until the related Mortgage Note or Lost Mortgage Note affidavit is delivered to the Custodian. Any substitution pursuant to (a) above or purchase pursuant to (b) above shall not be effected prior to the delivery to the Custodian of the Opinion of Counsel required by Section 2.05 hereof, if any, and any substitution pursuant to (a) above shall not be effected prior to the additional delivery to the Custodian of a Request for Release. With respect to any Distribution Date, a substitution is permitted to be made only during the related Due Period. Any substitution made thereafter will be applied to the following Distribution Date. The Purchase Price for any such Mortgage Loan shall be deposited by the Seller in the Collection Account on or prior to the Master Servicer Remittance Date for the Distribution Date in the month following the month of repurchase and, upon receipt of such deposit and a Request for Release, the Custodian shall release the related Mortgage File to the Seller and shall execute and deliver at the Seller's request such instruments of transfer or assignment prepared by the Seller, in each case without recourse, as shall be necessary to vest in the Seller, or a designee, the Trustee's interest in any Mortgage Loan released pursuant hereto. If pursuant to the foregoing provisions the Seller repurchases a Mortgage Loan that is a MERS Mortgage Loan, the Master Servicer shall either (i) cause MERS to execute and deliver an assignment of the related Mortgage in recordable form to transfer the Mortgage from MERS to the Seller and shall cause such Mortgage to be removed from registration on the MERS® System in accordance with MERS' rules and regulations or (ii) cause MERS to designate on the MERS® System the Seller as the beneficial holder of such Mortgage Loan.

(b) [Reserved].

(c) The Custodian shall retain possession and custody of each Mortgage File related to a Mortgage Loan in accordance with and subject to the terms and conditions set forth herein. The Master Servicer shall promptly deliver to the Custodian, upon the execution or receipt thereof, the originals of such other documents or instruments constituting the Mortgage File related to a Mortgage Loan as come into the possession of the Master Servicer from time to time.

(d) It is understood and agreed that the obligation of the Seller to substitute for or to purchase any Mortgage Loan which does not meet the requirements of Section 2.01 above shall constitute the sole remedy respecting such defect available to the Trustee, the Depositor and any Certificateholder against the Seller.

Section 2.03 Representations, Warranties and Covenants of the Seller
and Master Servicer.

(a) The Seller hereby makes the representations and warranties set forth in (i) Schedule II hereto, and by this reference incorporated herein, to the Depositor, the Master Servicer and the Trustee, as of the Closing Date and (ii) Schedule III hereto, and by this

reference incorporated herein, to the Depositor, the Master Servicer and the Trustee, as of the Closing Date, or if so specified therein, as of the Cut-off Date.

(b) The Master Servicer hereby makes the representations and warranties set forth in Schedule IV hereto, and by reference incorporated herein to the Depositor, the Seller and the Trustee as of the Closing Date.

(c) Upon discovery by any of the parties hereto of a breach of a representation or warranty made pursuant to Section 2.03(a)(ii) that materially and adversely affects the interests of the Certificateholders in any Mortgage Loan, the party discovering such breach shall give prompt notice thereof to the other parties. The Seller hereby covenants that within 90 days of the earlier of its discovery or its receipt of written notice from any party of a breach of any representation or warranty made pursuant to Section 2.03(a)(ii) which materially and adversely affects the interests of the Certificateholders in any Mortgage Loan, it shall cure such breach in all material respects, and if such breach is not so cured, shall, (i) if such 90-day period expires prior to the second anniversary of the Closing Date, remove such Mortgage Loan (a "Deleted Mortgage Loan") from the Trust Fund and substitute in its place a Substitute Mortgage Loan, in the manner and subject to the conditions set forth in this Section; or (ii) repurchase the affected Mortgage Loan or Mortgage Loans from the Trustee at the Purchase Price in the manner set forth below; provided, however, that any such substitution pursuant to (i) above shall not be effected prior to the delivery to the Trustee of the Opinion of Counsel required by Section 2.05 hereof, if any, and any such substitution pursuant to (i) above shall not be effected prior to the additional delivery to the Trustee and the Custodian of a Request for Release and the Mortgage File for any such Substitute Mortgage Loan. The Seller shall promptly reimburse the Master Servicer and the Trustee for any expenses reasonably incurred by the Master Servicer or the Trustee in respect of enforcing the remedies for such breach. With respect to the representations and warranties described in this Section which are made to the best of the Seller's knowledge, if it is discovered by either the Depositor, the Seller or the Trustee that the substance of such representation and warranty is inaccurate and such inaccuracy materially and adversely affects the value of the related Mortgage Loan or the interests of the Certificateholders therein, notwithstanding the Seller's lack of knowledge with respect to the substance of such representation or warranty, such inaccuracy shall be deemed a breach of the applicable representation or warranty.

With respect to any Substitute Mortgage Loan or Loans, the Seller shall deliver to the Trustee (or the Custodian on its behalf) for the benefit of the Certificateholders the documents required by Section 2.01. With respect to any Distribution Date, a substitution shall be made only during the related Due Period. Monthly Payments due with respect to Substitute Mortgage Loans in the month of substitution shall not be part of the Trust Fund and will be retained by the Seller on the next succeeding Distribution Date. For the month of substitution, distributions to Certificateholders will include the monthly payment due on any Deleted Mortgage Loan for such month and thereafter the Seller shall be entitled to retain all amounts received in respect of such Deleted Mortgage Loan. The Master Servicer shall amend the Mortgage Loan Schedule for the benefit of the Certificateholders to reflect the removal of such Deleted Mortgage Loan and the substitution of the Substitute Mortgage Loan or Loans and the Master Servicer shall deliver the amended Mortgage Loan Schedule to the Trustee and the Custodian. Upon such substitution, the Substitute Mortgage Loan or Loans shall be subject to the terms of this Agreement in all respects, and the Seller shall be deemed to have made with respect to such Substitute Mortgage

Loan or Loans, as of the date of substitution, the representations and warranties made pursuant to Section 2.03(a)(ii) with respect to such Mortgage Loan. Upon any such substitution and the deposit to the Collection Account of the amount required to be deposited therein in connection with such substitution as described in the following paragraph, the Custodian shall release the Mortgage File held for the benefit of the Certificateholders relating to such Deleted Mortgage Loan to the Seller and shall execute and deliver at the Seller's direction such instruments of transfer or assignment prepared by the Seller, in each case without recourse, as shall be necessary to vest title in the Seller, or its designee, the Trustee's interest in any Deleted Mortgage Loan substituted for pursuant to this Section 2.03.

For any month in which the Seller substitutes one or more Substitute Mortgage Loans for one or more Deleted Mortgage Loans, the Master Servicer will determine the amount (if any) by which the aggregate principal balance of all such Substitute Mortgage Loans as of the date of substitution is less than the aggregate Scheduled Principal Balance of all such Deleted Mortgage Loans (after application of the scheduled principal portion of the monthly payments due in the month of substitution). The amount of such shortage (the "Substitution Adjustment Amount") plus an amount equal to the aggregate of any unreimbursed Monthly Advances with respect to such Deleted Mortgage Loans shall be deposited in the Collection Account by the Seller on or before the Master Servicer Remittance Date for the Distribution Date in the month succeeding the calendar month during which the related Mortgage Loan became required to be purchased or replaced hereunder.

In the event that the Seller shall have repurchased a Mortgage Loan, the Purchase Price therefor shall be deposited in the Collection Account pursuant to Section 3.05 on or before the Master Servicer Remittance Date for the Distribution Date in the month following the month during which the Seller became obligated hereunder to repurchase or replace such Mortgage Loan and upon such deposit of the Purchase Price, the delivery of the Opinion of Counsel required by Section 2.05 and receipt of a Request for Release, the Custodian shall release the related Mortgage File held for the benefit of the Certificateholders to such Person, and the Trustee shall execute and deliver at such Person's direction such instruments of transfer or assignment prepared by such Person, in each case without recourse, as shall be necessary to transfer title from the Trustee. It is understood and agreed that the obligation under this Agreement of any Person to cure, repurchase or replace any Mortgage Loan as to which a breach has occurred and is continuing shall constitute the sole remedy against such Persons respecting such breach available to Certificateholders, the Depositor or the Trustee on their behalf.

The representations and warranties made pursuant to this Section 2.03 shall survive delivery of the respective Mortgage Files to the Trustee for the benefit of the Certificateholders.

Section 2.04 Representations and Warranties of the Depositor as to the Mortgage Loans.

The Depositor hereby represents and warrants to the Trustee with respect to each Mortgage Loan as of the date hereof or such other date set forth herein that as of the Closing Date, and following the transfer of the Mortgage Loans to it by the Seller, the Depositor had good title to the Mortgage Loans and the Mortgage Notes were subject to no offsets, defenses or counterclaims.

The Depositor hereby assigns, transfers and conveys to the Trustee, for the benefit of the Certificateholders, all of its rights with respect to the Mortgage Loans including, without limitation, the representations and warranties of the Seller made pursuant to Section 2.03(a)(ii) hereof, together with all rights of the Depositor to require the Seller to cure any breach thereof or to repurchase or substitute for any affected Mortgage Loan in accordance with this Agreement.

It is understood and agreed that the representations and warranties set forth in this Section 2.04 shall survive delivery of the Mortgage Files to the Trustee. Upon discovery by the Depositor or the Trustee of a breach of any of the foregoing representations and warranties set forth in this Section 2.04 (referred to herein as a “breach”), which breach materially and adversely affects the interest of the Certificateholders, the party discovering such breach shall give prompt written notice to the others and to each Rating Agency.

Section 2.05 Delivery of Opinion of Counsel in Connection with Substitutions.

(a) Notwithstanding any contrary provision of this Agreement, no substitution pursuant to Section 2.02 or Section 2.03 shall be made more than 90 days after the Closing Date unless the Seller delivers to the Trustee an Opinion of Counsel, which Opinion of Counsel shall not be at the expense of the Trustee or the Trust Fund, addressed to the Trustee, to the effect that such substitution will not (i) result in the imposition of the tax on “prohibited transactions” on the Trust Fund or contributions after the Startup Date, as defined in Sections 860F(a)(2) and 860G(d) of the Code, respectively, or (ii) cause each REMIC created hereunder to fail to qualify as a REMIC at any time that any Certificates are outstanding.

(b) Upon discovery by the Depositor, the Seller, the Master Servicer, the Custodian or the Trustee that any Mortgage Loan does not constitute a “qualified mortgage” within the meaning of Section 860G(a)(3) of the Code, the party discovering such fact shall promptly (and in any event within five (5) Business Days of discovery) give written notice thereof to the other parties. In connection therewith, the Trustee shall require the Seller, at the Seller’s option, to either (i) substitute, if the conditions in Section 2.03(c) with respect to substitutions are satisfied, a Substitute Mortgage Loan for the affected Mortgage Loan, or (ii) repurchase the affected Mortgage Loan, in each case, within 90 days of such discovery in the same manner as it would a Mortgage Loan for a breach of representation or warranty made pursuant to Section 2.03. The Trustee shall reconvey to the Seller the Mortgage Loan to be released pursuant hereto in the same manner, and on the same terms and conditions, as it would a Mortgage Loan repurchased for breach of a representation or warranty contained in Section 2.03.

Section 2.06 Execution and Delivery of Certificates.

The Trustee acknowledges the transfer and assignment to it of the Trust Fund and, concurrently with such transfer and assignment, has executed and delivered to or upon the order of the Depositor, the Certificates in authorized denominations evidencing directly or indirectly the entire ownership of the Trust Fund. The Trustee agrees to hold the Trust Fund and exercise the rights referred to above for the benefit of all present and future Holders of the Certificates and to perform the duties set forth in this Agreement to the best of its ability, to the end that the interests of the Holders of the Certificates may be adequately and effectively protected.

Section 2.07 REMIC Matters

The Preliminary Statement above sets forth the designations and “latest possible maturity date” for federal income tax purposes of all interests created hereby. The “Startup Day” for purposes of the REMIC Provisions shall be the Closing Date. The “tax matters person” with respect to each REMIC hereunder shall be the holder of the largest percentage interest in the Residual Certificates and the Trustee shall, as its agent, perform the duties of the Tax Matters Person. Each REMIC’s fiscal year shall be the calendar year.

Section 2.08 Covenants of the Master Servicer.

The Master Servicer hereby covenants to the Depositor and the Trustee as follows:

- (A) the Master Servicer shall comply in the performance of its obligations under this Agreement with all reasonable rules and requirements of the insurer under each Required Insurance Policy; and
- (B) no written information, certificate of an officer, statement furnished in writing or written report delivered to the Depositor, any affiliate of the Depositor or the Trustee and prepared by the Master Servicer pursuant to this Agreement will contain any untrue statement of a material fact or omit to state a material fact necessary to make such information, certificate, statement or report not misleading.

ARTICLE III

ADMINISTRATION AND SERVICING OF MORTGAGE LOANS

Section 3.01 Master Servicer to Service Mortgage Loans.

For and on behalf of the Certificateholders, the Master Servicer shall service and administer the Mortgage Loans in accordance with the terms of this Agreement and customary and usual standards of practice of prudent mortgage loan servicers. In connection with such servicing and administration, the Master Servicer shall have full power and authority, acting alone and/or through Subservicers as provided in Section 3.02 hereof, subject to the terms hereof (i) to execute and deliver, on behalf of the Certificateholders and the Trustee, customary consents or waivers and other instruments and documents, (ii) to consent to transfers of any related Mortgaged Property and assumptions of the related Mortgage Notes and related Mortgages (but only in the manner provided in this Agreement), (iii) to collect any related Insurance Proceeds and other related Liquidation Proceeds, (iv) to effectuate foreclosure or other conversion of the ownership of the Mortgaged Property securing any Mortgage Loan and (v) to take all actions that a mortgagee is permitted or required to take by the FHA, the VA or the RHS, as the case may be; provided that the Master Servicer shall not take any action that is inconsistent with or prejudices the interests of the Trust Fund or the Certificateholders in any Mortgage Loan or the rights and interests of the Depositor, the Trustee and the Certificateholders under this Agreement. The Master Servicer shall represent and protect the interests of the Trust Fund in the same manner as it protects its own interests in mortgage loans in its own portfolio in any claim, proceeding or litigation regarding a Mortgage Loan, and shall not make or permit any modification, waiver or amendment of any Mortgage Loan which would cause any REMIC created hereunder to fail to qualify as a REMIC or result in the imposition of any tax under Section 860F(a) or Section 860G(d) of the Code. Without limiting the generality of the foregoing, the Master Servicer, in its own name or in the name of the Depositor and the Trustee, is hereby authorized and empowered by the Depositor and the Trustee, when the Master Servicer believes it appropriate in its reasonable judgment, to execute and deliver, on behalf of the Trustee, the Depositor, the Certificateholders or any of them, any and all instruments of satisfaction or cancellation, or of partial or full release or discharge and all other comparable instruments, with respect to the Mortgage Loans, and with respect to the Mortgaged Properties held for the benefit of the Certificateholders. The Master Servicer shall prepare and deliver to the Depositor and/or the Trustee such documents requiring execution and delivery by either or both of them as are necessary or appropriate to enable the Master Servicer to service and administer the Mortgage Loans to the extent that the Master Servicer is not permitted to execute and deliver such documents pursuant to the preceding sentence. Upon receipt of such documents, the Depositor and/or the Trustee shall execute such documents and deliver them to the Master Servicer. The Master Servicer further is authorized and empowered by the Trustee, on behalf of the Certificateholders and the Trustee, in its own name or in the name of the Subservicer, when the Master Servicer or the Subservicer, as the case may be, believes it appropriate in its best judgment to register any Mortgage Loan on the MERS® System, or cause the removal from the registration of any Mortgage Loan on the MERS® System, to execute and deliver, on behalf of the Trustee and the Certificateholders or any of them, any and all instruments of assignment and

other comparable instruments with respect to such assignment or re-recording of a related Mortgage in the name of MERS, solely as nominee for the Trustee and its successors and assigns.

In accordance with the standards of the preceding paragraph, the Master Servicer shall advance or cause to be advanced funds as necessary for the purpose of effecting the payment of taxes and assessments on the Mortgaged Properties, which advances shall be reimbursable in the first instance from related collections from the Mortgagors pursuant to Section 3.06, and further as provided in Section 3.08. The costs incurred by the Master Servicer, if any, in effecting the timely payments of taxes and assessments on the Mortgaged Properties and related insurance premiums shall not, for the purpose of calculating monthly distributions to the Certificateholders, be added to the Scheduled Principal Balances of the related Mortgage Loans, notwithstanding that the terms of such Mortgage Loans so permit.

In servicing and administering the Mortgage Loans, the Master Servicer shall comply strictly with the National Housing Act, the FHA Regulations, the Servicemen's Readjustment Act, the VA Regulations, the RHS regulations and administrative guidelines issued thereunder or pursuant thereto (insofar as the same apply to any such Mortgage Loan) and, to the extent permitted hereunder, promptly discharge all of the obligations of the mortgagee thereunder and under each related Mortgage including the timely giving of notices, the essence hereof being that the full benefits of each FHA Insurance Contract, VA Guaranty Agreement and RHS Guaranty Agreement inure to the Trustee, on behalf of the Certificateholders. The Master Servicer shall not permit any modification with respect to any FHA Loan, VA Loan or RHS Loan if such modification would materially adversely affect the related FHA Insurance Contract, VA Guaranty Agreement or RHS Guaranty Agreement, as the case may be. In the event the Trust receives debentures from the FHA in exchange for a Mortgage Loan, the Master Servicer shall immediately purchase such debentures at a price equal to the unpaid principal balance of such debenture, plus one month's accrued interest at the related Mortgage Loan's interest rate, less the Servicing Fee unless the Master Servicer receives an Opinion of Counsel addressed to it and the Trustee to the effect that the inclusion of such debenture in the Trust will not cause the termination of the REMIC status of the related REMIC or the imposition of any tax on the Trust.

Section 3.02 Subservicing; Enforcement of the Obligations of Servicers.

(a) The Master Servicer may arrange for the subservicing of any Mortgage Loan by a Subservicer pursuant to a subservicing agreement; provided, however, that (i) such Subservicer is pre-approved by the FHA, VA and, if applicable, RHS, and an approved FHLMC, FHA, VA and, if applicable, RHS, seller/servicer as indicated in writing, and which represents and warrants that it is in compliance with the laws of each state necessary to enable it to perform its obligations under such subservicing agreement and (ii) such subservicing arrangement and the terms of the related subservicing agreement must provide for the servicing of such Mortgage Loans in a manner consistent with the servicing arrangements contemplated hereunder. Unless the context otherwise requires, references in this Agreement to actions taken or to be taken by the Master Servicer in servicing the Mortgage Loans include actions taken or to be taken by a Subservicer on behalf of the Master Servicer. Notwithstanding the provisions of any subservicing agreement, any of the provisions of this Agreement relating to agreements or arrangements between the Master Servicer and a Subservicer or reference to actions taken

through a Subservicer or otherwise, the Master Servicer shall remain obligated and liable to the Depositor, the Trustee and the Certificateholders for the servicing and administration of the Mortgage Loans in accordance with the provisions of this Agreement without diminution of such obligation or liability by virtue of such subservicing agreements or arrangements or by virtue of indemnification from the Subservicer and to the same extent and under the same terms and conditions as if the Master Servicer alone were servicing and administering the Mortgage Loans. All actions of each Subservicer performed pursuant to the related subservicing agreement shall be performed as an agent of the Master Servicer with the same force and effect as if performed directly by the Master Servicer.

(b) For purposes of this Agreement, the Master Servicer shall be deemed to have received any collections, recoveries or payments with respect to the Mortgage Loans that are received by a Subservicer regardless of whether such payments are remitted by the Subservicer to the Master Servicer.

(c) Notwithstanding any provision in this Agreement or in any subservicing agreement to the contrary, in no event will any termination fees payable to a subservicer upon the removal thereof be charged to (or paid from) monies in the Trust Fund (from the Collection Account or otherwise).

Section 3.03 Rights of the Depositor and the Trustee in Respect of the Master Servicer.

The Depositor may, but is not obligated to, enforce the obligations of the Master Servicer hereunder and may, but is not obligated to, perform, or cause a designee to perform, any defaulted obligation of the Master Servicer hereunder and in connection with any such defaulted obligation to exercise the related rights of the Master Servicer hereunder; provided that the Master Servicer shall not be relieved of any of its obligations hereunder by virtue of such performance by the Depositor or its designee. Neither the Trustee nor the Depositor shall have any responsibility or liability for any action or failure to act by the Master Servicer nor shall the Trustee or the Depositor be obligated to supervise the performance of the Master Servicer hereunder or otherwise.

Section 3.04 Trustee to Act as Master Servicer.

In the event that the Master Servicer shall for any reason no longer be the Master Servicer hereunder (including by reason of an Event of Default), the Trustee or its successor shall thereupon assume all of the rights and obligations of the Master Servicer hereunder arising thereafter (except that the Trustee shall not be (i) liable for losses of the Master Servicer pursuant to Section 3.09 hereof or any acts or omissions of the predecessor Master Servicer hereunder, (ii) obligated to make Monthly Advances if it is prohibited from doing so by applicable law, (iii) obligated to effectuate repurchases or substitutions of Mortgage Loans hereunder including, but not limited to, repurchases or substitutions of Mortgage Loans pursuant to Section 2.02, 2.03 or 3.01 hereof, (iv) responsible for expenses of the Master Servicer pursuant to Section 2.03 or (v) deemed to have made any representations and warranties of the Master Servicer hereunder). Any such assumption shall be subject to Section 7.02 hereof. If the Master Servicer shall for any reason no longer be the Master Servicer (including by reason of any Event of Default), the

Trustee or its successor shall succeed to any rights and obligations of the Master Servicer under each subservicing agreement.

The Master Servicer shall, upon request of the Trustee, but at the expense of the Master Servicer, deliver to the assuming party all documents and records relating to each subservicing agreement or substitute subservicing agreement and the Mortgage Loans then being serviced thereunder and an accounting of amounts collected or held by it and otherwise use its best efforts to effect the orderly and efficient transfer of the substitute subservicing agreement to the assuming party.

Section 3.05 Collection of Mortgage Loan Payments; Collection
Account; Distribution Account.

(a) The Master Servicer shall make reasonable efforts in accordance with the customary and usual standards of practice of prudent mortgage servicers to collect all payments called for under the terms and provisions of the Mortgage Loans to the extent such procedures shall be consistent with this Agreement and the terms and provisions of any related Required Insurance Policy. Consistent with the foregoing, the Master Servicer may in its discretion (i) waive any late payment charge or any prepayment charge or penalty interest in connection with the prepayment of a Mortgage Loan and (ii) extend the due dates for payments due on a related Mortgage Note in accordance with FHA, VA or RHS guidelines, as applicable. In the event of any such arrangement, the Master Servicer shall make Monthly Advances on the related Mortgage Loan in accordance with the provisions of Section 4.01 during the scheduled period in accordance with the amortization schedule of such Mortgage Loan without modification thereof by reason of such arrangements. The Master Servicer shall not be required to institute or join in litigation with respect to collection of any payment (whether under a Mortgage, Mortgage Note or otherwise or against any public or governmental authority with respect to a taking or condemnation) if it reasonably believes that enforcing the provision of the Mortgage or other instrument pursuant to which such payment is required is prohibited by applicable law.

(b) The Master Servicer shall establish and maintain a Collection Account into which the Master Servicer shall deposit or cause to be deposited no later than two Business Days after receipt, except as otherwise specifically provided herein, the following payments and collections remitted by Subservicers or received by it in respect of the Mortgage Loans subsequent to the Cut-off Date (other than in respect of principal and interest due on the Mortgage Loans on or before the Cut-off Date and Arrearages) and the following amounts required to be deposited hereunder:

- (i) all payments on account of principal on the Mortgage Loans, including Principal Prepayments;
- (ii) all payments on account of interest on the Mortgage Loans, net of the related Servicing Fee;
- (iii) all Insurance Proceeds and Liquidation Proceeds in respect of the Mortgage Loans, other than proceeds to be applied to the restoration or repair of the

Mortgaged Property or released to the Mortgagor in accordance with the Master Servicer's normal servicing procedures;

(iv) any amount required to be deposited by the Master Servicer pursuant to Section 3.05(e) in connection with any losses on Permitted Investments;

(v) any amounts required to be deposited by the Master Servicer pursuant to Section 3.09(c) and in respect of net monthly rental income from REO Property related to a Mortgage Loan pursuant to Section 3.11 hereof;

(vi) all Substitution Adjustment Amounts;

(vii) all Monthly Advances made by the Master Servicer pursuant to Section 4.01; and

(viii) any other amounts required to be deposited hereunder.

In addition, with respect to any Mortgage Loan that is subject to a buydown agreement, on each Due Date for such Mortgage Loan, in addition to the monthly payment remitted by the Mortgagor, the Master Servicer shall cause funds to be deposited into the Collection Account in an amount required to cause an amount of interest to be paid with respect to such Mortgage Loan equal to the amount of interest that has accrued on such Mortgage Loan from the preceding Due Date at the Mortgage Rate net of the related Servicing Fee.

The foregoing requirements for deposit by the Master Servicer shall be exclusive, it being understood and agreed that, without limiting the generality of the foregoing, payments in the nature of prepayment penalties, late payment charges or assumption fees, if collected, need not be deposited by the Master Servicer. In the event that the Master Servicer shall deposit any amount not required to be deposited, it may at any time withdraw or direct the institution maintaining the Collection Account to withdraw such amount from the Collection Account, any provision herein to the contrary notwithstanding. Such withdrawal or direction may be accomplished by delivering written notice thereof to the Trustee or such other institution maintaining the Collection Account that describes the amounts deposited in error in the Collection Account. The Master Servicer shall maintain adequate records with respect to all withdrawals made pursuant to this Section. All funds deposited in the Collection Account shall be held in trust for the Certificateholders until withdrawn in accordance with Section 3.08.

(c) [Reserved].

(d) The Trustee shall establish and maintain, on behalf of the Certificateholders, the Distribution Account. The Trustee shall, promptly upon receipt, deposit in the Distribution Account and retain therein the following:

(i) the aggregate amount remitted by the Master Servicer to the Trustee pursuant to Section 3.08(a)(ix);

(ii) any amount deposited by the Master Servicer pursuant to Section 3.05(e) in connection with any losses on Permitted Investments; and

(iii) any other amounts deposited hereunder which are required to be deposited in the Distribution Account.

In the event that the Master Servicer shall remit any amount not required to be remitted, it may at any time direct the Trustee to withdraw such amount from the Distribution Account, any provision herein to the contrary notwithstanding. Such direction may be accomplished by delivering an Officer's Certificate to the Trustee that describes the amounts deposited in error in the Distribution Account. All funds deposited in the Distribution Account shall be held by the Trustee in trust for the Certificateholders until disbursed in accordance with this Agreement or withdrawn in accordance with Section 3.08. In no event shall the Trustee incur liability for withdrawals from the Distribution Account at the direction of the Master Servicer.

(e) Each institution at which the Collection Account or the Distribution Account is maintained shall invest the funds therein as directed in writing by the Master Servicer in Permitted Investments, which shall mature not later than (i) in the case of the Collection Account, the Business Day next preceding the related Master Servicer Remittance Date and (ii) in the case of the Distribution Account, not later than such Distribution Date and, in each case, shall not be sold or disposed of prior to its maturity. All such Permitted Investments shall be made in the name of the Trustee, for the benefit of the Certificateholders. All income and gain net of any losses realized from any such investment of funds on deposit in the Collection Account and the Distribution Account shall be for the benefit of the Master Servicer as servicing compensation and shall be remitted to it monthly as provided herein. The amount of any realized losses in the Collection Account or the Distribution Account incurred in any such account in respect of any such investments shall promptly be deposited by the Master Servicer in the Collection Account or the Distribution Account, as applicable, from its own funds without right of reimbursement. The Trustee in its fiduciary capacity shall not be liable for the amount of any loss incurred in respect of any investment or lack of investment of funds held in the Collection Account or the Distribution Account and made in accordance with this Section 3.05.

(f) The Master Servicer shall give notice to the Trustee, the Seller, each Rating Agency and the Depositor of any proposed change of the location of the Collection Account prior to any change thereof. The Trustee shall give notice to the Master Servicer, the Seller, each Rating Agency and the Depositor of any proposed change of the location of the Distribution Account prior to any change thereof.

Section 3.06 Collection of Taxes, Assessments and Similar Items;
Escrow Accounts.

(a) To the extent required by the related Mortgage Note and not in violation of current law, the Master Servicer shall establish and maintain one or more accounts (each, an "Escrow Account") and deposit and retain therein all collections from the Mortgagors (or advances by the Master Servicer) for the payment of taxes, assessments, hazard insurance premiums or comparable items for the account of the Mortgagors. Nothing herein shall require the Master Servicer to compel a Mortgagor to establish an Escrow Account in violation of applicable law.

(b) Withdrawals of amounts so collected from the Escrow Accounts may be made only to effect timely payment of taxes, assessments, hazard insurance premiums, condominium or PUD association dues, or comparable items, to reimburse the Master Servicer out of related collections for any payments made pursuant to Sections 3.01 hereof (with respect to taxes and assessments and insurance premiums) and 3.09 hereof (with respect to hazard insurance), to refund to any Mortgagors any sums determined to be overages, to pay interest, if required by law or the terms of the related Mortgage or Mortgage Note, to Mortgagors on balances in the Escrow Account, in the case of FHA Loans, VA Loans or RHS Loans, for transfer to the Collection Account, fire and hazard insurance proceeds and escrow payments with respect to any Mortgage Loan where the FHA, VA or RHS, as the case may be, has directed application of such funds as a credit against the proceeds of the FHA Insurance Contract, the VA Guaranty Agreement or the RHS Guaranty Agreement, or to clear and terminate an Escrow Account at the termination of this Agreement in accordance with Section 9.01 hereof. The Escrow Accounts shall not be a part of the Trust Fund.

(c) The Master Servicer shall advance any payments referred to in Section 3.06(a) that are not timely paid by the Mortgagors on the date when the tax, premium or other cost for which such payment is intended is due, but the Master Servicer shall be required so to advance only to the extent that such advances, in the good faith judgment of the Master Servicer, will be recoverable by the Master Servicer out of Insurance Proceeds, Liquidation Proceeds or otherwise.

Section 3.07 Access to Certain Documentation and Information
Regarding the Mortgage Loans.

The Master Servicer shall afford the Depositor and the Trustee reasonable access to all records and documentation regarding the Mortgage Loans and all accounts, insurance information and other matters relating to this Agreement, such access being afforded without charge, but only upon reasonable request and during normal business hours at the office designated by the Master Servicer.

Upon reasonable advance notice in writing, the Master Servicer will provide to each Certificateholder which is a savings and loan association, bank, insurance company or financial institution certain reports and reasonable access to information and documentation regarding the Mortgage Loans sufficient to permit such Certificateholder to comply with applicable regulations of the OTS or other regulatory authorities with respect to investment in the Certificates; provided that the Master Servicer shall be entitled to be reimbursed by each such Certificateholder for actual expenses incurred by the Master Servicer in providing such reports and access.

Section 3.08 Permitted Withdrawals from the Collection Account and
the Distribution Account.

(a) The Master Servicer may from time to time make withdrawals from the Collection Account for the following purposes:

(i) to pay to the Master Servicer (to the extent not previously retained by the Master Servicer) the servicing compensation to which it is entitled pursuant to

Section 3.14, and to pay to the Master Servicer, as additional servicing compensation, earnings on or investment income with respect to funds in or credited to the Collection Account;

(ii) to reimburse each of the Master Servicer and the Trustee for unreimbursed Monthly Advances made by it, such right of reimbursement pursuant to this subclause (ii) being limited to amounts received on the Mortgage Loan(s) in respect of which any such Monthly Advance was made;

(iii) to reimburse the Master Servicer for unreimbursed Insured Expenses made by it from the related Insurance Proceeds;

(iv) to reimburse the Master Servicer for (a) unreimbursed Servicing Advances, the Master Servicer's right to reimbursement pursuant to this clause (a) with respect to any Mortgage Loan being limited to amounts received on such Mortgage Loan(s) which represent late recoveries of the payments for which such advances were made pursuant to Section 3.01, Section 3.06 or Section 3.09 and (b) for unpaid Servicing Advances and Servicing Fees as provided in Section 3.11 hereof;

(v) to pay to the purchaser, with respect to each Mortgage Loan or property acquired in respect thereof that has been purchased pursuant to Section 2.02, 2.03 or, with respect to a Mortgage Loan, 3.11, all amounts received thereon after the date of such purchase;

(vi) to reimburse the Seller, the Master Servicer or the Depositor for expenses incurred by any of them and reimbursable pursuant to Section 6.03 hereof;

(vii) to withdraw any amount deposited in the Collection Account and not required to be deposited therein;

(viii) to reimburse the Master Servicer or the Trustee, as the case may be, for expenses reasonably incurred in connection with any breach or defect giving rise to the purchase obligation under Section 2.03 of this Agreement, including any expenses arising out of the enforcement of the purchase obligation;

(ix) on or prior to the Master Servicer Remittance Date, to withdraw an amount equal to the Available Distribution Amount related to the Mortgage Loans and remit such amount to the Trustee;

(x) to pay to the servicer that made such advances, all Arrearages collected;

(xi) to reimburse each of the Master Servicer and the Trustee for any Nonrecoverable Advance previously made by it;

(xii) subject to Section 4.01, to reimburse the Master Servicer in respect of any unreimbursed Advances to the extent of funds held in the Collection Account for

future distribution that were not included in the Available Distribution Amount related to the Mortgage Loans for the preceding Distribution Date; and

(xiii) to clear and terminate the Collection Account upon termination of this Agreement pursuant to Section 9.01 hereof.

The Master Servicer shall keep and maintain separate accounting, on a loan by loan basis, for the purpose of justifying any withdrawal from the Collection Account pursuant to such subclauses (i), (ii), (iii), (iv), (v), (x) and (xi), prior to making any withdrawal from the Collection Account pursuant to such subclause.

(b) The Trustee shall withdraw funds from the Distribution Account for distributions to Certificateholders in the manner specified in this Agreement (and to withhold from the amounts so withdrawn, the amount of any taxes that it is authorized to withhold pursuant to the last paragraph of Section 8.11). In addition, the Trustee shall from time to time make withdrawals from the Distribution Account for the following purposes:

(i) to pay, prior to any distributions to Certificateholders, to itself the Trustee Fee and the reimbursement for any other amounts due and owing to it pursuant to this Agreement that are permitted expenses of the Trust, including but not limited to Section 7.02 and Section 8.05 (subject to the limitations set forth in such sections) for the related Distribution Date;

(ii) to pay, prior to any distributions to Certificateholders, to the Master Servicer as additional compensation earnings on or investment income with respect to funds in the Distribution Account;

(iii) to withdraw and return to the Master Servicer prior to any distributions to Certificateholders, any amount deposited in the Distribution Account and not required to be deposited therein; and

(iv) to clear and terminate the Distribution Account upon termination of the Agreement pursuant to Section 9.01 hereof.

Section 3.09 Maintenance of Hazard Insurance.

(a) The Master Servicer shall cause to be maintained, for each Mortgage Loan, hazard insurance with extended coverage in an amount that is at least equal to the lesser of (i) the maximum insurable value of the improvements securing such Mortgage Loan, (ii) the greater of (y) the outstanding principal balance of the Mortgage Loan and (z) an amount such that the proceeds of such policy shall be sufficient to prevent the Mortgagor and/or the mortgagee from becoming a co-insurer, or (iii) the amount required under applicable HUD/FHA regulations. Each such policy of standard hazard insurance shall contain, or have an accompanying endorsement that contains, a standard mortgagee clause. Any amounts collected by the Master Servicer under any such policies (other than the amounts to be applied to the restoration or repair of the related Mortgaged Property or amounts released to the Mortgagor in accordance with the Master Servicer's normal servicing procedures) shall be deposited in the Collection Account.

Any cost incurred by the Master Servicer in maintaining any such insurance shall not, for the purpose of calculating monthly distributions to the Certificateholders or remittances to the Trustee for their benefit, be added to the principal balance of the Mortgage Loan, notwithstanding that the terms of the Mortgage Loan so permit. Such costs shall be recoverable by the Master Servicer out of late payments by the related Mortgagor or out of Liquidation Proceeds to the extent permitted by Section 3.08 hereof. It is understood and agreed that no earthquake or other additional insurance is to be required of any Mortgagor or maintained on property acquired in respect of a Mortgage other than pursuant to such applicable laws and regulations as shall at any time be in force and as shall require such additional insurance. If the Mortgaged Property is located at the time of origination of the Mortgage Loan in a federally designated special flood hazard area and such area is participating in the national flood insurance program, the Master Servicer shall cause flood insurance to be maintained with respect to such Mortgage Loan. Such flood insurance shall be in an amount equal to the least of (i) the outstanding principal balance of the related Mortgage Loan, (ii) the replacement value of the improvements which are part of such Mortgaged Property, and (iii) the maximum amount of such insurance available for the related Mortgaged Property under the national flood insurance program.

Section 3.10 Enforcement of Due-on-Sale Clauses; Assumption
Agreements.

(a) Except as otherwise provided in this Section, when any property subject to a Mortgage has been conveyed by the Mortgagor, the Master Servicer shall to the extent that it has knowledge of such conveyance, enforce any due-on-sale clause contained in any Mortgage Note or Mortgage, to the extent permitted under applicable law and governmental regulations, but only to the extent that such enforcement will not adversely affect or jeopardize coverage under any Required Insurance Policy. Notwithstanding the foregoing, the Master Servicer is not required to exercise such rights with respect to a Mortgage Loan if the Person to whom the related Mortgaged Property has been conveyed or is proposed to be conveyed satisfies the terms and conditions contained in the Mortgage Note and Mortgage related thereto and the consent of the mortgagee under such Mortgage Note or Mortgage is not otherwise so required under such Mortgage Note or Mortgage as a condition to such transfer. In the event that the Master Servicer is prohibited by law from enforcing any such due-on-sale clause, or if coverage under any Required Insurance Policy would be adversely affected, or if nonenforcement is otherwise permitted hereunder, the Master Servicer is authorized, subject to Section 3.10(b), to take or enter into an assumption and modification agreement from or with the person to whom such property has been or is about to be conveyed, pursuant to which such person becomes liable under the Mortgage Note and, unless prohibited by applicable state law, the Mortgagor remains liable thereon; provided that the Mortgage Loan shall continue to be covered (if so covered before the Master Servicer enters such agreement) by the applicable Required Insurance Policies. The Master Servicer, subject to Section 3.10(b), is also authorized with the prior approval of the insurers under any Required Insurance Policies to enter into a substitution of liability agreement with such Person, pursuant to which the original Mortgagor is released from liability and such Person is substituted as Mortgagor and becomes liable under the Mortgage Note. Notwithstanding the foregoing, the Master Servicer shall not be deemed to be in default under

this Section by reason of any transfer or assumption which the Master Servicer reasonably believes it is restricted by law from preventing, for any reason whatsoever.

(b) Subject to the Master Servicer's duty to enforce any due-on-sale clause to the extent set forth in Section 3.10(a) hereof, in any case in which a Mortgaged Property has been conveyed to a Person by a Mortgagor, and such Person is to enter into an assumption agreement or modification agreement or supplement to the Mortgage Note or Mortgage that requires the signature of the Trustee, or if an instrument of release signed by the Trustee is required releasing the Mortgagor from liability on the Mortgage Loan, the Master Servicer shall prepare and deliver or cause to be prepared and delivered to the Trustee for signature and shall direct, in writing, the Trustee to execute the assumption agreement with the Person to whom the Mortgaged Property is to be conveyed and such modification agreement or supplement to the Mortgage Note or Mortgage or other instruments as are reasonable or necessary to carry out the terms of the Mortgage Note or Mortgage or otherwise to comply with any applicable laws regarding assumptions or the transfer of the Mortgaged Property to such Person. In connection with any such assumption, no material term of the Mortgage Note may be changed. In addition, the substitute Mortgagor and the Mortgaged Property must be acceptable to the Master Servicer in accordance with its underwriting standards as then in effect. Together with each such substitution, assumption or other agreement or instrument delivered to the Trustee for execution by it, the Master Servicer shall deliver an Officer's Certificate signed by a Servicing Officer stating that the requirements of this subsection have been met in connection therewith. The Master Servicer shall notify the Trustee that any such substitution or assumption agreement has been completed by forwarding to the Trustee the original of such substitution or assumption agreement, which shall be added to the related Mortgage File and shall, for all purposes, be considered a part of such Mortgage File to the same extent as all other documents and instruments constituting a part thereof. Any fee collected by the Master Servicer for entering into an assumption or substitution of liability agreement will be retained by the Master Servicer as additional servicing compensation.

Section 3.11 Realization Upon Defaulted Mortgage Loans; Repurchase of Certain Mortgage Loans.

The Master Servicer shall use reasonable efforts to foreclose upon or otherwise comparably convert the ownership of properties securing such of the Mortgage Loans as come into and continue in default and as to which no satisfactory arrangements can be made for collection of delinquent payments. In connection with such foreclosure or other conversion, the Master Servicer shall follow such practices and procedures as it shall deem necessary or advisable and as shall be normal and usual in its general mortgage servicing activities and meet the requirements of the insurer under any Required Insurance Policy; provided, however, that the Master Servicer shall not be required to expend its own funds in connection with any foreclosure or towards the restoration of any property unless it shall determine (i) that such restoration and/or foreclosure will increase the proceeds of liquidation of the Mortgage Loan after reimbursement to itself of such expenses and (ii) that such expenses will be recoverable to it through related Liquidation Proceeds (respecting which it shall have priority for purposes of withdrawals from the Collection Account). The Master Servicer shall be responsible for all other costs and expenses incurred by it in any such proceedings; provided, however, that it shall be entitled to reimbursement thereof from the liquidation proceeds with respect to the related Mortgaged

Property, as provided in the definition of Liquidation Proceeds. If the Master Servicer has knowledge that a Mortgaged Property which the Master Servicer is contemplating acquiring in foreclosure or by deed in lieu of foreclosure is located within a 1 mile radius of any site listed in the Expenditure Plan for the Hazardous Substance Clean Up Bond Act of 1984 or other site with environmental or hazardous waste risks known to the Master Servicer, the Master Servicer will, prior to acquiring the Mortgaged Property, consider such risks and only take action in accordance with its established environmental review procedures; provided that, in the good faith judgment of the Master Servicer, such actions will not have a material adverse effect on the Trust or the interests of the Certificateholders.

In the event that any payment due under any FHA Loan becomes delinquent, the Master Servicer shall take all such actions as are in the best interests of the Certificateholders and permitted under any applicable FHA loss mitigation proceedings, including, but not limited to, requesting the FHA to accept an assignment of such FHA Loan, and, upon the Master Servicer's determination that foreclosure is in the best interest of the Certificateholders, commencing foreclosure proceedings. With respect to each VA Loan or RHS Loan, the Master Servicer shall diligently seek to mitigate losses by utilizing all remedies available in the VA Regulations or RHS regulations, as applicable.

With respect to any REO Property, the deed or certificate of sale shall be taken in the name of the Trustee for the benefit of the Certificateholders, or its nominee, on behalf of the Certificateholders. The Trustee's name shall be placed on the title to such REO Property solely as the Trustee hereunder and not in its individual capacity. The Master Servicer shall ensure that the title to such REO Property references this Pooling and Servicing Agreement and the Trustee's capacity hereunder. Pursuant to its efforts to sell such REO Property, the Master Servicer shall either itself or through an agent selected by the Master Servicer protect and conserve such REO Property in the same manner and to such extent as is customary in the locality where such REO Property is located and may, incident to its conservation and protection of the interests of the Certificateholders, rent the same, or any part thereof, as the Master Servicer deems to be in the best interest of the Certificateholders for the period prior to the sale of such REO Property. The Master Servicer shall prepare for and deliver to the Trustee a statement with respect to each REO Property that has been rented showing the aggregate rental income received and all expenses incurred in connection with the maintenance of such REO Property at such times as is necessary to enable the Trustee to comply with the reporting requirements of the REMIC Provisions. The net monthly rental income, if any, from such REO Property shall be deposited in the Collection Account no later than the close of business on each Determination Date. The Master Servicer shall perform the tax reporting and withholding required by Sections 1445 and 6050J of the Code with respect to foreclosures and abandonments, the tax reporting required by Section 6050H of the Code with respect to the receipt of mortgage interest from individuals and any tax reporting required by Section 6050P of the Code with respect to the cancellation of indebtedness by certain financial entities, by preparing such tax and information returns as may be required, in the form required, and delivering the same to the Trustee for filing.

In the event that the Trust Fund acquires any Mortgaged Property as aforesaid or otherwise in connection with a default or imminent default on a Mortgage Loan, the Master Servicer shall dispose of such Mortgaged Property as soon as practicable in a manner that

maximizes the Liquidation Proceeds thereof, but in no event later than three years after its acquisition by the Trust Fund. In the event the Master Servicer does not dispose of such a Mortgaged Property during the related three-year period, the Trustee shall have been supplied with an Opinion of Counsel to the effect that the holding by the Trust Fund of such Mortgaged Property subsequent to such three-year period will not result in the imposition of taxes on “prohibited transactions” of any REMIC hereunder as defined in section 860F of the Code or cause any REMIC hereunder to fail to qualify as a REMIC at any time that any Certificates are outstanding, the Trust Fund may continue to hold such Mortgaged Property (subject to any conditions contained in such Opinion of Counsel) after the expiration of such three-year period. Notwithstanding any other provision of this Agreement, no Mortgaged Property acquired by the Trust Fund shall be rented (or allowed to continue to be rented) or otherwise used for the production of income by or on behalf of the Trust Fund in such a manner or pursuant to any terms that would (i) cause such Mortgaged Property to fail to qualify as “foreclosure property” within the meaning of section 860G(a)(8) of the Code or (ii) subject any REMIC hereunder to the imposition of any federal, state or local income taxes on the income earned from such Mortgaged Property under Section 860G(c) of the Code or otherwise, unless the Master Servicer has agreed to indemnify and hold harmless the Trust Fund with respect to the imposition of any such taxes.

In the event of a default on a Mortgage Loan one or more of whose obligor is not a United States Person, as that term is defined in Section 7701(a)(30) of the Code, in connection with any foreclosure or acquisition of a deed in lieu of foreclosure (together, “foreclosure”) in respect of such Mortgage Loan, the Master Servicer will cause compliance with the provisions of Treasury Regulation Section 1.1445-2(d)(3) (or any successor thereto) necessary to assure that no withholding tax obligation arises with respect to the proceeds of such foreclosure except to the extent, if any, that proceeds of such foreclosure are required to be remitted to the obligors on such Mortgage Loan.

The decision of the Master Servicer to foreclose on a defaulted Mortgage Loan shall be subject to a determination by the Master Servicer that the proceeds of such foreclosure would exceed the costs and expenses of bringing such a proceeding. The income earned from the management of any REO Properties, net of reimbursement to the Master Servicer for expenses incurred (including any property or other taxes) in connection with such management and net of unreimbursed Servicing Fees, Monthly Advances and Servicing Advances, shall be applied to the payment of principal of and interest on the related defaulted Mortgage Loans (with interest accruing as though such Mortgage Loans were still current) and all such income shall be deemed, for all purposes in this Agreement, to be payments on account of principal and interest on the related Mortgage Notes and shall be deposited into the Collection Account. To the extent the net income received during any calendar month is in excess of the amount attributable to amortizing principal and accrued interest at the related Mortgage Rate on the related Mortgage Loan for such calendar month, such excess shall be considered to be a partial prepayment of principal of the related Mortgage Loan.

The proceeds from any liquidation of a Mortgage Loan, as well as any income from an REO Property, will be applied in the following order of priority: first, to reimburse the Master Servicer for any related unreimbursed Servicing Advances and Servicing Fees; second, to reimburse the Master Servicer for any unreimbursed Monthly Advances; third, to accrued and

unpaid interest (to the extent no Monthly Advance has been made for such amount or any such Monthly Advance has been reimbursed) on the Mortgage Loan or related REO Property, at the Net Mortgage Rate to the Due Date occurring in the month in which such amounts are required to be distributed; and fourth, as a recovery of principal of the Mortgage Loan. Excess Proceeds, if any, from the liquidation of a Liquidated Mortgage Loan will be retained by the Master Servicer as additional servicing compensation pursuant to Section 3.14.

Section 3.12 Custodians to Cooperate; Release of Mortgage Files.

Upon the payment in full of any Mortgage Loan, or the receipt by the Master Servicer of a notification that payment in full will be escrowed in a manner customary for such purposes, the Master Servicer will immediately notify the Custodian by delivering, or causing to be delivered a Request for Release. Upon receipt of such request, the Custodian shall promptly release the related Mortgage File to the Master Servicer, and the Custodian shall at the Master Servicer's direction execute and deliver to the Master Servicer the request for reconveyance, deed of reconveyance or release or satisfaction of mortgage or such instrument releasing the lien of the Mortgage in each case provided by the Master Servicer, together with the Mortgage Note with written evidence of cancellation thereon. The Master Servicer is authorized to cause the removal from the registration on the MERS® System of the related Mortgage and to execute and deliver, on behalf of the Trustee and the Certificateholders or any of them, any and all instruments of satisfaction or cancellation or of partial or full release. Expenses incurred in connection with any instrument of satisfaction or deed of reconveyance shall be chargeable to the related Mortgagor. From time to time and as shall be appropriate for the servicing or foreclosure of any Mortgage Loan, including for such purpose, collection under any policy of flood insurance, any fidelity bond or errors or omissions policy, or for the purposes of effecting a partial release of any Mortgaged Property from the lien of the Mortgage or the making of any corrections to any of the documents included in the Mortgage File, the Custodian shall, upon delivery to it of a Request for Release signed by a Servicing Officer, release the Mortgage File to the Master Servicer. Subject to the further limitations set forth below, the Master Servicer shall cause the Mortgage File or documents so released to be returned to the Custodian when the need therefor by the Master Servicer no longer exists, unless such Mortgage Loan is liquidated and the proceeds thereof are deposited in the Collection Account, in which case the Master Servicer shall deliver to the Custodian and the Trustee a Request for Release signed by a Servicing Officer.

If the Master Servicer at any time seeks to initiate a foreclosure proceeding in respect of any Mortgaged Property as authorized by this Agreement, the Master Servicer shall deliver or cause to be delivered to the Trustee, for signature, as appropriate, any court pleadings, requests for trustee's sale or other documents necessary to effectuate such foreclosure or any legal action brought to obtain judgment against the Mortgagor on the Mortgage Note or the Mortgage or to obtain a deficiency judgment or to enforce any other remedies or rights provided by the Mortgage Note or the Mortgage or otherwise available at law or in equity.

Section 3.13 Documents, Records and Funds in Possession of Master Servicer to be Held for the Trustee.

Notwithstanding any other provisions of this Agreement, the Master Servicer shall transmit to the Custodians, as required by this Agreement all documents and instruments in

respect of a Mortgage Loan coming into the possession of the Master Servicer from time to time and shall account fully to the Trustee for any funds received by the Master Servicer or which otherwise are collected by the Master Servicer as Liquidation Proceeds or Insurance Proceeds in respect of any Mortgage Loan. All Mortgage Files and funds collected or held by, or under the control of, the Master Servicer in respect of any Mortgage Loans, whether from the collection of principal and interest payments or from Liquidation Proceeds, including but not limited to, any funds on deposit in the Collection Account, shall be held by the Master Servicer for and on behalf of the Trustee for the benefit of the Certificateholders and shall be and remain the sole and exclusive property of the Trustee, subject to the applicable provisions of this Agreement. The Master Servicer also agrees that it shall not create, incur or subject any Mortgage File or any funds that are deposited in the Collection Account, Distribution Account or any Escrow Account, or any funds that otherwise are or may become due or payable to the Trustee for the benefit of the Certificateholders, to any claim, lien, security interest, judgment, levy, writ of attachment or other encumbrance, or assert by legal action or otherwise any claim or right of setoff against any Mortgage File or any funds collected on, or in connection with, a Mortgage Loan, except, however, that the Master Servicer shall be entitled to set off against and deduct from any such funds any amounts that are properly due and payable to the Master Servicer under this Agreement.

Section 3.14 Servicing Compensation.

As compensation for its activities hereunder, the Master Servicer shall be entitled to retain or withdraw from the Collection Account an amount equal to the Servicing Fee in respect of the Mortgage Loans; provided, that the aggregate Servicing Fee with respect to any Distribution Date shall be reduced by an amount equal to the aggregate of the Prepayment Interest Shortfalls in respect of the Mortgage Loans, if any, with respect to such Distribution Date, but not below an amount equal to one-half of the amount in clause (i) of the definition of Servicing Fee payable to the Master Servicer for such Distribution Date before reduction thereof in respect of such Prepayment Interest Shortfalls.

Additional servicing compensation in the form of Excess Proceeds, Prepayment Interest Excess, prepayment penalties, assumption fees, late payment charges and all income and gain net of any losses realized from Permitted Investments in the Collection Account shall be retained by the Master Servicer to the extent not required to be deposited in the Collection Account pursuant to Section 3.05 hereof. The Master Servicer shall be required to pay all expenses incurred by it in connection with its master servicing activities hereunder (including payment of any premiums for hazard insurance and maintenance of the other forms of insurance coverage required by this Agreement) and shall not be entitled to reimbursement therefor except as specifically provided in this Agreement.

Section 3.15 Access to Certain Documentation.

(a) The Master Servicer shall provide to the OTS and the FDIC and to comparable regulatory authorities supervising Holders of Subordinate Certificates and the examiners and supervisory agents of the OTS, the FDIC and such other authorities, access to the documentation regarding the Mortgage Loans required by applicable regulations of the OTS and the FDIC. Such access shall be afforded without charge, but only upon

reasonable and prior written request and during normal business hours at the offices designated by the Master Servicer. Nothing in this Section shall limit the obligation of the Master Servicer to observe any applicable law prohibiting disclosure of information regarding the Mortgagors and the failure of the Master Servicer to provide access as provided in this Section as a result of such obligation shall not constitute a breach of this Section.

Section 3.16 Annual Statement as to Compliance.

The Master Servicer shall deliver to the Depositor and the Trustee on or before March 30 of each year, commencing with 2006, an Officer's Certificate stating, as to the signer thereof, that (i) a review of the activities of the Master Servicer during the preceding calendar year and of the performance of the Master Servicer under this Agreement has been made under such officer's supervision and (ii) to the best of such officer's knowledge, based on such review, the Master Servicer has fulfilled all its obligations under this Agreement throughout such year, or, if there has been a default in the fulfillment of any such obligation, specifying each such default known to such officer and the nature and status thereof. The Trustee shall forward a copy of each such statement to each Rating Agency.

Section 3.17 Annual Independent Public Accountants' Servicing Statement; Financial Statements.

On or before March 30 of each, commencing with 2006, the Master Servicer at its expense shall cause a nationally or regionally recognized firm of independent public accountants (who may also render other services to the Master Servicer, the Seller or any affiliate thereof) which is a member of the American Institute of Certified Public Accountants to furnish a statement to the Trustee and the Depositor to the effect that such firm has examined certain documents and records relating to the servicing of the Mortgage Loans under this Agreement or of mortgage loans under pooling and servicing agreements substantially similar to this Agreement (such statement to have attached thereto a schedule setting forth the pooling and servicing agreements covered thereby) and that, on the basis of such examination, conducted substantially in compliance with the Uniform Single Attestation Program for Mortgage Bankers or the Audit Program for Mortgages serviced for FHLMC, such servicing has been conducted in compliance with such pooling and servicing agreements except for such significant exceptions or errors in records that, in the opinion of such firm, the Uniform Single Attestation Program for Mortgage Bankers or the Audit Program for Mortgages serviced for FHLMC requires it to report. In rendering such statement, such firm may rely, as to matters relating to direct servicing of mortgage loans by Subservicers, upon comparable statements for examinations conducted substantially in compliance with the Uniform Single Attestation Program for Mortgage Bankers or the Audit Program for Mortgages serviced for FHLMC (rendered within one year of such statement) of independent public accountants with respect to the related Subservicer. Copies of such statement shall be provided by the Trustee to any Certificateholder upon request at the Master Servicer's expense; provided that such statement is delivered by the Master Servicer to the Trustee.

Section 3.18 Errors and Omissions Insurance; Fidelity Bonds.

The Master Servicer shall for so long as it acts as master servicer under this Agreement, obtain and maintain in force (a) a policy or policies of insurance covering errors and omissions in the performance of its obligations as Master Servicer hereunder and (b) a fidelity bond in respect of its officers, employees and agents. Each such policy or policies and bond shall, together, comply with the requirements from time to time of FHLMC for persons performing servicing for mortgage loans purchased by FHLMC. In the event that any such policy or bond ceases to be in effect, the Master Servicer shall obtain a comparable replacement policy or bond from an insurer or issuer, meeting the requirements set forth above as of the date of such replacement.

Section 3.19 Reports of Foreclosure and Abandonment of Mortgaged Properties.

On or before May 31st of each year beginning in 2005, the Master Servicer shall file the reports of foreclosure and abandonment of any Mortgaged Property required by Section 6050J of the Code and cancellation of indebtedness required under Section 6050P of the Code with the Internal Revenue Service. The reports from the Master Servicer shall be made in a timely fashion and in form and substance sufficient to meet the reporting requirements imposed by such Section 6050J and 6050P.

Section 3.20 Repurchase of Rate-Reduced Mortgage Loans.

In the event that the Master Servicer modifies a Mortgage Loan to effect a reduction in the interest rate thereof (other than by reason of application of the Relief Act), the Master Servicer shall repurchase such Mortgage Loans at the Purchase Price therefore and shall deposit such Purchase Price in the Collection Account on or before the Master Servicer Remittance Date for the Distribution Date in the month succeeding the calendar month during which the related Mortgage Loan became a Reduced-Rate Mortgage Loan.

ARTICLE IV

DISTRIBUTIONS AND ADVANCES BY THE MASTER SERVICER

Section 4.01 Advances.

The Master Servicer shall determine on or before each Master Servicer Remittance Date whether it is required to make a Monthly Advance with respect to a Mortgage Loan pursuant to the definition thereof. If the Master Servicer determines it is required to make a Monthly Advance, it shall, on or before 1:00 p.m. New York City time on the Master Servicer Remittance Date (the “Master Servicer Advance Date”), either (i) deposit into the Collection Account an amount equal to the Monthly Advance or (ii) make an appropriate entry in its records relating to the Collection Account that any Amount Held for Future Distribution has been used by the Master Servicer in discharge of its obligation to make any such Monthly Advance. Any funds so applied shall be replaced by the Master Servicer by deposit in the Collection Account no later than the close of business on any future Master Servicer Remittance Date to the extent that the Available Distribution Amount with respect to the Mortgage Loans for the related Distribution Date (determined without regard to Monthly Advances to be made on the Master Servicer Remittance Date) shall be less than the total amount that would be distributed to the Classes of Certificateholders pursuant to Section 4.03 on such Distribution Date if such Amounts Held for Future Distributions had not been so used to make Monthly Advances or reimburse for Monthly Advances previously made. The Master Servicer shall be entitled to be reimbursed from the Collection Account for all Monthly Advances of its own funds made pursuant to this Section as provided in Section 3.08.

Notwithstanding anything herein to the contrary, no Monthly Advance or Servicing Advance shall be required to be made hereunder by the Master Servicer if such Monthly Advance or Servicing Advance would, if made, constitute a Nonrecoverable Advance. The determination by the Master Servicer that it has made a Nonrecoverable Advance or that any proposed Monthly Advance or Servicing Advance, if made, would constitute a Nonrecoverable Advance shall be evidenced by an Officers’ Certificate of the Master Servicer delivered to the Trustee.

The Master Servicer shall continue to make Monthly Advances with respect to any delinquent Mortgage Loan, until the earlier of (i) the date of conveyance of the related Mortgage Property to HUD or the Department of Veteran Affairs, as applicable and (ii) the date on which the foreclosure date of such Mortgage Loan has been determined.

Nothing in this Section 4.01 shall be construed to prohibit the Master Servicer from reimbursing itself for such Monthly Advances at any time from the Collection Account out of any late collection of a Monthly Payment on the Mortgage Loan.

Section 4.02 Obligations of the Master Servicer in Respect of
Prepayment Interest Shortfalls.

The Master Servicer shall deliver to the Trustee for deposit into the Distribution Account no later than the close of business on the Master Servicer Remittance Date from its own funds an amount (“Compensating Interest”) equal to the lesser of (i) the aggregate of the Prepayment Interest Shortfalls with respect to the Mortgage Loans for the related Distribution Date resulting from full or partial Principal Prepayments during the related Prepayment Period, and (ii) one-half (50%) of the amount calculated pursuant to clause (i) of the definition of Servicing Fee with respect to the Mortgage Loans for such Distribution Date. Any amounts paid by the Master Servicer pursuant to this Section 4.02 shall not be reimbursed by REMIC I. The Master Servicer shall not have the right to reimbursement for any amounts remitted to the Trustee in respect of Compensating Interest. Such amounts so remitted shall be included in the Available Distribution Amount with respect to the Mortgage Loans and distributed therewith on the next Distribution Date. The Master Servicer shall not be obligated to pay Compensating Interest with respect to Relief Act Reductions.

Section 4.03 Priorities of Distribution.

(a) On each Distribution Date, the Trustee shall withdraw the Available Distribution Amount for such Distribution Date from the Distribution Account and apply such funds to distributions in the following order of priority:

(1) to the Trustee the Trustee Fee for such Distribution Date and any amounts due and owing to the Trustee pursuant to this Agreement that are permitted expenses of the Trust as set forth in this Agreement, including but not limited to Section 8.05 or Section 7.02 hereof (subject to the limitations set forth in such sections) and to the Custodians pursuant to Section 8.14 hereof;

(2) the Class RM Interest Distribution Amount for such Distribution Date to the Class RM Certificates;

(3) from the Interest Distributable Amount related to the Category 1 Mortgage Loans for such Distribution Date in the following amounts and order of priority:

(i) concurrently, the Class 1A-S Interest Distribution Amount for such Distribution Date to the Class 1A-S Certificates and the related Senior Interest Distribution Amount for such Distribution Date to the Class 1A-F1 Certificates and the Class 1A-F2 Certificates, any shortfall being allocated among such Classes in proportion to the amount of the Interest Distribution Amount that such Certificates would have been distributed in the absence of such shortfall;

(4) from the Interest Distributable Amount related to the Category 2 Mortgage Loans for such Distribution Date in the following amounts and order of priority:

(i) concurrently, the Class 2A-IO Interest Distribution Amount for such Distribution Date to the Class 2A-IO Certificates and the related Senior Interest

Distribution Amount for such Distribution Date to the Class 2A-1 Certificates and the Class 2A-2 Certificates, any shortfall being allocated among such Classes in proportion to the amount of the Interest Distribution Amount that such Certificates would have been distributed in the absence of such shortfall;

(5) from the Interest Distributable Amount related to all the Mortgage Loans for such Distribution Date remaining after the above distributions in (3) and (4) above have been made:

(i) concurrently, to the Class 1A-S Certificates, the Class 1A-F1 Certificates, the Class 1A-F2 Certificates, the Class 2A-1 Certificates, the Class 2A-2 Certificates and the Class 2A-IO Certificates, the related Class 1A-S Interest Distribution Amount, the related Senior Interest Distribution Amount and the related Class 2A-IO Interest Distribution Amount, respectively, for such Distribution Date remaining unpaid pursuant to (3) and (4) above, pro rata, based on the remaining amount of the Interest Distribution Amount for each such Class of Certificates;

(ii) the related Subordinate Interest Distribution Amount for such Distribution Date to the Class M Certificates;

(iii) the related Subordinate Interest Distribution Amount for such Distribution Date to the Class B-1 Certificates;

(iv) the related Subordinate Interest Distribution Amount for such Distribution Date to the Class B-2 Certificates;

(v) the related Subordinate Interest Distribution Amount for such Distribution Date to the Class B-3 Certificates;

(vi) the related Subordinate Interest Distribution Amount for such Distribution Date to the Class B-4 Certificates;

(vii) the related Subordinate Interest Distribution Amount for such Distribution Date to the Class B-5 Certificates;

(6) from Principal Collections for such Distribution Date related to the Category 1 Mortgage Loans in the following amounts and order of priority:

(i), the Category 1 Senior Principal Distribution Amount for such Distribution Date, pro rata, to the Class 1A-F1 and Class 1A-F2 Certificates until their respective Class Certificate Balances have been reduced to zero;

(7) from Principal Collections for such Distribution Date related to the Category 2 Mortgage Loans in the following amounts and order of priority:

(i) concurrently, the Class PO Principal Distribution Amount for such

Distribution Date to the Class 2A-PO Certificates, the related Class 2A-1 Senior Principal Distribution Amounts for such Distribution Date to the Class 2A-1 Certificates and the Class 2A-2 Senior Principal Distribution Amount to the Class 2A-2 Certificates until their respective Class Certificate Balances have been reduced to zero;

(8) from Principal Collections for such Distribution Date related to all the Mortgage Loans remaining after the distributions in (6) and (7) above have been made, in the following amounts and order of priority:

(i) the Class PO Deferred Amount for such Distribution Date to the Class 2A-PO Certificates until the Certificate Principal Balance thereof has been reduced to zero;

(ii) the Class M Specified Subordinate Principal Distribution Amount to the Class M Certificates, until the Class Certificate Balance thereof has been reduced to zero;

(iii) the related Class B Specified Subordinate Principal Distribution Amount, to the Class B-1 Certificates until the Class Certificate Balance thereof has been reduced to zero;

(iv) the related Class B Specified Subordinate Principal Distribution Amount to the Class B-2 Certificates, until the Class Certificate Balance thereof has been reduced to zero;

(v) the related Class B Specified Subordinate Principal Distribution Amount to the Class B-3 Certificates, until the Class Certificate Balance thereof has been reduced to zero;

(vi) the related Class B Specified Subordinate Principal Distribution Amount to the Class B-4 Certificates, until the Class Certificate Balance thereof has been reduced to zero;

(vii) the related Class B Specified Subordinate Principal Distribution Amount to the Class B-5 Certificates, until the Class Certificate Balance thereof has been reduced to zero;

(viii) the related Allocated Realized Loss Amount for such Distribution Date to the Class 1A-F1 Certificates, Class 1A-F2 Certificates, Class 2A-1 Certificates, Class 2A-2 Certificates and Class 2A-PO Certificates then outstanding, pro rata, based on their respective Allocated Realized Loss Amounts;

(ix) the related Allocated Realized Loss Amount for such Distribution Date to the Class M Certificates;

(x) the related Allocated Realized Loss Amount for such Distribution Date to the Class B-1 Certificates;

(xi) the related Allocated Realized Loss Amount for such Distribution Date to the Class B-2 Certificates;

(xii) the related Allocated Realized Loss Amount for such Distribution Date to the Class B-3 Certificates;

(xiii) the related Allocated Realized Loss Amount for such Distribution Date to the Class B-4 Certificates;

(xiv) the related Allocated Realized Loss Amount for such Distribution Date to the Class B-5 Certificates;

(9) from the Principal Collections remaining after principal payments pursuant to (1) through (8) above have been made, to the Class R Certificates.

(b) On each Distribution Date, Net Prepayment Interest Shortfalls and Relief Act Reductions incurred during the Prepayment Period with respect to the Mortgage Loans and such Distribution Date shall be allocated in the following order of priority: first, to reduce the amount referred to in clause (i) of the definition of Subordinate Interest Distribution Amount with respect to the Subordinate Certificates in reverse order of their respective numerical Class designations (beginning with the Class of Subordinate Certificates then outstanding with the highest numerical Class designation) until the Subordinate Interest Distribution Amount to which each such Class is entitled on such Distribution Date is reduced to zero; and second, if such Net Prepayment Interest Shortfalls and Relief Act Reductions are incurred with respect to the Category 1 Mortgage Loans, *pro rata*, to reduce the amount referred to in clause (i) of the definition of Senior Interest Distribution Amount and Class 1A-S Interest Distribution Amount with respect to the Class 1A-F1, Class 1A-F2 and Class 1A-S Certificates, as applicable, until the Interest Distribution Amount to which each such Class is entitled on such Distribution Date is reduced to zero or if such remaining Net Prepayment Interest Shortfalls and Relief Act Reductions incurred with respect to the Category 2 Mortgage Loans, *pro rata*, to reduce the amount referred to in clause (i) of the definition of Senior Interest Distribution Amount and Class 2A-IO Interest Distribution Amount with respect to the Class 2A-1, Class 2A-2 and Class 2A-IO Certificates, as applicable, until the Interest Distribution Amount to which each such Class is entitled on such Distribution Date is reduced to zero. For purposes of allocating Net Prepayment Interest Shortfalls and Relief Act Reductions to the Subordinate Certificates, the Class M Certificates will be deemed to have a lower numerical class designation, and to be of a higher relative payment priority, than any other Class of Subordinate Certificates.

Section 4.04 Allocation of Realized Losses; Subsequent Recoveries.

(a) On or prior to each Distribution Date, the Trustee shall determine the total amount of Realized Losses with respect to the Mortgage Loans and the related Distribution Date based solely on the information provided to it by the Master Servicer. For purposes of allocating losses to the Subordinate Certificates, the Class M Certificates will be deemed to have a lower

numerical class designation, and to be of a higher relative payment priority, than any other Class of Subordinate Certificates. Realized Losses with respect to any Distribution Date and the Mortgage Loans shall be allocated first, to the related Subordinate Certificates in reverse order of their respective numerical Class designations (beginning with the Class of Subordinate Certificates then outstanding with the highest numerical Class designation) until the respective Class Certificate Balance of each such Class is reduced to zero and then (i) if such Realized Losses are incurred with respect to the Category 1 Mortgage Loans, pro rata to the Class 1A-F Certificates, based on the Certificate Principal Balance of each such Class, until the Certificate Principal Balance of each such Class has been reduced to zero, or (ii) if such Realized Losses are incurred with respect to the Category 2A Mortgage Loans, the related Class PO Percentage of such Realized Losses to the Class 2A-PO Certificates and the related Class 2A-1 Percentage of such Realized Losses to the Class 2A-1 Certificates, in each case until the Certificate Principal Balance of each such Class has been reduced to zero, or (iii) if such Realized Losses are incurred with respect to the Category 2B Mortgage Loans, the related Class 2A-1 Percentage of such Realized Losses to the Class 2A-1 Certificates and the related Class 2A-2 Percentage of such Realized Losses to the Class 2A-2 Certificates, in each case until the Certificate Principal Balance of each such Class has been reduced to zero, or (iv) if such Realized Losses are incurred with respect to the Category 2C Mortgage Loans, to the Class 2A-2 Certificates, until the Certificate Principal Balance of such Class has been reduced to zero.

(b) [Reserved].

(c) Any Realized Loss allocated to a Class of Certificates or any reduction in the Class Certificate Balance of a Class of Certificates pursuant to Section 4.04(a) above shall be allocated among the Certificates of such Class in proportion to their respective Certificate Principal Balances.

(d) Any allocation of Realized Losses to a Certificate or any reduction in the Certificate Principal Balance of a Certificate pursuant to Section 4.04(a) above shall be accomplished by reducing the Certificate Principal Balance thereof, as applicable, immediately following the distributions made on the related Distribution Date in accordance with the definition of "Certificate Principal Balance".

(e) After giving effect to all distributions on a Distribution Date, the amount of Subsequent Recoveries for such Distribution Date will be allocated to a Class or Classes of Certificates by reducing the Allocated Realized Loss Amount outstanding for such Class in the following order of priority: first, to the Class A Certificates, on a *pro rata* basis, until the Allocated Realized Loss Amount, if any, for each such class has been reduced to zero, then to the Subordinate Certificates in order of their respective numerical Class designations (beginning with the Class of Subordinate Certificates then outstanding with the lowest numerical Class designation) until the respective Allocated Realized Loss Amount, if any, of each such Class is reduced to zero. For purposes of allocating Subsequent Recoveries to the Subordinate Certificates, the Class M Certificates will be deemed to have a lower numerical class designation, and to be of a higher relative payment priority, than any other Class of Subordinate Certificates.

Section 4.05 Net WAC Rate Carryover Reserve Account.

No later than the Closing Date, the Trustee shall establish and maintain with itself a separate, segregated trust account titled “Net WAC Rate Carryover Reserve Account, The Bank of New York, as Trustee, in trust for registered Holders of CWMBS Repperforming Loan REMIC Trust Certificates, Series 2005-R1.” All Cap Payments received by the trustee from the cap contract administrator for the benefit of the Trust shall be deposited in the Net WAC Rate Carryover Reserve Account. On each Distribution Date, the Trustee shall withdraw all amounts on deposit in the Net WAC Carryover Reserve Account and shall distribute such amounts first, to the Holders of the related Class 1A-F Certificates up to the Net WAC Rate Carryover Amount with respect to such Certificates for such Distribution Date and second, any remaining amounts to the Holders of the Class RM Certificates.

For federal and state income tax purposes, the Trustee will be deemed to be the owner of the Net WAC Rate Carryover Reserve Account. The Net WAC Rate Carryover Reserve Account will be an “outside reserve fund” within the meaning of Treasury regulation Section 1.860G-2(h). Upon the termination of the Trust, or the payment in full of the Class 1A-F1 and Class 1A-F2 Certificates, as applicable, all amounts remaining on deposit in the Net WAC Rate Carryover Reserve Account will be released by the Trust and distributed to the holder of the Class RM Certificates and will not be available on any future Distribution Dates to cover any Net WAC Rate Carryover Amounts on such Certificates or any other Certificates. The Net WAC Rate Carryover Reserve Account will be part of the Trust but not part of any REMIC and any payments to the Holders of the Class 1A-F Certificates of Net WAC Rate Carryover Amounts will not be payments with respect to a “regular interest” in a REMIC within the meaning of Code Section 860(G)(a)(1).

Amounts on deposit in the Net WAC Rate Carryover Reserve Account shall remain uninvested.

For federal tax return and information reporting, the value of the right to receive payments from a Net WAC Rate Carryover Account is \$2,240,000 with respect to the Class 1A-F1 Certificates and \$420,000 with respect to the Class 1A-F2 Certificates.

Section 4.06 Monthly Statements to Certificateholders.

(a) Not later than each Distribution Date, the Trustee shall prepare, based solely on information provided by the Master Servicer pursuant to Section 4.06(c) below, and make available to each Certificateholder, the Master Servicer, the Depositor and each Rating Agency a statement setting forth with respect to the related distribution:

- (i) the amount thereof allocable to principal, separately identifying the aggregate amount of any Principal Prepayments, Liquidation Proceeds and Insurance Proceeds included therein;
- (ii) the amount thereof allocable to interest, any Class Interest Shortfall Carryforward Amounts included in such distribution and any remaining Class Interest Shortfall Carryforward Amounts after giving effect to such distribution;

(iii) if the distribution to the Holders of such Class of Certificates is less than the full amount that would be distributable to such Holders if there were sufficient funds available therefor, the amount of the shortfall and the allocation thereof as between principal and interest;

(iv) the Class Certificate Balance of each Class of Certificates after giving effect to the distributions on such Distribution Date, the Notional Amount for the Class 1A-S and Class 2A-IO Certificates;

(v) the Pool Scheduled Principal Balance for such Distribution Date;

(vi) the Senior Percentage and Subordinate Percentage for Category 1, Collateral Group 1 and Collateral Group 2 and such Distribution Date;

(vii) the amount of the Servicing Fees paid to or retained by the Master Servicer;

(viii) the Pass-Through Rate for each such Class of Certificates with respect to such Distribution Date and the Net WAC Rate Carryover Amounts, if any, for each Class for such Distribution Date;

(ix) the amount of Monthly Advances made by the Master Servicer and included in the distribution on such Distribution Date and the aggregate amount of Monthly Advances with respect to the Mortgage Loans outstanding as of the close of business on such Distribution Date;

(x) the number and aggregate Scheduled Principal Balance of the Mortgage Loans in each Category and the weighted average Mortgage Rate of the Mortgage Loans in each Category;

(xi) with respect to each Category the number and aggregate principal amounts of Mortgage Loans (A) delinquent (exclusive of Mortgage Loans in foreclosure) (1) 1 to 30 days (2) 31 to 60 days (3) 61 to 90 days and (4) 91 or more days and (B) in foreclosure and delinquent (1) 1 to 30 days (2) 31 to 60 days (3) 61 to 90 days and (4) 91 or more days, as of the close of business on the last day of the calendar month preceding such Distribution Date;

(xii) the total number and principal balance of any REO Properties (and market value, if available) as of the close of business on the Determination Date preceding such Distribution Date;

(xiii) the Senior Prepayment Percentage and Subordinate Prepayment Percentage for Category 1, Collateral Group 1 and Collateral Group 2 for such Distribution Date;

(xiv) the aggregate amount of Realized Losses incurred during the related Prepayment Period with respect to each Category and Collateral Group and the number and aggregate Scheduled Principal Balance of the Mortgage Loans in each Category and Collateral Group that are subject to a bankruptcy proceeding;

(xv) the cumulative fees and reimbursements paid to the Trustee and the Custodian for such Distribution Date;

(xvi) with respect to the Reduced Rate Mortgage Loans, the loan identification number for each such Mortgage Loan, and the Purchase Price remitted therefor;

(xvii) with respect to the Rate-Increased Mortgage Loans, the identification number for each such Mortgage Loan, the Mortgage Rate of each such Mortgage Loan prior to such rate-increase, the Mortgage Rate of each such Mortgage Loan after such rate-increase and the Class RM Interest Distribution Amount, if any, for such Distribution Date; and

(xviii) such other information that is required by the Code and regulations thereunder to be made available to Certificateholders.

The Trustee will make the statement to Certificateholders available each month via the Trustee's internet website. The Trustee's internet website will initially be located at "www.mbsreporting". Assistance in using the website can be obtained by calling the Trustee's bondholder relations desk at (800) 548-5075. Parties that are unable to use the above distribution method are entitled to have a paper copy mailed to them via first class mail by calling the customer service desk and indicating such. The Trustee shall have the right to change the way such statement is distributed in order to make such distribution more convenient and/or more accessible and the Trustee shall provide timely and adequate notification to the Certificateholders and the parties to this Agreement regarding any such changes.

The Trustee shall also be entitled to rely on but shall not be responsible for the content or accuracy of any information provided by third parties for purposes of preparing such statement and may affix thereto any disclaimer it deems appropriate in its reasonable discretion (without suggesting liability on the part of any other party hereto).

As a condition to access the Trustee's internet website, the Trustee may require registration and the acceptance of a disclaimer. The Trustee will not be liable for the dissemination of information in accordance with this Agreement.

(b) The Trustee's responsibility for disbursing the above information to the Certificateholders is limited to the availability, timeliness and accuracy of the information provided by the Master Servicer upon which the Trustee may conclusively rely without verification as to accuracy.

(c) On or before the close of business on the Loan Data Remittance Date of each month, the Master Servicer shall deliver to the Trustee (which delivery may be by electronic data transmission) a report with respect to the Mortgage Loans in substantially the form set forth as Schedule V hereto which includes but is not limited to items (ix) through (xi) and (xiii) of Section 4.06(a) hereof and in such format as is mutually agreed to by the Master Servicer and the Trustee.

(d) Within the period of time required under the Code after the end of each calendar year, the Trustee shall cause to be furnished, upon request, to each Person who at any time during the calendar year was a Certificateholder, a statement containing the information set forth in clauses (a)(i), (a)(ii) and (a)(vii) of this Section 4.06 aggregated for such calendar year or applicable portion thereof during which such Person was a Certificateholder. Such obligation of the Trustee shall be deemed to have been satisfied to the extent that substantially comparable information shall be provided by the Trustee pursuant to any requirements of the Code as from time to time in effect.

Section 4.07 Distributions on the REMIC I Regular Interests and
REMIC II Regular Interests.

(a) On each Distribution Date, the Trustee shall be deemed to distribute to itself, solely in its capacity as trustee of the Trust as the holder of the REMIC I Regular Interests, the Uncertificated REMIC Accrued Interest and distributions of principal in the following order of priority to the extent of the Available Distribution Amount relating to the Mortgage Loans:

(i) Uncertificated REMIC Accrued Interest on the REMIC I Regular Interests (other than REMIC I Regular Interest LT1-PO) for such Distribution Date, plus any Uncertificated REMIC Accrued Interest thereon remaining unpaid from any previous Distribution Date; and

(ii) *With respect to the Category 1 Mortgage Loans:*

(I) Principal received from the Category 1 Mortgage Loans shall be deemed to be paid to REMIC I Regular Interest LT1-1.

With respect to the Category 2 Mortgage Loans:

(I) Principal received on Category 2A Mortgage Loans shall be allocated to REMIC I Regular Interest LT1-2 and REMIC I Regular Interest LT1-PO, in the same proportion as the Non-Class PO Percentage and the Class PO-Percentage, respectively;

(II) Principal received on Category 2B Mortgage Loans shall be allocated to REMIC I Regular Interest LT1-2 and REMIC I Regular Interest LT1-3, in the same proportion as the Class 2A-1 Percentage and Class 2A-2 Percentage divides such Mortgage Loan; and

(III) Principal received on Category 2C Mortgage Loans shall be allocated to REMIC I Regular Interest I-LT3.

With respect to Realized Losses on Category 1 Mortgage Loans:

(1) Realized Losses on the Category 1 Mortgage Loans shall be allocated to REMIC I Regular Interest LT1-1.

With respect to Realized Losses on Category 2 Mortgage Loans:

(I) Realized Losses on Category 2A Mortgage Loans shall be allocated to REMIC I Regular Interest LT1-2 and REMIC I Regular Interest LT1-PO, in the same proportion as the Non-Class PO Percentage and the Class PO-Percentage, respectively;

(II) Realized Losses on Category 2B Mortgage Loans shall be allocated to REMIC I Regular Interest I-LT2 and REMIC I Regular Interest I-LT2, in the same proportion as the Class 2A-1 Percentage and Class 2A-2 Percentage divides such Mortgage Loan; and

(III) Realized Losses on Category 2C Mortgage Loans shall be allocated to REMIC I Regular Interest LT1-3.

(b) On each Distribution Date, the Trustee shall be deemed to distribute to itself, solely in its capacity as trustee of the Trust as the holder of the REMIC II Regular Interests, the Uncertificated REMIC Accrued Interest and distributions of principal in the following order of priority to the extent of the Available Distribution Amount relating to the Mortgage Loans:

(i) Uncertificated REMIC Accrued Interest on the REMIC II Regular Interests (other than REMIC II Regular Interest LT2-PO) for such Distribution Date, plus any Uncertificated REMIC Accrued Interest thereon remaining unpaid from any previous Distribution Date; and

(ii) *With respect to the Category 1 Mortgage Loans:*

(I) Principal received on the Category 1 Mortgage Loans and distributed to the the Class IA-F1 Certificates, the Class IA-F2 Certificates and the Subordinated Certificates shall be deemed to have been paid to (i) REMIC II Regular Interest LT2-F1, (ii) REMIC II Regular Interest LT2-F2 and (iii) REMIC II Regular Interest LT2-1SUB, respectively.

With respect to the Category 2 Mortgage Loans:

(I) Principal received on Category 2A Mortgage Loans and distributed to (1) the Class 2A-1 Certificates, (2) Class 2A-PO Certificates and (3) Subordinated Certificates shall be deemed to have been paid to (1) REMIC II Regular Interest LT2-2SEN, (2) REMIC II Regular Interest LT2-PO and (3) REMIC II Regular Interest LT2-SUB;

(II) Principal received on Category 2B Mortgage Loans and distributed to (1) the Class 2A-1 Certificates, (2) Class 2A-2 Certificates and (3) Subordinated Certificates shall be deemed to have been paid to (1) REMIC II Regular Interest LT2-2SEN, (2) REMIC II Regular Interest LT2-3SEN and (3) REMIC II Regular Interest LT2-SUB; and

(III) Principal received on Category 2C Mortgage Loans and distributed to (1) the Class 2A-2 Certificates and (2) Subordinated Certificates shall be deemed to

have been paid to (1) REMIC II Regular Interest LT2-3SEN and (2) REMIC II Regular Interest LT3-SUB.

With respect to Realized Losses on Category 1 Mortgage Loans:

(I) Realized Losses on the Category 1 Mortgage Loans and allocated to the (1) the Class IA-F1 Certificates (2) the Class IA-F2 Certificates and (iii) the Subordinated Certificates shall be deemed to have been allocated to (1) REMIC II Regular Interest LT2-F1, (2) REMIC II Regular Interest LT2-F2 and (3) REMIC II Regular Interest LT2-1SUB, respectively.

With respect to Realized Losses on Category 2 Mortgage Loans:

(I) Realized Losses on Category 2A Mortgage Loans and allocated to (1) the Class 2A-1 Certificates, (2) Class 2A-PO Certificates and (3) Subordinated Certificates shall be deemed to have been allocated to (1) REMIC II Regular Interest LT2-2SEN, (2) REMIC II Regular Interest LT2-PO and (3) REMIC II Regular Interest LT2-SUB;

(II) Realized Losses Principal received on Category 2B Mortgage Loans and allocated to (1) the Class 2A-1 Certificates, (2) Class 2A-2 Certificates and (3) Subordinated Certificates shall be deemed to have been allocated to (1) REMIC II Regular Interest LT2-2SEN, (2) REMIC II Regular Interest LT2-3SEN and (3) REMIC II Regular Interest LT2-SUB; and

(III) Realized Losses on Category 2C Mortgage Loans and allocated to (1) the Class 2A-2 Certificates and (2) Subordinated Certificates shall be deemed to have been allocated to (1) REMIC II Regular Interest LT2-3SEN and (2) REMIC II Regular Interest LT3-SUB.

ARTICLE V

THE CERTIFICATES

Section 5.01 The Certificates.

The Certificates shall be substantially in the forms attached hereto as exhibits. The Certificates (other than the Subordinate Certificates) shall be issuable in registered form, in the minimum denominations of \$100,000 Certificate Balance (Notional Amount in the case of the Notional Amount Certificates) and the Subordinate Certificates shall be issuable in registered form, in the minimum denominations of \$100,000 Certificate Balance and each in integral dollar multiples of \$1 Certificate Balance (Notional Amount in the case of the Notional Amount Certificates) in excess thereof (except that one Certificate of each such Class may be in a different denomination so that the sum of the denominations of all outstanding Certificates of

such Class shall equal the Class Certificate Balance (Notional Amount in the case of the Notional Amount Certificates) of such Class on the Closing Date) and aggregate denominations per Class set forth in the Preliminary Statement.

Subject to Section 9.02 hereof respecting the final distribution on the Certificates, on each Distribution Date the Trustee shall make distributions to each Certificateholder of record on the related Record Date either (x) by wire transfer in immediately available funds to the account of such holder at a bank or other entity having appropriate facilities therefor, if such Holder has so notified the Trustee at least five Business Days prior to the related Record Date or (y) by check mailed by first class mail to such Certificateholder at the address of such holder appearing in the Certificate Register.

The Certificates shall be executed by manual or facsimile signature on behalf of the Trustee by an authorized signatory. Certificates bearing the manual or facsimile signatures of individuals who were, at the time when such signatures were affixed, authorized to sign on behalf of the Trustee shall bind the Trustee, notwithstanding that such individuals or any of them have ceased to be so authorized prior to the countersignature and delivery of such Certificates or did not hold such offices at the date of such Certificate. No Certificate shall be entitled to any benefit under this Agreement, or be valid for any purpose, unless countersigned by the Trustee by manual signature, and such countersignature upon any Certificate shall be conclusive evidence, and the only evidence, that such Certificate has been duly executed and delivered hereunder. All Certificates shall be dated the date of their countersignature. On the Closing Date, the Trustee shall countersign the Certificates to be issued at the direction of the Depositor, or any affiliate thereof.

The Depositor shall provide, or cause to be provided, to the Trustee on a continuous basis, an adequate inventory of Certificates to facilitate transfers.

Section 5.02 Certificate Register; Registration of Transfer and Exchange of Certificates.

(a) The Trustee shall maintain, or cause to be maintained in accordance with the provisions of Section 5.06 hereof, a Certificate Register for the Trust Fund in which, subject to the provisions of subsections (b) and (c) below and to such reasonable regulations as it may prescribe, the Trustee shall provide for the registration of Certificates and of transfers and exchanges of Certificates as herein provided. Upon surrender for registration of transfer of any Certificate, the Trustee shall execute and deliver, in the name of the designated transferee or transferees, one or more new Certificates of the same Class and aggregate Percentage Interest.

At the option of a Certificateholder, Certificates may be exchanged for other Certificates of the same Class in authorized denominations and evidencing the same aggregate Percentage Interest upon surrender of the Certificates to be exchanged at the office or agency of the Trustee. Whenever any Certificates are so surrendered for exchange, the Trustee shall execute, authenticate, and deliver the Certificates which the Certificateholder making the exchange is entitled to receive. Every Certificate presented or surrendered for registration of transfer or exchange shall be accompanied by a written instrument of transfer in form satisfactory to the Trustee duly executed by the holder thereof or his attorney duly authorized in writing.

No service charge to the Certificateholders shall be made for any registration of transfer or exchange of Certificates, but payment of a sum sufficient to cover any tax or governmental charge that may be imposed in connection with any transfer or exchange of Certificates may be required.

All Certificates surrendered for registration of transfer or exchange shall be cancelled and subsequently destroyed by the Trustee in accordance with the Trustee's customary procedures.

(b) No transfer of a Private Certificate shall be made unless (i) such transfer is made either (1) pursuant to an effective registration statement under the Securities Act or (2) to a "qualified institutional buyer" as such term is defined in Rule 144A of the Securities Act (a "QIB") and (ii) pursuant to any applicable state securities laws.

In the event that a transfer is to be made in reliance upon Rule 144A of the Securities Act, in order to assure compliance with the Securities Act and such laws, (i) with respect to a Private Certificate that is a Definitive Certificate, the Certificateholder desiring to effect such transfer and such Certificateholder's prospective transferee shall each certify to the Trustee in writing the facts surrounding the transfer in substantially the form set forth in Exhibit J (the "Transferor Certificate") and deliver a letter in the form of Exhibit L (the "Rule 144A Letter") and (ii) with respect to a Private Certificate that is a Book-Entry Certificate, the purchaser of such Certificate will be deemed to have represented and agreed as follows:

(1) The purchaser (A) is a QIB, (B) is aware that the sale of the Certificates to it may be being made in reliance on the exemption from registration provided by Rule 144A under the Securities Act and (C) is acquiring the Certificates for its own account or for one or more accounts, each of which is a QIB, and as to each of which the purchaser exercises sole investment discretion, and in a principal amount of not less than the minimum denomination of such Certificate for the purchaser and for each such account. The purchaser has such knowledge and experience in financial and business matters as to be capable of evaluating the merits and risks of its investment in the Certificates, and the purchaser and any accounts for which it is acting are each able to bear the economic risk of the purchaser's or its investment.

(2) The purchaser understands that the Certificates are being offered only in a transaction not involving any public offering in the United States within the meaning of the Securities Act, the Certificates have not been and will not be registered under the Securities Act, and, if in the future the purchaser decides to offer, resell, pledge or otherwise transfer the Certificates, such Certificates may be offered, resold, pledged or otherwise transferred only in accordance with the legend on such Certificates as set forth in the form of such Certificate attached hereto. The purchaser acknowledges that no representation is made by the Depositor, or the Seller, the Trustee or the Initial Purchasers, as the case may be, as to the availability of any exemption under the Securities Act or any state securities laws for resale of the Certificates. The purchaser, by accepting its Certificate, agrees to indemnify the Trustee and the Depositor, the Seller and the Master Servicer against any liability that may result if the transfer is not so exempt or is not made in accordance with federal and state laws.

(3) The purchaser understands that an investment in the Certificates involves certain risks, including the risk of loss of a substantial part of its investment under certain circumstances. The purchaser has had access to such financial and other information concerning the Depositor and the Certificates as it deemed necessary or appropriate in order to make an informed investment decision with respect to its purchase of the Certificates, including an opportunity to ask questions of and request information from the Trust.

(4) In connection with the purchase of the Certificates, (i) none of the Depositor, the Master Servicer, the Seller, the Trustee or either Initial Purchaser is acting as a fiduciary or financial or investment advisor for the purchaser; (ii) the purchaser is not relying (for purposes of making an investment decision or otherwise) upon any advice, counsel or representations (whether written or oral) of the Depositor, the Master Servicer, the Seller, the Trustee or either Initial Purchaser other than any in offering memorandum for such Certificates and any representations expressly set forth in a written agreement with such party; (iii) none of the Depositor, the Master Servicer, the Seller, the Trustee or either Initial Purchaser have given to the purchaser (directly or indirectly through any other person) any assurance, guarantee, or representation whatsoever as to the expected or projected success, profitability, return, performance, result, effect, or benefit (including legal, regulatory, tax, financial, accounting, or otherwise) of its purchase or the documentation for the Certificates; (iv) the purchaser has consulted with its own legal, regulatory, tax, business, financial, and accounting advisers to the extent it has deemed necessary, and it has made its own decisions (including decisions regarding the suitability of any transaction pursuant to the documentation for the Certificates) based upon its own judgment and upon any advice from such advisers as it has deemed necessary and not upon any view expressed by the Depositor, the Master Servicer, the Seller, the Trustee or either Initial Purchaser; (v) the purchaser has determined that the rates, prices or amounts and other terms of the purchase and sale of the Certificates reflect those in the relevant market for similar transactions; (vi) the purchaser is purchasing the Certificates with a full understanding of all of the terms, conditions and risks thereof (economic and otherwise), and it is capable of assuming and willing to assume (financially and otherwise) those risks; and (vii) the purchaser is a sophisticated investor familiar with transactions similar to its investment in the Certificates.

(5) The purchaser will not, at any time, offer to buy or offer to sell the Certificates by any form of general solicitation or advertising, including, but not limited to, any advertisement, article, notice or other communication published in any newspaper, magazine or similar medium or broadcast over television or radio or seminar or meeting whose attendees have been invited by general solicitations or advertising.

The Depositor shall provide to any Holder of a Private Certificate and any prospective transferee designated by any such Holder, information regarding the related Certificates and the Mortgage Loans and such other information as shall be necessary to satisfy the condition to eligibility set forth in Rule 144A(d)(4) for transfer of any such Certificate without registration thereof under the Securities Act pursuant to the registration exemption provided by Rule 144A. The Trustee and the Master Servicer shall cooperate with the Depositor in providing the Rule 144A information referenced in the preceding sentence, including

providing to the Depositor such information regarding the Certificates, the Mortgage Loans and other matters regarding the Trust Fund as the Depositor shall reasonably request to meet its obligation under the preceding sentence. Each Holder of a Private Certificate desiring to affect such transfer shall, and does hereby agree to, indemnify the Trustee and the Depositor, the Seller and the Master Servicer against any liability that may result if the transfer is not so exempt or is not made in accordance with such federal and state laws.

Except with respect to the initial transfer by the Depositor to an affiliate (in which case the affiliate shall be deemed to represent that it is not a Plan or purchasing with assets of a Plan), (i) no transfer of a Residual Certificate or any interest therein shall be made to any Plan or any Person who is directly or indirectly purchasing such Certificate or an interest therein on behalf of, as named fiduciary of, as trustee of, or with assets of, a Plan (including any insurance company using funds in its general or separate account that may constitute "plan assets" within the meaning of 29 C.F.R. Section 2510.3-101), unless the Trustee is provided with an opinion of counsel which establishes to the satisfaction of the Trustee that such transfer either (A) will not result in a non-exempt prohibited transaction under Section 406 of ERISA or Section 4975 of the Code or cause either the Trustee, the Depositor or the Master Servicer to have any duties in addition to those under this Agreement or result in the imposition of an excise tax under Section 4975 of the Code, or (B) is exempt under the regulations promulgated under Section 401(c)(1)(A) of ERISA and (ii) each beneficial owner of a Class B or Class M Certificate or any interest therein shall be deemed to have represented, by virtue of its acquisition or holding of that certificate or interest therein, that either (A) it is not a Plan or investing with "plan assets" of a Plan, or (B) (1) it is an insurance company, (2) the source of funds used to acquire or hold the Certificate or interest therein is an "insurance company general account," as such term is defined in Prohibited Transaction Class Exemption ("PTCE") 95-60, and (3) the conditions in Sections I and III of PTCE 95-60 have been satisfied. Notwithstanding anything else to the contrary herein, any purported transfer of a Class M, Class B or Residual Certificate to or on behalf of a Plan in violation of the requirements as described above shall be void and of no effect.

To the extent permitted under applicable law (including, but not limited to ERISA), the Trustee shall be under no liability to any Person for any registration of transfer of any Class M, Class B or Residual Certificate that is in fact not permitted by this Section 5.02(b) or for making any payments due on such Certificate to the Holder thereof or taking any other action with respect to such Holder under the provisions of this Agreement if such transfer was registered by the Trustee in accordance with the foregoing requirements.

(c) Each Person who has or who acquires any Ownership Interest in a Residual Certificate shall be deemed by the acceptance or acquisition of such Ownership Interest to have agreed to be bound by the following provisions, and the rights of each Person acquiring any Ownership Interest in a Residual Certificate are expressly subject to the following provisions:

(i) Each Person holding or acquiring any Ownership Interest in a Residual Certificate shall be a Permitted Transferee and shall promptly notify the Trustee of any change or impending change in its status as a Permitted Transferee.

(ii) No Ownership Interest in a Residual Certificate may be registered on the Closing Date (except with respect to the initial transfer by the Depositor to an

affiliate) or thereafter transferred, and the Trustee shall not register the Transfer of any Residual Certificate unless, in addition to the certificates required to be delivered to the Trustee under subparagraph (b) above, the Trustee shall have been furnished with an affidavit (a "Transfer Affidavit") of the initial owner or the proposed transferee in the form attached hereto as Exhibit I.

(iii) Each Person holding or acquiring any Ownership Interest in a Residual Certificate shall agree (A) to obtain a Transfer Affidavit from any other Person to whom such Person attempts to Transfer its Ownership Interest in a Residual Certificate, (B) to obtain a Transfer Affidavit from any Person for whom such Person is acting as nominee, trustee or agent in connection with any Transfer of a Residual Certificate and (C) not to Transfer its Ownership Interest in a Residual Certificate or to cause the Transfer of an Ownership Interest in a Residual Certificate to any other Person if it has actual knowledge that such Person is not a Permitted Transferee.

(iv) Any attempted or purported Transfer of any Ownership Interest in a Residual Certificate in violation of the provisions of this Section 5.02(c) shall be absolutely null and void and shall vest no rights in the purported Transferee. If any purported transferee shall become a Holder of a Residual Certificate in violation of the provisions of this Section 5.02(c), then the last preceding Permitted Transferee shall be restored to all rights as Holder thereof retroactive to the date of registration of Transfer of such Residual Certificate. The Trustee shall be under no liability to any Person for any registration of Transfer of a Residual Certificate that is in fact not permitted by Section 5.02(b) and this Section 5.02(c) or for making any payments due on such Certificate to the Holder thereof or taking any other action with respect to such Holder under the provisions of this Agreement so long as the Transfer was registered after receipt of the related Transfer Affidavit, Transferor Certificate and either the Rule 144A Letter or an Investment Letter. The Trustee shall be entitled but not obligated to recover from any Holder of a Residual Certificate that was in fact not a Permitted Transferee at the time it became a Holder or, at such subsequent time as it became other than a Permitted Transferee, all payments made on such Residual Certificate at and after either such time. Any such payments so recovered by the Trustee shall be paid and delivered by the Trustee to the last preceding Permitted Transferee of such Certificate.

(v) The Depositor shall use its best efforts to make available, upon receipt of written request from the Trustee, all information necessary to compute any tax imposed under Section 860E(e) of the Code as a result of a Transfer of an Ownership Interest in a Residual Certificate to any Holder who is not a Permitted Transferee.

The restrictions on Transfers of a Residual Certificate set forth in this Section 5.02(c) shall cease to apply (and the applicable portions of the legend on a Residual Certificate may be deleted) with respect to Transfers occurring after delivery to the Trustee of an Opinion of Counsel, which Opinion of Counsel shall not be an expense of the Trust Fund, the Trustee, the

Seller, the Depositor or the Master Servicer, to the effect that the elimination of such restrictions will not cause any REMIC hereunder to fail to qualify as a REMIC at any time that the Certificates are outstanding or result in the imposition of any tax on the Trust Fund, a Certificateholder or another Person. Each Person holding or acquiring any Ownership Interest in a Residual Certificate hereby consents to any amendment of this Agreement which, based on an Opinion of Counsel furnished to the Trustee, is reasonably necessary (a) to ensure that the record ownership of, or any beneficial interest in, a Residual Certificate is not transferred, directly or indirectly, to a Person that is not a Permitted Transferee and (b) to provide for a means to compel the Transfer of a Residual Certificate which is held by a Person that is not a Permitted Transferee to a Holder that is a Permitted Transferee.

(d) The preparation and delivery of all certificates and opinions referred to above in this Section 5.02 in connection with transfer shall be at the expense of the parties to such transfers.

(e) Except as provided below, the Book-Entry Certificates shall at all times remain registered in the name of the Depository or its nominee and at all times: (i) registration of the Certificates may not be transferred by the Trustee except to another Depository; (ii) the Depository shall maintain book-entry records with respect to the Certificate Owners and with respect to ownership and transfers of such Book-Entry Certificates; (iii) ownership and transfers of registration of the Book-Entry Certificates on the books of the Depository shall be governed by applicable rules established by the Depository; (iv) the Depository may collect its usual and customary fees, charges and expenses from its Depository Participants; (v) the Trustee shall deal with the Depository, Depository Participants and indirect participating firms as representatives of the Certificate Owners of the Book-Entry Certificates for purposes of exercising the rights of holders under this Agreement, and requests and directions for and votes of such representatives shall not be deemed to be inconsistent if they are made with respect to different Certificate Owners; and (vi) the Trustee may rely and shall be fully protected in relying upon information furnished by the Depository with respect to its Depository Participants and furnished by the Depository Participants with respect to indirect participating firms and persons shown on the books of such indirect participating firms as direct or indirect Certificate Owners.

All transfers by Certificate Owners of Book-Entry Certificates shall be made in accordance with the procedures established by the Depository Participant or brokerage firm representing such Certificate Owner. Each Depository Participant shall only transfer Book-Entry Certificates of Certificate Owners it represents or of brokerage firms for which it acts as agent in accordance with the Depository's normal procedures.

If (x) (i) the Depository or the Depositor advises the Trustee in writing that the Depository is no longer willing or able to properly discharge its responsibilities as Depository, and (ii) the Trustee or the Depositor is unable to locate a qualified successor, (y) the Depositor at its option advises the Trustee in writing that it elects to terminate the book-entry system through the Depository or (z) after the occurrence of an Event of Default, Certificate Owners representing at least 51% of the Certificate Principal Balance of the Book-Entry Certificates together advise the Trustee and the Depository through the Depository Participants in writing that the continuation of a book-entry system through the Depository is no longer in the best interests of the Certificate Owners, the Trustee shall notify all Certificate Owners, through the

Depository, of the occurrence of any such event and of the availability of definitive, fully-registered Certificates (the “Definitive Certificates”) to Certificate Owners requesting the same. Upon surrender to the Trustee of the related Class of Certificates by the Depository, accompanied by the instructions from the Depository for registration, the Trustee shall issue the Definitive Certificates. Neither the Master Servicer, the Depositor nor the Trustee shall be liable for any delay in delivery of such instruction and each may conclusively rely on, and shall be protected in relying on, such instructions. The Master Servicer shall provide the Trustee with an adequate inventory of certificates to facilitate the issuance and transfer of Definitive Certificates. Upon the issuance of Definitive Certificates all references herein to obligations imposed upon or to be performed by the Depository shall be deemed to be imposed upon and performed by the Trustee, to the extent applicable with respect to such Definitive Certificates and the Trustee shall recognize the Holders of the Definitive Certificates as Certificateholders hereunder; provided that the Trustee shall not by virtue of its assumption of such obligations become liable to any party for any act or failure to act of the Depository.

Section 5.03 Mutilated, Destroyed, Lost or Stolen Certificates.

If (a) any mutilated Certificate is surrendered to the Trustee, or the Trustee receives evidence to its satisfaction of the destruction, loss or theft of any Certificate and (b) there is delivered to the Master Servicer and the Trustee such security or indemnity as may be required by them to save each of them harmless, then, in the absence of notice to the Trustee that such Certificate has been acquired by a bona fide purchaser, the Trustee shall execute, countersign and deliver, in exchange for or in lieu of any such mutilated, destroyed, lost or stolen Certificate, a new Certificate of like Class, tenor and Percentage Interest. In connection with the issuance of any new Certificate under this Section 5.03, the Trustee may require the payment of a sum sufficient to cover any tax or other governmental charge that may be imposed in relation thereto and any other expenses (including the fees and expenses of the Trustee) connected therewith. Any replacement Certificate issued pursuant to this Section 5.03 shall constitute complete and indefeasible evidence of ownership, as if originally issued, whether or not the lost, stolen or destroyed Certificate shall be found at any time.

Section 5.04 Persons Deemed Owners.

The Master Servicer, the Trustee and any agent of the Master Servicer or the Trustee may treat the Person in whose name any Certificate is registered as the owner of such Certificate for the purpose of receiving distributions as provided in this Agreement and for all other purposes whatsoever, and none of the Master Servicer, the Trustee or any agent of the Master Servicer or the Trustee shall be affected by any notice to the contrary.

Section 5.05 Access to List of Certificateholders’ Names and Addresses.

If three or more Certificateholders (a) request such information in writing from the Trustee, (b) state that such Certificateholders desire to communicate with other Certificateholders with respect to their rights under this Agreement or under the Certificates, and (c) provide a copy of the communication which such Certificateholders propose to transmit, or if the Depositor or Master Servicer shall request such information in writing from the Trustee, then the Trustee shall, within ten Business Days after the receipt of such request, provide the

Depositor, the Master Servicer or such Certificateholders at such recipients' expense the most recent list of the Certificateholders of such Trust Fund held by the Trustee, if any. The Depositor and every Certificateholder, by receiving and holding a Certificate, agree that the Trustee shall not be held accountable by reason of the disclosure of any such information as to the list of the Certificateholders hereunder, regardless of the source from which such information was derived.

Section 5.06 Maintenance of Office or Agency.

Certificates may be surrendered for registration of transfer or exchange at the Corporate Trust Office of the Trustee. The Trustee will give prompt written notice to the Certificateholders of any change in such location of any such office or agency.

ARTICLE VI

THE DEPOSITOR AND THE MASTER SERVICER

Section 6.01 Respective Liabilities of the Depositor and the Master Servicer.

The Depositor and the Master Servicer shall each be liable in accordance herewith only to the extent of the obligations specifically and respectively imposed upon and undertaken by them herein.

Section 6.02 Merger or Consolidation of the Depositor or the Master Servicer.

The Depositor will keep in full effect its existence, rights and franchises as a corporation under the laws of the United States or under the laws of one of the states thereof and will obtain and preserve its qualification to do business as a foreign corporation in each jurisdiction in which such qualification is or shall be necessary to protect the validity and enforceability of this Agreement, or any of the Mortgage Loans and to perform its duties under this Agreement. The Master Servicer will keep in effect its existence, rights and franchises as a limited partnership under the laws of the United States or under the laws of one of the states thereof and will obtain and preserve its qualification or registration to do business as a foreign partnership in each jurisdiction in which such qualification or registration is or shall be necessary to protect the validity and enforceability of this Agreement or any of the Mortgage Loans and to perform its duties under this Agreement.

Any Person into which the Depositor or the Master Servicer may be merged or consolidated, or any Person resulting from any merger or consolidation to which the Depositor or the Master Servicer shall be a party, or any person succeeding to the business of the Depositor or the Master Servicer, shall be the successor of the Depositor or the Master Servicer, as the case may be, hereunder, without the execution or filing of any paper or any further act on the part of any of the parties hereto, anything herein to the contrary notwithstanding; provided, however, that the successor or surviving Person to the Master Servicer shall be qualified to service mortgage loans on behalf of, FHLMC.

Section 6.03 Limitation on Liability of the Depositor, the Master Servicer and Others.

None of the Depositor, the Master Servicer or any of the directors, officers, employees or agents of the Depositor or the Master Servicer shall be under any liability to the Certificateholders for any action taken or for refraining from the taking of any action in good faith pursuant to this Agreement, or for errors in judgment; provided, however, that this provision shall not protect the Depositor, the Master Servicer or any such Person against any breach of representations or warranties made by it herein or protect the Depositor, the Master Servicer or any such Person from any liability which would otherwise be imposed by reasons of willful misfeasance, bad faith or negligence in the performance of duties or by reason of reckless disregard of obligations and duties hereunder. The Depositor, the Master Servicer and any

director, officer, employee or agent of the Depositor or the Master Servicer may rely in good faith on any document of any kind prima facie properly executed and submitted by any Person respecting any matters arising hereunder. The Depositor, the Master Servicer and any director, officer, employee or agent of the Depositor or the Master Servicer shall be indemnified by the Trust Fund and held harmless against any loss, liability or expense incurred in connection with any audit, controversy or judicial proceeding relating to a governmental taxing authority or any legal action relating to this Agreement or the Certificates out of the Collection Account up to an amount equal to \$500,000 in any calendar year, other than any loss, liability or expense related to any specific Mortgage Loan or Mortgage Loans (except as any such loss, liability or expense shall be otherwise reimbursable pursuant to this Agreement) and any loss, liability or expense incurred by reason of willful misfeasance, bad faith or negligence in the performance of duties hereunder or by reason of reckless disregard of obligations and duties hereunder. None of the Depositor or the Master Servicer shall be under any obligation to appear in, prosecute or defend any legal action that is not incidental to its respective duties hereunder and which in its opinion may involve it in any expense or liability; provided, however, that any of the Depositor or the Master Servicer, may in its discretion undertake any such action that it may deem necessary or desirable in respect of this Agreement and the rights and duties of the parties hereto and interests of the Trustee and the Certificateholders hereunder. In such event, (unless the Depositor or the Master Servicer acts without the consent of the Holders of Certificates entitled to at least 51% of the Voting Rights), the legal expenses and costs of such action and any liability resulting therefrom shall be expenses, costs and liabilities of the Trust Fund, and the Depositor and the Master Servicer shall be entitled to be reimbursed therefor out of the Collection Account without limitation.

Section 6.04 Limitation on Resignation of Master Servicer.

The Master Servicer shall not resign from the obligations and duties hereby imposed on it except (a) upon appointment of a successor servicer and receipt by the Trustee of a letter from each Rating Agency that such a resignation and appointment will not result in a downgrading of the rating of any of the Certificates, or (b) upon determination that its duties hereunder are no longer permissible under applicable law. Any such determination under clause (b) permitting the resignation of the Master Servicer shall be evidenced by an Opinion of Counsel to such effect delivered to the Trustee. No such resignation shall become effective until the Trustee or a successor master servicer shall have assumed the Master Servicer's responsibilities, duties, liabilities and obligations hereunder.

Section 6.05 Rights of the Trustee in Respect of the Master Servicer.

The Master Servicer shall afford (and any Sub-Servicing Agreement shall provide that each Sub-Servicer shall afford) the Trustee, upon reasonable notice, during normal business hours, access to all records and documentation regarding the Mortgage Loans maintained by the Master Servicer (and any such Sub-Servicer, in respect of the Master Servicer's rights and obligations hereunder and access to officers, employees and independent public accountants (and by this provision the Master Servicer hereby authorizes said accountants to discuss with the Trustee such affairs, finances and accounts) of the Master Servicer responsible for such obligations. Upon request, the Master Servicer shall furnish to the Trustee its (and any such Sub-Servicer's) most recent financial statements and such other information relating to the Master

Servicer's capacity to perform its obligations under this Agreement as it possesses (and that any such Sub-Servicer possesses). To the extent such information is not otherwise available to the public, the Trustee shall not disseminate any information obtained pursuant to the preceding two sentences without the Master Servicer's written consent, except as required pursuant to this Agreement or to the extent that it is appropriate to do so (i) in working with legal counsel, auditors, taxing authorities or other governmental agencies or (ii) pursuant to any law, rule, regulation, order, judgment, writ, injunction or decree of any court or governmental authority having jurisdiction over the Trustee or the Trust Fund, and in any case, the Trustee shall use its best efforts to assure the confidentiality of any such disseminated non-public information.

ARTICLE VII

DEFAULT

Section 7.01 Events of Default.

“Event of Default,” wherever used herein, means any one of the following events:

(i) any failure by the Master Servicer to deposit in the Collection Account or remit to the Trustee any payment required to be made under the terms of this Agreement (including a payment required to be made pursuant to Section 4.01 hereof), which failure shall continue unremedied for one Business Day after the date upon which written notice of such failure shall have been given to the Master Servicer by the Trustee or the Depositor or to the Master Servicer and the Trustee by the Holders of Certificates having not less than 51% of the Voting Rights evidenced by the Certificates; provided, that in the event that the Master Servicer fails to remit the Available Distribution Amount with respect to the Mortgage Loans for such Master Servicer Remittance Date on such Master Servicer Remittance Date and cures such failure on the Distribution Date, the Master Servicer will pay the Trustee interest at the Prime Rate on the Available Distribution Amount with respect to the Mortgage Loans for the period from and including such Master Servicer Remittance Date to but excluding the related Distribution Date; or

(ii) any failure by the Master Servicer to observe or perform in any material respect any other of the covenants or agreements on the part of the Master Servicer contained in this Agreement, which failure materially affects the rights of Certificateholders, that failure continues unremedied for a period of 60 days after the date on which written notice of such failure shall have been given to the Master Servicer by the Trustee or the Depositor, or to the Master Servicer and the Trustee by the Holders of Certificates evidencing not less than 51% of the Voting Rights evidenced by the Certificates; provided, however, that the cure period with respect to the delivery of the Mortgage File for Delay Delivery Mortgage Loans shall be thirty (30) days after the date on which written notice of such failure shall have been given to the Master Servicer by the Trustee or the Depositor, or to the Master Servicer and the Trustee by the Holders of Certificates evidencing not less than 51% of the Voting Rights evidenced by the Certificates; or

(iii) a decree or order of a court or agency or supervisory authority having jurisdiction in the premises for the appointment of a receiver or liquidator in any insolvency, readjustment of debt, marshalling of assets and liabilities or similar proceedings, or for the winding-up or liquidation of its affairs, shall have been entered against the Master Servicer and such decree or order shall have remained in force undischarged or unstayed for a period of 60 consecutive days; or

(iv) the Master Servicer shall consent to the appointment of a receiver or liquidator in any insolvency, readjustment of debt, marshalling of assets and liabilities or similar proceedings of or relating to the Master Servicer or all or substantially all of the property of the Master Servicer; or

(v) the Master Servicer shall admit in writing its inability to pay its debts generally as they become due, file a petition to take advantage of, or commence a voluntary case under, any applicable insolvency or reorganization statute, make an assignment for the benefit of its creditors, or voluntarily suspend payment of its obligations; or

(vi) the Master Servicer is no longer an approved servicer of FHLMC, FHA, VA; or

(vii) the Master Servicer fails to maintain a FHLMC Tier I or Tier II rating in each rated area as a FHLMC seller/servicer for two consecutive Distribution Dates; or

(viii) the Master Servicer's failure to comply with its reporting obligations in Section 4.06(c) and Section 4.10(a).

If an Event of Default described in clauses (i) to (viii) of this Section shall occur, then, and in each and every such case, so long as such Event of Default shall not have been remedied, the Trustee may, or at the direction of the Holders of Certificates evidencing at least 51% of the Voting Rights evidenced by the Certificates, the Trustee shall by notice in writing to the Master Servicer (with a copy to each Rating Agency), terminate all of the rights and obligations of the Master Servicer under this Agreement and in and to the Mortgage Loans and the proceeds thereof, other than its rights as a Certificateholder hereunder. On and after the receipt by the Master Servicer of such written notice, all authority and power of the Master Servicer hereunder, whether with respect to the Mortgage Loans or otherwise, shall pass to and be vested in the Trustee. The Trustee shall thereupon make any Monthly Advance which the Master Servicer failed to make subject to Section 4.01 hereof whether or not the obligations of the Master Servicer have been terminated pursuant to this Section. The Trustee is hereby authorized and empowered to execute and deliver, on behalf of the Master Servicer, as attorney-in-fact or otherwise, any and all documents and other instruments, and to do or accomplish all other acts or things necessary or appropriate to effect the purposes of such notice of termination, whether to complete the transfer and endorsement or assignment of the Mortgage Loans and related documents, or otherwise. Unless expressly provided in such written notice, no such termination shall affect any obligation of the Master Servicer to pay amounts owed pursuant to Article VIII. The Master Servicer agrees to cooperate with the Trustee in effecting the termination of the Master Servicer's responsibilities and rights hereunder, including, without limitation, the transfer to the Trustee of all cash amounts which shall at the time be credited to the Collection Account, or thereafter be received with respect to the Mortgage Loans.

Notwithstanding any termination of the activities of the Master Servicer hereunder, the Master Servicer shall be entitled to receive, out of any late collection of a Monthly Payment on a Mortgage Loan which was due prior to the notice terminating such Master Servicer's rights and obligations as Master Servicer hereunder and received after such notice, that portion thereof to which such Master Servicer would have been entitled pursuant to Sections 3.08(a)(i) through (ix), and any other amounts payable to such Master Servicer hereunder the entitlement to which arose prior to the termination of its activities hereunder.

Section 7.02 Trustee to Act; Appointment of Successor.

On and after the time the Master Servicer receives a notice of termination pursuant to Section 7.01 hereof (but in no event later than 90 days after receipt of such notice), the Trustee shall, subject to and to the extent provided in Section 3.04, be the successor to the Master Servicer in its capacity as master servicer under this Agreement and the transactions set forth or provided for herein and shall be subject to all the responsibilities, duties and liabilities relating thereto placed on the Master Servicer by the terms and provisions hereof and applicable law including the obligation to make Monthly Advances pursuant to Section 4.01. As compensation therefor, the Trustee as successor Master Servicer shall be entitled to all funds relating to the Mortgage Loans that the Master Servicer would have been entitled to charge to the Collection Account or Distribution Account if the Master Servicer had continued to act hereunder. Notwithstanding the foregoing, if the Trustee has become the successor to the Master Servicer in accordance with Section 7.01 hereof, the Trustee may, if it shall be unwilling to so act, or shall, if it is prohibited by applicable law from making Monthly Advances pursuant to Section 4.01 hereof or if it is otherwise unable to so act, appoint, or petition a court of competent jurisdiction to appoint, any established mortgage loan servicing institution the appointment of which does not adversely affect the then current rating of the Certificates by each Rating Agency, as the successor to the Master Servicer hereunder in the assumption of all or any part of the responsibilities, duties or liabilities of the Master Servicer hereunder. Any successor to the Master Servicer shall be an institution which is a FHLMC, FHA and VA approved seller/servicer in good standing, which has a net worth of at least \$15,000,000, and which is willing to service the Mortgage Loans and executes and delivers to the Depositor and the Trustee an agreement accepting such delegation and assignment, which contains an assumption by such Person of the rights, powers, duties, responsibilities, obligations and liabilities of the Master Servicer (other than liabilities of the Master Servicer under Section 6.03 hereof incurred prior to termination of the Master Servicer under Section 7.01), with like effect as if originally named as a party to this Agreement; and provided further that each Rating Agency acknowledges that its rating of the Certificates in effect immediately prior to such assignment and delegation will not be qualified or reduced, as a result of such assignment and delegation. The Trustee and such successor shall take such action, consistent with this Agreement, as shall be necessary to effectuate any such succession. All Servicing Transfer Costs shall be paid by the predecessor Master Servicer upon presentation of reasonable documentation of such costs, and if such predecessor Master Servicer defaults in its obligation to pay such costs, such costs shall be paid by the successor Master Servicer or the Trustee (in which case the successor Master Servicer or the Trustee, as applicable, shall be entitled to reimbursement therefor from the assets of the Trust Fund). Any indemnification from the Trust Fund, as contemplated above, shall be payable by the Trust Fund in the manner set forth in Section 4.03, subject to the limitations set forth in Section 8.05.

Pending appointment of a successor to the Master Servicer hereunder, the Trustee, unless the Trustee is prohibited by law from so acting, shall, subject to Section 3.04 hereof, act in such capacity as successor Master Servicer as hereinabove provided. In connection with such appointment and assumption, the Trustee may make such arrangements for the compensation of such successor out of payments on Mortgage Loans as it and such successor shall agree; provided, however, that no such compensation shall be in excess of the Servicing Fee permitted the Master Servicer hereunder. The Trustee and such successor shall take such action, consistent

with this Agreement, as shall be necessary to effectuate any such succession. Neither the Trustee nor any other successor master servicer shall be deemed to be in default hereunder by reason of any failure to make, or any delay in making, any distribution hereunder or any portion thereof or any failure to perform, or any delay in performing, any duties or responsibilities hereunder, in either case caused by the failure of the Master Servicer to deliver or provide, or any delay in delivering or providing, any cash, information, documents or records to it.

Any successor to the Master Servicer as master servicer shall give notice to the Mortgagors of such change of servicer and shall, during the term of its service as master servicer maintain in force the policy or policies that the Master Servicer is required to maintain pursuant to Section 3.09.

In connection with the termination or resignation of the Master Servicer hereunder, either (i) the successor Master Servicer, including the Trustee if the Trustee is acting as successor Master Servicer, shall represent and warrant that it is a member of MERS in good standing and shall agree to comply in all material respects with the rules and procedures of MERS in connection with the servicing of the Mortgage Loans that are registered with MERS, or (ii) the predecessor Master Servicer shall cooperate with the successor Master Servicer either (x) in causing MERS to execute and deliver an assignment of Mortgage in recordable form to transfer the Mortgage from MERS to the Trustee and to execute and deliver such other notices, documents and other instruments as may be necessary or desirable to effect a transfer of such Mortgage Loan or servicing of such Mortgage Loan on the MERS® System to the successor Master Servicer or (y) in causing MERS to designate on the MERS® System the successor Master Servicer as the servicer of such Mortgage Loan. The predecessor Master Servicer shall file or cause to be filed any such assignment in the appropriate recording office. The successor Master Servicer shall cause such assignment to be delivered to the Trustee promptly upon receipt of the original with evidence of recording thereon or a copy certified by the public recording office in which such assignment was recorded.

Section 7.03 Notification to Certificateholders.

(a) Upon any termination of or appointment of a successor to the Master Servicer, the Trustee shall give prompt written notice thereof to Certificateholders and to each Rating Agency.

(b) Within 60 days after the occurrence of any Event of Default, the Trustee shall transmit by mail to all Certificateholders notice of each such Event of Default hereunder known to the Trustee, unless such Event of Default shall have been cured or waived.

Section 7.04 Waiver of Master Servicer Events of Termination.

The Holders of Certificates evidencing not less than 51% of the Voting Rights may, on behalf of all Certificateholders, waive any default by the Master Servicer in the performance of its obligations hereunder and the consequences thereof, except a default in the making of or the causing to be made of any required distribution on the Certificates. Upon any such waiver of a past default, such default shall be deemed to cease to exist, and any Event of Default arising therefrom shall be deemed to have been timely remedied for every purpose of this Agreement. No such waiver shall extend to any subsequent or other default or impair any right consequent

thereon except to the extent expressly so waived. The Trustee shall give notice of any such waiver to the Rating Agencies.

ARTICLE VIII

CONCERNING THE TRUSTEE

Section 8.01 Duties of Trustee.

The Trustee, prior to the occurrence of an Event of Default and after the curing of all Events of Default that may have occurred, shall undertake to perform such duties and only such duties as are specifically set forth in this Agreement. In case an Event of Default has occurred and remains uncured, the Trustee shall exercise such of the rights and powers vested in it by this Agreement, and use the same degree of care and skill in their exercise as a prudent person would exercise or use under the circumstances in the conduct of such person's own affairs.

The Trustee, upon receipt of all resolutions, certificates, statements, opinions, reports, documents, orders or other instruments furnished to the Trustee that are specifically required to be furnished pursuant to any provision of this Agreement shall examine them to determine whether they are in the form required by this Agreement; provided, however, that the Trustee shall not be responsible for the accuracy or content of any such resolution, certificate, statement, opinion, report, document, order or other instrument.

No provision of this Agreement shall be construed to relieve the Trustee from liability for its own negligent action, its own negligent failure to act or its own willful misconduct; provided, however, that:

- (i) unless an Event of Default known to the Trustee shall have occurred and be continuing, the duties and obligations of the Trustee shall be determined solely by the express provisions of this Agreement, the Trustee shall not be liable, individually or as Trustee, except for the performance of such duties and obligations as are specifically set forth in this Agreement, no implied covenants or obligations shall be read into this Agreement against the Trustee and the Trustee may conclusively rely, as to the truth of the statements and the correctness of the opinions expressed therein, upon any certificates or opinions furnished to the Trustee and conforming to the requirements of this Agreement which it believed in good faith to be genuine and to have been duly executed by the proper authorities respecting any matters arising hereunder;
- (ii) the Trustee shall not be liable, individually or as Trustee, for an error of judgment made in good faith by a Responsible Officer or Responsible Officers of the Trustee, unless it shall be finally proven that the Trustee was negligent in ascertaining the pertinent facts; and
- (iii) the Trustee shall not be liable, individually or as Trustee, with respect to any action taken, suffered or omitted to be taken by it (a) in good faith; (b) in accordance with the direction, when such direction is required by this Agreement before taking, suffering or omitting to take such action, of the Holders of Certificates evidencing not less than 25% of the Voting Rights of Certificates and (c) relating to the time, method and place of conducting any proceeding for any

remedy available to the Trustee, or exercising any trust or power conferred upon the Trustee under this Agreement.

Section 8.02 Certain Matters Affecting the Trustee.

Except as otherwise provided in Section 8.01:

- (i) the Trustee may request and rely upon and shall be protected in acting or refraining from acting upon any resolution, Officers' Certificate, certificate of auditors or any other certificate, statement, instrument, opinion, report, notice, request, consent, order, appraisal, bond or other paper or document believed by it to be genuine and to have been signed or presented by the proper party or parties and the Trustee shall have no responsibility to ascertain or confirm the genuineness of any signature of any such party or parties;
- (ii) the Trustee may consult with counsel, financial advisers or accountants and the advice of any such counsel, financial advisers or accountants and any Opinion of Counsel shall be full and complete authorization and protection in respect of any action taken or suffered or omitted by it hereunder in good faith and in accordance with such advice or Opinion of Counsel;
- (iii) the Trustee shall not be liable, individually or as Trustee, for any action taken, suffered or omitted by it in good faith and believed by it to be authorized or within the discretion or rights or powers conferred upon it by this Agreement;
- (iv) prior to the occurrence of an Event of Default hereunder and after the curing of all Events of Default that may have occurred, the Trustee shall not be bound to make any investigation into the facts or matters stated in any resolution, certificate, statement, instrument, opinion, report, notice, request, consent, order, approval, bond or other paper or document, unless requested in writing so to do by the Holders of Certificates evidencing not less than 25% of the Voting Rights allocated to each Class of Certificates;
- (v) the Trustee may execute any of the trusts or powers hereunder or perform any duties hereunder either directly or by or through agents, accountants or attorneys;
- (vi) the Trustee shall not be required to risk or expend its own funds or otherwise incur any financial liability in the performance of any of its duties or in the exercise of any of its rights or powers hereunder if it shall have reasonable grounds for believing that repayment of such funds or adequate indemnity against such risk or liability satisfactory to it is not assured to it;
- (vii) the Trustee shall not be liable, individually or as Trustee, for any loss on any investment of funds pursuant to this Agreement;

(viii) the Trustee shall not be deemed to have knowledge of an Event of Default until a Responsible Officer of the Trustee shall have received written notice thereof; and

(ix) the Trustee shall be under no obligation to exercise any of the trusts, rights or powers vested in it by this Agreement or to institute, conduct or defend any litigation hereunder or in relation hereto at the request, order or direction of the Certificateholders, pursuant to the provisions of this Agreement, unless such Certificateholders shall have offered to the Trustee reasonable security or indemnity satisfactory to the Trustee against the costs, expenses and liabilities which may be incurred therein or thereby.

All rights of action under this Agreement or under any of the Certificates, enforceable by the Trustee, may be enforced by the Trustee without the possession of any of the Certificates, or the production thereof at the trial or other proceeding relating thereto, and any such suit, action or proceeding instituted by the Trustee shall be brought in its name for the benefit of all the Holders of the Certificates, subject to the provisions of this Agreement.

Section 8.03 Trustee Not Liable for Certificates or Mortgage Loans.

The recitals contained herein and in the Certificates shall be taken as the statements of the Depositor or the Seller, as the case may be, and the Trustee assumes no responsibility for their correctness. The Trustee makes no representations as to the validity or sufficiency of this Agreement, the Offering Memorandum or of the Certificates or of any Mortgage Loan or related document or of MERS or the MERS® System other than with respect to the Trustee's execution and counter-signature of the Certificates. The Trustee shall not be accountable for the use or application by the Depositor or the Master Servicer of any funds paid to the Depositor or the Master Servicer in respect of the Mortgage Loans or deposited in or withdrawn from the Collection Account by the Depositor or the Master Servicer.

Section 8.04 Trustee May Own Certificates.

The Trustee in its individual or any other capacity may become the owner or pledgee of Certificates with the same rights as it would have if it were not the Trustee.

Section 8.05 Trustee's Fees and Expenses.

As compensation for its services provided hereunder, the Trustee shall be entitled to the Trustee Fee and such amount as set forth in a separate fee agreement between the Seller and the Trustee. The Trustee and any director, officer, employee or agent of the Trustee shall be indemnified by the Seller and held harmless against any loss, liability or expense (including reasonable attorney's fees) (i) incurred in connection with its duties acting as Trustee hereunder (but not as successor to the Master Servicer) with respect to (a) this Agreement, (b) the Certificates, (c) the Mortgage Loans and the performance by the related Custodian of its obligations as the Custodian with respect thereto, or (d) the performance of any of the Trustee's duties hereunder, other than any loss, liability or expense incurred (1) by reason of willful

misfeasance, bad faith or negligence in the performance of any of the Trustee's duties hereunder, (2) by reason of any action of the Trustee taken at the direction of the Certificateholders or (3) as a result of an event for which the Master Servicer is responsible and must indemnify the Trustee and (ii) resulting from any error in any tax or information return prepared by the Master Servicer. If the Seller or the Master Servicer fails to perform its obligations as set forth in this Section 8.05 with respect to the payment of any indemnification amount owed to the Trustee, the Trustee may withdraw such amounts owed from the Distribution Account, on any Distribution Date prior to distributions to Certificateholders, up to an amount not to exceed \$100,000 per year, except that, an additional amount not to exceed \$100,000 per year may be withdrawn if such additional amount is needed to reimburse the Trustee for Servicing Transfer Costs not paid by the predecessor Master Servicer in the aggregate. Such indemnity shall survive the termination of this Agreement or the resignation or removal of the Trustee hereunder. Without limiting the foregoing, the Seller covenants and agrees, except as otherwise agreed upon in writing by the Depositor and the Trustee, and except for any such expense, disbursement or advance as may arise from the Trustee's negligence, bad faith or willful misconduct, to pay or reimburse the Trustee, for all reasonable expenses, disbursements and advances incurred or made by the Trustee in accordance with any of the provisions of this Agreement with respect to: (A) the reasonable compensation and the expenses and disbursements of its counsel, (B) the reasonable compensation, expenses and disbursements of any accountant, engineer or appraiser that is not regularly employed by the Trustee, to the extent that the Trustee must engage such persons to perform acts or services hereunder, (C) printing and engraving expenses in connection with preparing any Definitive Certificates or (D) resulting from an error in any tax or information return prepared by the Master Servicer. Except as otherwise provided herein, the Trustee shall not be entitled to payment or reimbursement for any routine ongoing expenses incurred by the Trustee in the ordinary course of its duties as Trustee, Registrar, agent for the Tax Matters Person or Paying Agent hereunder or for any other expenses.

Section 8.06 Eligibility Requirements for Trustee.

The Trustee hereunder shall at all times be a corporation or association organized and doing business under the laws of a state or the United States of America, authorized under such laws to exercise corporate trust powers, having a combined capital and surplus of at least \$50,000,000, subject to supervision or examination by federal or state authority and with a credit rating which would not cause either of the Rating Agencies to reduce their respective then current ratings of the Certificates (or having provided such security from time to time as is sufficient to avoid such reduction), as evidenced in writing by each Rating Agency. If such corporation or association publishes reports of condition at least annually, pursuant to law or to the requirements of the aforesaid supervising or examining authority, then for the purposes of this Section 8.06 the combined capital and surplus of such corporation or association shall be deemed to be its combined capital and surplus as set forth in its most recent report of condition so published. In case at any time the Trustee shall cease to be eligible in accordance with the provisions of this Section 8.06, the Trustee shall resign immediately in the manner and with the effect specified in Section 8.07 hereof. The entity serving as Trustee may have normal banking and trust relationships with the Depositor and its affiliates or the Master Servicer and its affiliates; provided, however, that such entity cannot be an affiliate of the Master Servicer other than the Trustee in its role as successor to the Master Servicer.

Section 8.07 Resignation and Removal of Trustee.

The Trustee may at any time resign and be discharged from the trusts hereby created by giving written notice of resignation to the Depositor, the Master Servicer and each Rating Agency not less than 60 days before the date specified in such notice when, subject to Section 8.08, such resignation is to take effect, and acceptance by a successor trustee in accordance with Section 8.08 meeting the qualifications set forth in Section 8.06. If no successor trustee meeting such qualifications shall have been so appointed and have accepted appointment within 30 days after the giving of such notice or resignation, the resigning Trustee may petition any court of competent jurisdiction for the appointment of a successor trustee.

If at any time the Trustee (i) shall cease to be eligible in accordance with the provisions of Section 8.06 hereof or (ii) fails to comply with the reporting obligations of Section 4.10, and shall fail to resign, or if at any time the Trustee shall become incapable of acting, or shall be adjudged as bankrupt or insolvent, or a receiver of the Trustee or of its property shall be appointed, or any public officer shall take charge or control of the Trustee or of its property or affairs for the purpose of rehabilitation, conservation or liquidation, or a tax is imposed with respect to the Trust Fund by any state in which the Trustee or the Trust Fund is located and the imposition of such tax would be avoided by the appointment of a different trustee, then the Depositor or the Master Servicer may remove the Trustee and the Depositor shall appoint a successor trustee by written instrument, in triplicate, one copy of which instrument shall be delivered to the Trustee, one copy of which shall be delivered to the Master Servicer and one copy to the successor trustee.

The Holders of Certificates entitled to at least 51% of the Voting Rights may at any time remove the Trustee and the Depositor shall appoint a successor trustee by written instrument or instruments, in triplicate, signed by such Holders or their attorneys-in-fact duly authorized, one complete set of which instruments shall be delivered by the successor Trustee to the Master Servicer, one complete set to the Trustee so removed and one complete set to the successor so appointed. Notice of any removal of the Trustee shall be given to each Rating Agency by the successor trustee.

Any resignation or removal of the Trustee and appointment of a successor trustee pursuant to any of the provisions of this Section 8.07 shall become effective upon acceptance of appointment by the successor trustee as provided in Section 8.08 hereof.

Section 8.08 Successor Trustee.

Any successor trustee appointed as provided in Section 8.07 hereof shall execute, acknowledge and deliver to the Depositor, its predecessor trustee and the Master Servicer an instrument accepting such appointment hereunder and thereupon the resignation or removal of the predecessor trustee shall become effective and such successor trustee, without any further act, deed or conveyance, shall become fully vested with all the rights, powers, duties and obligations of its predecessor hereunder, with the like effect as if originally named as trustee herein. The Depositor, the Master Servicer and the predecessor trustee shall execute and deliver such instruments and do such other things as may reasonably be required for more fully and

certainly vesting and confirming in the successor trustee all such rights, powers, duties, and obligations.

No successor trustee shall accept appointment as provided in this Section 8.08 unless at the time of such acceptance such successor trustee shall be eligible under the provisions of Section 8.06 hereof, its appointment shall not adversely affect the then current rating of the Certificates.

Upon acceptance of appointment by a successor trustee as provided in this Section 8.08, the Depositor shall mail notice of the succession of such trustee hereunder to all Holders of Certificates. If the Depositor fails to mail such notice within 10 days after acceptance of appointment by the successor trustee, the successor trustee shall cause such notice to be mailed at the expense of the Depositor.

Section 8.09 Merger or Consolidation of Trustee.

Any corporation into which the Trustee may be merged or converted or with which it may be consolidated or any corporation resulting from any merger, conversion or consolidation to which the Trustee shall be a party, or any corporation succeeding to the business of the Trustee, shall be the successor of the Trustee hereunder; provided that such corporation shall be eligible under the provisions of Section 8.06 hereof without the execution or filing of any paper or further act on the part of any of the parties hereto, anything herein to the contrary notwithstanding.

Section 8.10 Appointment of Co-Trustee or Separate Trustee.

Notwithstanding any other provisions of this Agreement, at any time, for the purpose of meeting any legal requirements of any jurisdiction in which any part of the Trust Fund or property securing any Mortgage Note may at the time be located, the Master Servicer and the Trustee acting jointly shall have the power and shall execute and deliver all instruments to appoint one or more Persons approved by the Trustee to act as co-trustee or co-trustees jointly with the Trustee, or separate trustee or separate trustees, of all or any part of the Trust Fund, and to vest in such Person or Persons, in such capacity and for the benefit of the Certificateholders, such title to the Trust Fund or any part thereof, whichever is applicable, and, subject to the other provisions of this Section 8.10, such powers, duties, obligations, rights and trusts as the Master Servicer and the Trustee may consider necessary or desirable. If the Master Servicer shall not have joined in such appointment within 15 days after the receipt by it of a request to do so, or in the case an Event of Default shall have occurred and be continuing, the Trustee alone shall have the power to make such appointment. No co-trustee or separate trustee hereunder shall be required to meet the terms of eligibility as a successor trustee under Section 8.06 and no notice to Certificateholders of the appointment of any co-trustee or separate trustee shall be required under Section 8.08.

Every separate trustee and co-trustee shall, to the extent permitted by law, be appointed and act subject to the following provisions and conditions:

(i) To the extent necessary to effectuate the purposes of this Section 8.10, all rights, powers, duties and obligations conferred or imposed upon the Trustee, except for the obligation of the Trustee under this Agreement to advance funds on behalf of the Master Servicer, shall be conferred or imposed upon and exercised or performed by the Trustee and such separate trustee or co-trustee jointly (it being understood that such separate trustee or co-trustee is not authorized to act separately without the Trustee joining in such act), except to the extent that under any law of any jurisdiction in which any particular act or acts are to be performed (whether as Trustee hereunder or as successor to the Master Servicer hereunder), the Trustee shall be incompetent or unqualified to perform such act or acts, in which event such rights, powers, duties and obligations (including the holding of title to the applicable Trust Fund or any portion thereof in any such jurisdiction) shall be exercised and performed singly by such separate trustee or co-trustee, but solely at the direction of the Trustee;

(ii) No trustee hereunder shall be held personally liable by reason of any act or omission of any other trustee hereunder and such appointment shall not, and shall not be deemed to, constitute any such separate trustee or co-trustee as agent of the Trustee;

(iii) The Trustee may at any time accept the resignation of or remove any separate trustee or co-trustee; and

(iv) The Master Servicer, and not the Trustee, shall be liable for the payment of reasonable compensation, reimbursement and indemnification to any such separate trustee or co-trustee.

Any notice, request or other writing given to the Trustee shall be deemed to have been given to each of the separate trustees and co-trustees, when and as effectively as if given to each of them. Every instrument appointing any separate trustee or co-trustee shall refer to this Agreement and the conditions of this Article VIII. Each separate trustee and co-trustee, upon its acceptance of the trusts conferred, shall be vested with the estates or property specified in its instrument of appointment, either jointly with the Trustee or separately, as may be provided therein, subject to all the provisions of this Agreement, specifically including every provision of this Agreement relating to the conduct of, affecting the liability of, or affording protection to, the Trustee. Every such instrument shall be filed with the Trustee and a copy thereof given to the Master Servicer and the Depositor.

Any separate trustee or co-trustee may, at any time, constitute the Trustee its agent or attorney-in-fact, with full power and authority, to the extent not prohibited by law, to do any lawful act under or in respect of this Agreement on its behalf and in its name. If any separate trustee or co-trustee shall die, become incapable of acting, resign or be removed, all of its estates, properties, rights, remedies and trusts shall vest in and be exercised by the Trustee, to the extent permitted by law, without the appointment of a new or successor trustee.

Section 8.11 Tax Matters.

It is intended that the Trust Fund, shall constitute, and that the conduct of matters relating to such assets shall be such as to qualify each of REMIC I and REMIC II as, a “real estate mortgage investment conduit” as defined in and in accordance with the REMIC Provisions. In furtherance of such intention, the Trustee covenants and agrees that it shall act as agent (and the Trustee is hereby appointed to act as agent) on behalf of the Tax Matters Person for any such REMIC and that in such capacity it shall: (a) prepare and file, or cause to be prepared and filed, in a timely manner, a U.S. Real Estate Mortgage Investment Conduit Income Tax Return (Form 1066 or any successor form adopted by the Internal Revenue Service) and prepare and file or cause to be prepared and filed with the Internal Revenue Service and applicable state or local tax authorities income tax or information returns for each taxable year with respect to any such REMIC, containing such information and at the times and in the manner as may be required by the Code or state or local tax laws, regulations, or rules, and furnish or cause to be furnished to Certificateholders the schedules, statements or information at such times and in such manner as may be required thereby; (b) within thirty days of the Closing Date, furnish or cause to be furnished to the Internal Revenue Service, on Forms 8811 or as otherwise may be required by the Code, the name, title, address, and telephone number of the person that the holders of the Certificates may contact for tax information relating thereto, together with such additional information as may be required by such Form, and update such information at the time or times in the manner required by the Code; (c) make or cause to be made elections that the Trust Fund be treated as a REMIC on the federal tax return for its first taxable year (and, if necessary, under applicable state law); (d) prepare and forward, or cause to be prepared and forwarded, to the Certificateholders and to the Internal Revenue Service and, if necessary, state tax authorities, all information returns and reports as and when required to be provided to them in accordance with the REMIC Provisions, including without limitation, the calculation of any original issue discount using the Prepayment Assumption; (e) provide information necessary for the computation of tax imposed on the transfer of a Residual Certificate to a Person that is not a Permitted Transferee, or an agent (including a broker, nominee or other middleman) of a Non-Permitted Transferee, or a pass-through entity in which a Non-Permitted Transferee is the record holder of an interest (the reasonable cost of computing and furnishing such information may be charged to the Person liable for such tax but such information will be provided in all events (regardless of whether such payment has been made)); (f) to the extent that they are under its control conduct matters relating to the Trust Fund at all times that any Certificates are outstanding so as to maintain the status as a REMIC under the REMIC Provisions; (g) pay, from the sources specified in the last paragraph of this Section 8.11, the amount of any federal or state tax, including prohibited transaction taxes as described below, imposed on any such REMIC prior to its termination when and as the same shall be due and payable (but such obligation shall not prevent the Trustee or any other appropriate Person from contesting any such tax in appropriate proceedings and shall not prevent the Trustee from withholding payment of such tax, if permitted by law, pending the outcome of such proceedings); (h) ensure that federal, state or local income tax or information returns shall be signed by the Trustee or such other Person as may be required to sign such returns by the Code or state or local laws, regulations or rules; (i) maintain records relating to any such REMIC, including but not limited to the income, expenses, assets and liabilities thereof, as may be necessary to prepare the foregoing returns, schedules, statements or information; and (j) as and when necessary and appropriate, represent

any such REMIC in any administrative or judicial proceedings relating to an examination or audit by any governmental taxing authority.

In order to enable the Trustee to perform its duties as set forth herein, the Depositor shall provide, or cause to be provided, to the Trustee within ten (10) days after the Closing Date all information or data that the Trustee requests in writing and determines to be relevant for tax purposes to the valuations and offering prices of the Certificates, including, without limitation, the price, yield, prepayment assumption and projected cash flows of the Certificates and the Mortgage Loans. Thereafter, the Depositor shall provide to the Trustee promptly upon written request therefor, any such additional information or data that the Trustee may, from time to time, reasonably request in order to enable the Trustee to perform its duties as set forth herein. The Depositor hereby indemnifies the Trustee for any losses, liabilities, damages, claims or expenses of the Trustee arising from any errors or miscalculations of the Trustee that result from any failure of the Depositor to provide, or to cause to be provided, accurate information or data to the Trustee on a timely basis.

In the event that any tax is imposed on “prohibited transactions” of any REMIC hereunder as defined in Section 860F(a)(2) of the Code, on the “net income from foreclosure property” of such REMIC as defined in Section 860G(c) of the Code, on any contribution to any REMIC hereunder after the Startup Day pursuant to Section 860G(d) of the Code, or any other tax is imposed, including, without limitation, any minimum tax imposed upon any REMIC hereunder pursuant to Sections 23153 and 24874 of the California Revenue and Taxation Code, if not paid as otherwise provided for herein, such tax shall be paid by (i) the Trustee, if any such other tax arises out of or results from a breach by the Trustee of any of its obligations under this Agreement and which breach constitutes negligence of the Trustee; provided, however, that the Trustee shall not be liable for any such taxes attributable to the action or inaction of the Depositor or the Tax Matters Person (so long as the Trustee is not the Tax Matters Person), as applicable, nor for any such losses resulting from any information, misinformation, direction, writing or document provided by the Depositor or the Tax Matters Person and on which the Trustee has reasonably relied. The foregoing shall not limit or restrict the rights and remedies of the Holders of the Certificates now or hereafter at law or in equity. Notwithstanding the foregoing, however, in no event shall the Trustee have any responsibility or liability under this Section 8.11 (1) for any action or omission that is taken in accordance with and in compliance with the terms of, or which are permitted by the terms of, this Agreement, (2) for any losses other than arising out of a negligent performance by the Trustee of its duties and obligations set forth herein, and (3) for any special, indirect or consequential damage to Certificateholders, (ii) the Master Servicer, in the case of any such minimum tax, or if such tax arises out of or results from a breach by the Master Servicer or Seller of any of their obligations under this Agreement, (iii) the Seller, if any such tax arises out of or results from the Seller’s obligation to repurchase a Mortgage Loan pursuant to Section 2.02, 2.03 or 3.01 or (iv) in all other cases, or in the event that the Trustee, the Master Servicer or the Seller fails to honor its obligations under the preceding clauses (i),(ii) or (iii), any such tax will be paid with amounts otherwise to be distributed to the Certificateholders, as provided in Section 3.08(a).

In the event that the Master Servicer is required by HUD or the Department of Veterans Affairs to modify a Mortgage Loan in a manner that causes the Trust to fail to qualify as a

REMIC, the Seller or the Master Servicer shall purchase such Mortgage Loan from the Trust at the Purchase Price.

The Master Servicer agrees to indemnify the Trust Fund, the Depositor, the Seller and the Trustee for any taxes and costs including, without limitation, any reasonable attorneys fees imposed on or incurred by the Trust Fund, the Depositor, the Seller or the Trustee as a result of a breach of the Master Servicer's covenants set forth in this Section 8.11.

None of the Depositor or the Master Servicer shall sell, dispose of or substitute for any of the Mortgage Loans (except in connection with (i) the foreclosure of a Mortgage Loan, including but not limited to, the acquisition or sale of a Mortgaged Property acquired by deed in lieu of foreclosure, (ii) the bankruptcy of REMIC I (iii) the termination of REMIC I pursuant to Article IX of this Agreement, (iv) a substitution pursuant to Article II of this Agreement or (v) a purchase of Mortgage Loans pursuant to Article II or III of this Agreement), nor acquire any assets for any REMIC (other than REO Property acquired in respect of a defaulted Mortgage Loan), nor sell or dispose of any investments in the Collection Account or the Distribution Account for gain, nor accept any contributions to any REMIC after the Closing Date (other than a Substitute Mortgage Loan delivered in accordance with Section 2.03), unless it have received an Opinion of Counsel, addressed to the Trustee (at the expense of the party seeking to cause such sale, disposition, substitution, acquisition or contribution but in no event at the expense of the Trustee) that such sale, disposition, substitution, acquisition or contribution will not (a) affect adversely the status of any REMIC as a REMIC or (b) cause any REMIC to be subject to a tax on "prohibited transactions" or "contributions" pursuant to the REMIC Provisions.

Section 8.12 [Reserved].

Section 8.13 Compliance With National Housing Act of 1934.

In performing its duties hereunder with respect to FHA Loans, the Trustee shall comply with all requirements of the National Housing Act of 1934, as amended.

Section 8.14 Appointment of Custodian.

The Trustee may, with the consent of the Depositor and the Master Servicer, appoint one or more Custodians to hold all or a portion of the Mortgage Files as agent for the Trustee. The appointment of any Custodian may at any time be terminated and a substitute Custodian appointed therefor upon the reasonable request of the Master Servicer to the Trustee, the consent to which shall not be unreasonably withheld. Each Custodian shall be a depository institution or trust company subject to supervision by federal or state authority, shall have combined capital and surplus of at least \$10,000,000 and shall be qualified to do business in the jurisdiction in which it holds any Mortgage File. If no Custodian is appointed the Trustee shall perform the duties of the Custodian hereunder. In no event shall the appointment of any Custodian diminish the obligations of the Trustee hereunder.

The Bank of New York is hereby appointed as the Custodian and The Bank of New York hereby accepts such appointment, with respect to the Mortgage Files relating to the Mortgage Loans that constitute, or may in the future constitute, part of the Trust Fund. The

Custodian, as compensation for its services hereunder, shall be entitled to a fee paid by the Trustee in such amount as agreed upon between the Custodian and the Trustee. The Custodian shall be responsible hereunder solely for the express duties and functions specified for it herein with respect to the custody, review and confirmation, safekeeping, substitution and release of the Mortgage Files relating to the Mortgage Loans. The Custodian shall have all of the rights and benefits of and limitations on liability afforded to the Trustee under this Article VIII to the same extent as though the Custodian had been named in the various provisions of this Article VIII except with respect to the provisions of Section 8.05.

Each director, officer, employee or agent of the Custodian shall be indemnified by the Master Servicer and held harmless against any loss, liability or expense (including reasonable attorney's fees) incurred in connection with its duties acting as the Custodian hereunder with respect to (a) this Agreement, (b) the Mortgage Loans or (c) the performance of any of the Custodian's duties hereunder, other than any loss, liability or expense incurred by reason of willful misfeasance, bad faith or negligence in the performance of any of the Custodian's duties hereunder. If the Master Servicer fails to perform its obligations as set forth in this Section 8.14 with respect to the payment of any indemnification amount owed to the Custodian, the Trustee shall withdraw such amounts owed from the Distribution Account for payment to the Custodian on the last Distribution Date of each calendar year prior to distributions to Certificateholders; provided, however, that in no event shall such indemnification payment withdrawal to the Custodian exceed, in the aggregate, \$100,000 less the aggregate indemnification amounts withdrawn from the Distribution Account during such year (including on such Distribution Date) for payment to the Trustee pursuant to Section 8.05. Such indemnity shall survive the termination of this Agreement or the resignation or removal of the Custodian hereunder; provided, further, that in the event that such amount shall not be sufficient to make the indemnification payments required to the Custodian in a calendar year, such amount shall be prorated among the Custodian based on the aggregate outstanding principal balance of the Mortgage Loans of which the Custodian has custody of. Such indemnity shall survive the termination of this Agreement or the resignation or removal of the Custodian hereunder.

The Custodian shall be entitled to rely and act upon advice of counsel with respect to its performance hereunder as Custodian and shall be without liability for any action reasonably taken in good faith pursuant to such advice; provided that such action is not in violation of applicable Federal or State law. The Custodian shall have no duties or obligations other than those specifically set forth herein, and no further duties or obligations shall arise by implication or otherwise. The Custodian shall not have any responsibility or duty with respect to the Mortgage Files that it has relinquished from its possession pursuant to the terms hereof during the period of time that the Custodian is not in possession of such Mortgage Files. The Custodian agrees to use its best judgment and good faith in the performance of such obligations and duties and shall incur no liability for its acts or omissions hereunder, except as may result from its negligence or willful misconduct. No provision of this Agreement shall require the Custodian to expend or risk its own funds or otherwise incur financial liability in the performance of its duties hereunder if it shall have reasonable grounds for believing that repayment of such funds or adequate indemnity is not reasonably assured to it.

Section 8.15 Representations and Warranties of the Custodian.

The Custodian hereby represents and warrants to, and covenants that, as of the date hereof:

(a) it is a national banking association duly organized, validly existing, and in good standing under the laws of the United States of America;

(b) it has full power and authority to execute, deliver, and perform this Agreement, and has taken all necessary action to authorize the execution, delivery, and performance by it of this Agreement;

(c) the consummation of the transactions contemplated by this Agreement and the fulfillment of its terms do not conflict with, result in any breach of, or constitute (with or without notice or lapse of time) a default under, the certificate of incorporation or bylaws of the Custodian or any agreement or other instrument to which it is a party or by which it is bound;

(d) to the Custodian's best knowledge, no proceedings or investigations concerning the Custodian are pending or threatened before any court, regulatory body, administrative agency, or other governmental instrumentality having jurisdiction over it or its properties:

(i) asserting the invalidity of this Agreement,

(ii) seeking to prevent the consummation of any of the transactions contemplated by this Agreement, or

(iii) seeking any determination that might affect its performance of its obligations under this Agreement or the validity or enforceability of this Agreement.

ARTICLE IX

TERMINATION

Section 9.01 Termination upon Liquidation or Purchase of all Mortgage Loans.

Subject to Section 9.03, the obligations and responsibilities of the Depositor, the Master Servicer and the Trustee created hereby with respect to the Trust Fund shall terminate upon the earlier of (i) the purchase by the Master Servicer pursuant to the following paragraph of this Section 9.01 of all Mortgage Loans (and REO Properties) remaining in the Trust Fund and (ii) the later of (a) the maturity or other liquidation (or any Monthly Advance with respect thereto) of the last Mortgage Loan remaining in the Trust Fund and the disposition of all REO Property and (b) the distribution to Certificateholders of all amounts required to be distributed to them pursuant to this Agreement. In no event shall the trusts created hereby continue beyond the earlier of (i) the expiration of 21 years from the death of the survivor of the descendants of Joseph P. Kennedy, the late Ambassador of the United States to the Court of St. James's, living on the date hereof and (ii) the Latest Possible Maturity Date.

On any Distribution Date on which the Master Servicer determines that the customary and reasonable costs and expenses incurred in the performance of the Master Servicer of its servicing obligations hereunder exceed the benefits accruing to the Master Servicer, the Master Servicer shall have the right to purchase all Mortgage Loans and REO Properties at the price equal to the sum of (a) 100% of the Scheduled Principal Balance of each Mortgage Loan or, if REO Property, the Scheduled Principal Balance of each Mortgage Loan related to any REO Property plus (b) one month's accrued interest thereon at the applicable Net Mortgage Rate and (the "Termination Price"); provided, however, that in no event shall the Master Servicer exercise its right to purchase all Mortgage Loans and REO Properties pursuant to this paragraph before the Distribution Date on which the Pool Scheduled Principal Balance, at the time of any such repurchase, is less than or equal to one percent (1%) of the sum of the aggregate Cut-off Date Principal Balance of the Mortgage Loans.

Any such purchase shall be accomplished by deposit into the Distribution Account on the Determination Date before such Distribution Date of the Termination Price.

Section 9.02 Final Distribution on the Certificates.

If on any Determination Date, the Master Servicer determines that there are no Outstanding Mortgage Loans and no other funds or assets in the Trust Fund other than the funds in the Collection Account, the Master Servicer shall direct the Trustee promptly to send a final distribution notice to each Certificateholder. If the Master Servicer elects to terminate the Trust Fund pursuant to clause (a) of Section 9.01, at least 20 days prior to the date notice is to be mailed to the affected Certificateholders, the Master Servicer shall notify the Depositor and the Trustee of the date the Master Servicer intends to terminate the Trust Fund and of the applicable repurchase price of the Mortgage Loans and REO Properties.

Notice of any termination of the Trust Fund, specifying the Distribution Date on which Certificateholders may surrender their Certificates for payment of the final distribution and cancellation, shall be given promptly by the Trustee by letter to Certificateholders mailed not earlier than the 10th day and no later than the 15th day of the month next preceding the month of such final distribution. Any such notice shall specify (a) the Distribution Date upon which final distribution on the Certificates will be made upon presentation and surrender of Certificates at the office therein designated, (b) the amount of such final distribution, (c) the location of the office or agency at which such presentation and surrender must be made, and (d) that the Record Date otherwise applicable to such Distribution Date is not applicable, distributions being made only upon presentation and surrender of the Certificates at the office therein specified. The Master Servicer will give such notice to each Rating Agency at the time such notice is given to Certificateholders.

In the event such notice is given, the Master Servicer shall cause all funds in the Collection Account to be remitted to the Trustee for deposit in the Distribution Account on the Business Day prior to the applicable Distribution Date in an amount equal to the final distribution in respect of the Certificates. Upon such final deposit with respect to the Trust Fund and the receipt by the Trustee of a Request for Release therefor, the Trustee shall promptly release to the Master Servicer the Mortgage Files for the Mortgage Loans.

Upon presentation and surrender of the Certificates, the Trustee shall cause to be distributed to the Certificateholders of each Class, in each case on the final Distribution Date and in the order set forth in Section 4.03, in proportion to their respective Percentage Interests, with respect to Certificateholders of the same Class, an amount equal to (i) as to each Class of Regular Certificates, the Certificate Principal Balance thereof plus accrued interest thereon (or on their Notional Amount, if applicable) in the case of an interest bearing Certificate, and (ii) as to the Residual Certificates, the amount, if any, which remains on deposit in the Distribution Account (other than the amounts retained to meet claims) after application pursuant to clause (i) above.

In the event that any affected Certificateholders shall not surrender Certificates for cancellation within six months after the date specified in the above mentioned written notice, the Trustee shall give a second written notice to the remaining Certificateholders to surrender their Certificates for cancellation and receive the final distribution with respect thereto. If within six months after the second notice all the applicable Certificates shall not have been surrendered for cancellation, the Trustee may take appropriate steps, or may appoint an agent to take appropriate steps, to contact the remaining Certificateholders concerning surrender of their Certificates, and the cost thereof shall be paid out of the funds and other assets which remain a part of the Trust Fund. If within one year after the second notice all Certificates shall not have been surrendered for cancellation, the Class R Certificateholders shall be entitled to all unclaimed funds and other assets of the Trust Fund which remain subject hereto.

Section 9.03 Additional Termination Requirements.

(a) In the event the Master Servicer exercises its purchase option as provided in Section 9.01, the Trust Fund shall be terminated in accordance with the following additional requirements, unless the Trustee have been supplied with an Opinion of Counsel, at the expense of the Master Servicer, to the effect that the failure to comply with the requirements of this

Section 9.03 will not (i) result in the imposition of taxes on “prohibited transactions” on any REMIC as defined in section 860F of the Code, or (ii) cause any REMIC to fail to qualify as a REMIC at any time that any Certificates are outstanding:

(1) Within 90 days prior to the final Distribution Date set forth in the notice given by the Master Servicer under Section 9.02, the Master Servicer shall prepare and the Trustee, at the expense of the Tax Matters Person, shall adopt a plan of complete liquidation within the meaning of section 860F(a)(4) of the Code which, as evidenced by an Opinion of Counsel (which opinion shall not be an expense of the Trustee or the Tax Matters Person), meets the requirements of a qualified liquidation; and

(2) Within 90 days after the time of adoption of such a plan of complete liquidation, the Trustee shall sell all of the assets of the Trust Fund to the Master Servicer for cash in accordance with Section 9.01.

(b) The Trustee as agent for any REMIC hereby agrees to adopt and sign such a plan of complete liquidation upon the written request of the Master Servicer, and the receipt of the Opinion of Counsel referred to in Section 9.03(a)(1) and to take such other action in connection therewith as may be reasonably requested by the Master Servicer.

(c) By their acceptance of the Certificates, the Holders thereof hereby authorize the Master Servicer to prepare and the Trustee to adopt and sign a plan of complete liquidation.

ARTICLE X

MISCELLANEOUS PROVISIONS

Section 10.01 Amendment.

This Agreement may be amended from time to time by the Depositor, the Master Servicer and the Trustee without the consent of any of the Certificateholders (i) to cure any ambiguity or mistake, (ii) to correct any defective provision herein or to supplement any provision herein which may be inconsistent with any other provision herein, (iii) to add to the duties of the Depositor, the Seller or the Master Servicer, (iv) to add any other provisions with respect to matters or questions arising hereunder or (v) to modify, alter, amend, add to or rescind any of the terms or provisions contained in this Agreement; provided that any action pursuant to clauses (iv) or (v) above shall not, as evidenced by an Opinion of Counsel (which Opinion of Counsel shall not be an expense of the Trustee or the Trust Fund), adversely affect in any material respect the interests of any Certificateholder; provided, however, that the amendment shall not be deemed to adversely affect in any material respect the interests of the Certificateholders if the Person requesting the amendment obtains a letter from each Rating Agency stating that the amendment would not result in the downgrading or withdrawal of the respective ratings then assigned to the Certificates. Notwithstanding the foregoing, no amendment that significantly changes the permitted activities of the trust created by this Agreement may be made without the consent of a Majority in Interest of each Class of Certificates affected by such amendment. The Trustee, the Depositor and the Master Servicer also may at any time and from time to time amend this Agreement without the consent of the Certificateholders to modify, eliminate or add to any of its provisions to such extent as shall be necessary or helpful to (i) maintain the qualification of any REMIC as a REMIC under the Code, (ii) avoid or minimize the risk of the imposition of any tax on any REMIC pursuant to the Code that would be a claim at any time prior to the final redemption of the Certificates or (iii) comply with any other requirements of the Code; provided that the Trustee has been provided an Opinion of Counsel, which opinion shall be an expense of the party requesting such opinion but in any case shall not be an expense of the Trustee or the Trust Fund, to the effect that such action is necessary or helpful to, as applicable, (i) maintain such qualification, (ii) avoid or minimize the risk of the imposition of such a tax or (iii) comply with any such requirements of the Code.

This Agreement may also be amended from time to time by the Depositor, the Master Servicer and the Trustee with the consent of the Holders of a Majority in Interest of each Class of Certificates affected thereby for the purpose of adding any provisions to or changing in any manner or eliminating any of the provisions of this Agreement or of modifying in any manner the rights of the Holders of Certificates; provided, however, that no such amendment shall (i) reduce in any manner the amount of, or delay the timing of, payments required to be distributed on any Certificate without the consent of the Holder of such Certificate, (ii) adversely affect in any material respect the interests of the Holders of any Class of Certificates in a manner other than as described in (i), without the consent of the Holders of Certificates of such Class evidencing, as to such Class, Percentage Interests aggregating 66%, or (iii) reduce the aforesaid percentages of Certificates the Holders of which are required to consent to any such amendment, without the consent of the Holders of all such Certificates then outstanding.

Notwithstanding any contrary provision of this Agreement, the Trustee shall not consent to any amendment to this Agreement unless it shall have first received an Opinion of Counsel satisfactory to it, which opinion shall not be an expense of the Trustee or the Trust Fund, to the effect that such amendment will not cause the imposition of any tax on any REMIC or the Certificateholders or cause any REMIC to fail to qualify as a REMIC at any time that any Certificates are outstanding.

Promptly after the execution of any amendment to this Agreement requiring the consent of Certificateholders, the Trustee shall furnish written notification of the substance or a copy of such amendment to each Certificateholder and each Rating Agency.

It shall not be necessary for the consent of Certificateholders under this Section to approve the particular form of any proposed amendment, but it shall be sufficient if such consent shall approve the substance thereof. The manner of obtaining such consents and of evidencing the authorization of the execution thereof by Certificateholders shall be subject to such reasonable regulations as the Trustee may prescribe.

Nothing in this Agreement shall require the Trustee to enter into an amendment without receiving an Opinion of Counsel (which Opinion shall (1) not be an expense of the Trustee or the Trust Fund, and (2) be satisfactory to the Trustee that (i) such amendment is permitted and is not prohibited by this Agreement and that all requirements for amending this Agreement have been complied with.

Section 10.02 Recordation of Agreement; Counterparts.

This Agreement is subject to recordation in all appropriate public offices for real property records in all the counties or other comparable jurisdictions in which any or all of the properties subject to the Mortgages are situated, and in any other appropriate public recording office or elsewhere, such recordation to be effected by the Master Servicer at its expense, but only upon direction by the Trustee accompanied by an Opinion of Counsel to the effect that such recordation materially and beneficially affects the interests of the Certificateholders.

For the purpose of facilitating the recordation of this Agreement as herein provided and for other purposes, this Agreement may be executed simultaneously in any number of counterparts, each of which counterparts shall be deemed to be an original, and such counterparts shall constitute but one and the same instrument.

Section 10.03 Governing Law.

THIS AGREEMENT SHALL BE CONSTRUED IN ACCORDANCE WITH AND GOVERNED BY THE SUBSTANTIVE LAWS OF THE STATE OF NEW YORK APPLICABLE TO AGREEMENTS MADE AND TO BE PERFORMED IN THE STATE OF NEW YORK AND THE OBLIGATIONS, RIGHTS AND REMEDIES OF THE PARTIES HERETO AND THE CERTIFICATEHOLDERS SHALL BE DETERMINED IN ACCORDANCE WITH SUCH LAWS.

Section 10.04 Intention of Parties.

It is the express intent of the parties hereto that the conveyance of the (i) of the Mortgage Loans by the Seller to the Depositor and (ii) Trust Fund by the Depositor to the Trustee each be, and be construed as, an absolute sale thereof to the Trustee. It is, further, not the intention of the parties that such conveyances be deemed a pledge thereof. However, in the event that, notwithstanding the intent of the parties, such assets are held to be the property of the Seller or Depositor, as the case may be, or if for any other reason this Agreement is held or deemed to create a security interest in either such assets, then (i) this Agreement shall be deemed to be a security agreement (within the meaning of the Uniform Commercial Code of the State of New York) with respect to all such assets and security interests and (ii) the conveyances provided for in this Agreement shall be deemed to be an assignment and a grant pursuant to the terms of this Agreement (i) by the Seller to the Depositor or (ii) by the Depositor to the Trustee, for the benefit of the Certificateholders, of a security interest in all of the assets that constitute the Trust Fund, whether now owned or hereafter acquired.

The Seller and the Depositor for the benefit of the Certificateholders shall, to the extent consistent with this Agreement, take such actions as may be necessary to ensure that, if this Agreement were deemed to create a security interest in the Trust Fund, such security interest would be deemed to be a perfected security interest of first priority under applicable law and will be maintained as such throughout the term of the Agreement. The Depositor shall arrange for filing any Uniform Commercial Code continuation statements in connection with any security interest granted or assigned to the Trustee for the benefit of the Certificateholders.

Section 10.05 Notices.

(a) The Trustee shall use its best efforts to promptly provide notice to each Rating Agency with respect to each of the following of which it has actual knowledge:

- (1) Any material change or amendment to this Agreement;
- (2) The occurrence of any Event of Default that has not been cured;
- (3) The resignation or termination of the Master Servicer or the Trustee and the appointment of any successor;
- (4) The repurchase or substitution of Mortgage Loans pursuant to Section 2.03;
- (5) The final payment to Certificateholders; and
- (6) Any rating action involving the long-term credit rating of the Master Servicer, which notice shall be made by first-class mail within two Business Days after the Trustee gains actual knowledge thereof.

In addition, the Trustee shall promptly furnish to each Rating Agency copies of the following:

- (1) Each report to Certificateholders described in Section 4.06;

- (2) Each annual statement as to compliance described in Section 3.16;
- (3) Each annual independent public accountants' servicing report described in Section 3.17; and
- (4) Any notice of a purchase of a Mortgage Loan pursuant to Section 2.02, 2.03 or 3.11.

All directions, demands and notices hereunder shall be in writing and shall be deemed to have been duly given when delivered by first class mail, by courier or by facsimile transmission to (a) in the case of the Depositor, CWMBBS, Inc., 4500 Park Granada, MS CH-143 Calabasas, California 91302, facsimile number: (818) 225-4032, Attention: Michael Schloessmann, (CWMBBS 2005-R1), (b) in the case of the Seller, Countrywide Home Loans, Inc., 4500 Park Granada, MS CH-143 Calabasas, California 91302, facsimile number: (818) 225-4032, Attention: Michael Schloessmann, (CWMBBS 2005-R1), with a copy to Countrywide Home Loans, Inc., 4500 Park Granada, MS CH-11 Calabasas, California 91302, facsimile number (818) 225-4028, Attention: Office of General Counsel (CWMBBS 2005-R1), (c) in the case of the Master Servicer, Countrywide Home Loans Servicing LP, 400 Countrywide Way, MS SV-44m, Simi Valley, California 93065, Attention: CWMBBS 2005-R1, facsimile number (805) 520-5623, or such other address as may be hereafter furnished to the Depositor and the Trustee by the Master Servicer in writing, (d) in the case of the Trustee, 101 Barclay Street, New York, New York 10286, Attention: Corporate Trust, MBS Administration-CWMBBS Reperforming Loan REMIC Trust 2005-R1, or such other address as the Trustee may hereafter furnish to the Depositor or Master Servicer, (e) in the case of the Custodian: The Bank of New York, 101 Barclay Street, New York, New York 10286, with a copy to BNY Western Trust Company, 700 South Flower Street, Los Angeles, California 90017 and (f) in the case of the Rating Agencies, the address specified therefor in the definition corresponding to the name of such Rating Agency. Notices to Certificateholders shall be deemed given when mailed, first class postage prepaid, to their respective addresses appearing in the Certificate Register.

Section 10.06 Severability of Provisions.

If any one or more of the covenants, agreements, provisions or terms of this Agreement shall be for any reason whatsoever held invalid, then such covenants, agreements, provisions or terms shall be deemed severable from the remaining covenants, agreements, provisions or terms of this Agreement and shall in no way affect the validity or enforceability of the other provisions of this Agreement or of the Certificates or the rights of the Holders thereof.

Section 10.07 Assignment.

Notwithstanding anything to the contrary contained herein, except as provided in Section 6.02, this Agreement may not be assigned by the Master Servicer without the prior written consent of the Trustee and the Depositor.

Section 10.08 Limitation on Rights of Certificateholders.

The death or incapacity of any Certificateholder shall not operate to terminate this Agreement or the trust created hereby, nor entitle such Certificateholder's legal representative or heirs to claim an accounting or to take any action or commence any proceeding in any court for a petition or winding up of the trust created hereby, or otherwise affect the rights, obligations and liabilities of the parties hereto or any of them.

No Certificateholder shall have any right to vote (except as provided herein) or in any manner otherwise control the operation and management of the Trust Fund, or the obligations of the parties hereto, nor shall anything herein set forth or contained in the terms of the Certificates be construed so as to constitute the Certificateholders from time to time as partners or members of an association; nor shall any Certificateholder be under any liability to any third party by reason of any action taken by the parties to this Agreement pursuant to any provision hereof.

No Certificateholder shall have any right by virtue or by availing itself of any provisions of this Agreement to institute any suit, action or proceeding in equity or at law upon or under or with respect to this Agreement, unless such Holder previously shall have given to the Trustee a written notice of an Event of Default and of the continuance thereof, as herein provided, and unless the Holders of Certificates evidencing not less than 25% of the Voting Rights evidenced by the Certificates shall also have made written request to the Trustee to institute such action, suit or proceeding in its own name as Trustee hereunder and shall have offered to the Trustee such reasonable indemnity as it may require against the costs, expenses, and liabilities to be incurred therein or thereby, and the Trustee, for 60 days after its receipt of such notice, request and offer of indemnity shall have neglected or refused to institute any such action, suit or proceeding; it being understood and intended, and being expressly covenanted by each Certificateholder with every other Certificateholder and the Trustee, that no one or more Holders of Certificates shall have any right in any manner whatever by virtue or by availing itself or themselves of any provisions of this Agreement to affect, disturb or prejudice the rights of the Holders of any other of the Certificates, or to obtain or seek to obtain priority over or preference to any other such Holder or to enforce any right under this Agreement, except in the manner herein provided and for the common benefit of all Certificateholders. For the protection and enforcement of the provisions of this Section 10.08, each and every Certificateholder and the Trustee shall be entitled to such relief as can be given either at law or in equity.

Section 10.09 Inspection and Audit Rights.

The Master Servicer agrees that, on reasonable prior notice, it will permit and will cause each Subservicer to permit any representative of the Depositor or the Trustee during the Master Servicer's or subservicer's normal business hours, to examine all the books of account, records, reports and other papers of the Master Servicer pertaining to the Master Servicer's mortgage servicing operations or relating to the Mortgage Loans, to make copies and extracts therefrom, to cause such books to be audited by independent certified public accountants selected by the Depositor or the Trustee and to discuss its affairs, finances and accounts pertaining to the Master Servicer's mortgage servicing operations or relating to the Mortgage Loans with its officers, employees and independent public accountants (and by this provision the Master Servicer hereby authorizes said accountants to discuss with such representative such affairs, finances and

accounts), all at such reasonable times and as often as may be reasonably requested. Any out-of-pocket expense incident to the exercise by the Depositor or the Trustee of any right under this Section 10.09 shall be borne by the party requesting such inspection; all other such expenses shall be borne by the Master Servicer or the related Subservicer.

Section 10.10 Certificates Nonassessable and Fully Paid.

It is the intention of the Depositor that Certificateholders shall not be personally liable for obligations of the Trust Fund, that the interests in the Trust Fund represented by the Certificates shall be nonassessable for any reason whatsoever, and that the Certificates, upon due authentication thereof by the Trustee pursuant to this Agreement, are and shall be deemed fully paid.

Section 10.11 [Reserved].

Section 10.12 Protection of Assets.

(a) Except for transactions and activities entered into in connection with the securitization that is the subject of this Agreement, the Trust Fund created by this Agreement is not authorized and has no power to:

- (i) borrow money or issue debt;
- (ii) merge with another entity, reorganize, liquidate or sell assets; or
- (iii) engage in any business or activities.

(b) Each party to this Agreement agrees that it will not file an involuntary bankruptcy petition against the Trustee or the Trust Fund or initiate any other form of insolvency proceeding until after the Certificates have been paid in full.

* * * * *

IN WITNESS WHEREOF, the Depositor, the Trustee, the Seller, the Custodian, and the Master Servicer have caused their names to be signed hereto by their respective officers thereunto duly authorized as of the day and year first above written.

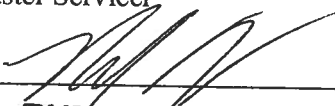
CWMBS, INC.,
as Depositor

By: 
Name: **RUBEN AVILEZ**
Title: **VICE PRESIDENT**

COUNTRYWIDE HOME LOANS, INC.,
as Seller

By: 
Name: **RUBEN AVILEZ**
Title: **VICE PRESIDENT**

COUNTRYWIDE HOME LOANS
SERVICING LP,
as Master Servicer

By: 
Name: **RUBEN AVILEZ**
Title: **VICE PRESIDENT**

THE BANK OF NEW YORK
as Trustee and Custodian

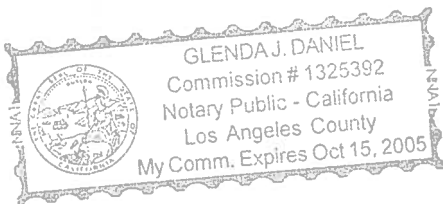
By: Maria Tokarz
Name:
Title:


MARIA TOKARZ
ASSISTANT TREASURER

STATE OF California)
COUNTY OF Los Angeles) ss.:

On the 31st day of March, 2005 before me, a notary public in and for said State, personally appeared Ruben Aviles known to me to be a Vice President of CWMBS, Inc., a Delaware corporation that executed the within instrument, and also known to me to be the person who executed it on behalf of said corporation, and acknowledged to me that such corporation executed the within instrument.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

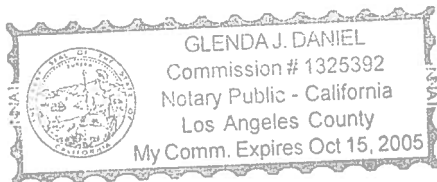



Notary Public

STATE OF California,
COUNTY OF Los Angeles) ss.:

On the 31st day of March, 2005 before me, a notary public in and for said State, personally appeared Ruben Aviles known to me to be a Vice President of Countrywide Home Loans, Inc., a New York corporation that executed the within instrument, and also known to me to be the person who executed it on behalf of said corporation, and acknowledged to me that such corporation executed the within instrument.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.



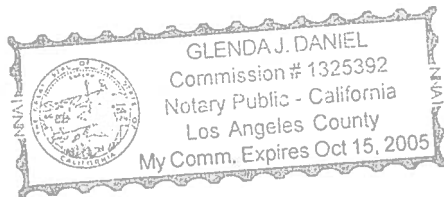
A handwritten signature in blue ink, appearing to be "Glenda J. Daniel", written over a horizontal line.

Notary Public

STATE OF California)
COUNTY OF Los Angeles) ss.:

On the 31st day of March, 2005 before me, a notary public in and for said State, personally appeared Ruben Avila known to me to be a Vice President of Countrywide Home Loans Servicing LP, a Texas corporation that executed the within instrument, and also known to me to be the person who executed it on behalf of said corporation, and acknowledged to me that such corporation executed the within instrument.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.




A handwritten signature in blue ink, appearing to be "Glenda J. Daniel", written over a horizontal line.

Notary Public

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

On the 31 day of March, 2005 before me, a notary public in and for said State, personally appeared Maria Tokarz known to me to be a Assistant Treasurer of The Bank of New York, a New York banking corporation that executed the within instrument, and also known to me to be the person who executed it on behalf of said corporation, and acknowledged to me that such corporation executed the within instrument.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.



Notary Public

MIRNA CARDONA
NOTARY PUBLIC, State of New York
No. 01CA6115638
Qualified in Kings County
Commission Expires September 13, 2008

SCHEDULE I
Mortgage Loan Schedule

[Delivered at Closing to Trustee]

SCHEDULE II
CWMBS, Inc.
CWMBS Reperforming REMIC Trust Certificates
Series 2005-R1
Representations and Warranties of the Seller

Countrywide Home Loans, Inc. ("Countrywide") hereby makes the representations and warranties set forth in this Schedule II to the Depositor, the Master Servicer and the Trustee, as of the Closing Date, or if so specified herein, as of the Cut-off Date. Capitalized terms used but not otherwise defined in this Schedule II shall have the meanings ascribed thereto in the Pooling and Servicing Agreement (the "Pooling and Servicing Agreement") relating to the above-referenced Series, among Countrywide, as seller, Countrywide Home Loans Servicing LP, as master servicer, CWMBS, Inc., as depositor, and The Bank of New York, as trustee and custodian.

(1) Countrywide is duly organized as a New York corporation and is validly existing and in good standing under the laws of the State of New York and is duly authorized and qualified to transact any and all business contemplated by the Pooling and Servicing Agreement to be conducted by Countrywide in any state in which a Mortgaged Property is located or is otherwise not required under applicable law to effect such qualification and, in any event, is in compliance with the doing business laws of any such state, to the extent necessary to perform any of its obligations under the Pooling and Servicing Agreement in accordance with the terms thereof.

(2) Countrywide has the full corporate power and authority to sell and service each Mortgage Loan, and to execute, deliver and perform, and to enter into and consummate the transactions contemplated by the Pooling and Servicing Agreement and has duly authorized by all necessary corporate action on the part of Countrywide the execution, delivery and performance of the Pooling and Servicing Agreement; and the Pooling and Servicing Agreement, assuming the due authorization, execution and delivery thereof by the other parties thereto, constitutes a legal, valid and binding obligation of Countrywide, enforceable against Countrywide in accordance with its terms, except that (a) the enforceability thereof may be limited by bankruptcy, insolvency, moratorium, receivership and other similar laws relating to creditors' rights generally and (b) the remedy of specific performance and injunctive and other forms of equitable relief may be subject to equitable defenses and to the discretion of the court before which any proceeding therefor may be brought.

(3) The execution and delivery of the Pooling and Servicing Agreement by Countrywide, the sale of the Mortgage Loans by Countrywide under the Pooling and Servicing Agreement, the consummation of any other of the transactions contemplated by the Pooling and Servicing Agreement, and the fulfillment of or compliance with the terms thereof are in the ordinary course of business of Countrywide and will not (A) result in a material breach of any term or provision of the charter or by-laws of Countrywide or (B) materially conflict with, result in a material breach, violation or acceleration of, or result in a material default under, the terms of any other material agreement or instrument to which Countrywide is a party or by which it may be bound, or (C) constitute a material

violation of any statute, order or regulation applicable to Countrywide of any court, regulatory body, administrative agency or governmental body having jurisdiction over Countrywide; and Countrywide is not in breach or violation of any material indenture or other material agreement or instrument, or in violation of any statute, order or regulation of any court, regulatory body, administrative agency or governmental body having jurisdiction over it which breach or violation may materially impair Countrywide's ability to perform or meet any of its obligations under the Pooling and Servicing Agreement.

(4) Countrywide is an approved servicer of conventional mortgage loans for FHLMC and is a mortgagee approved by the Secretary of Housing and Urban Development pursuant to sections 203 and 211 of the National Housing Act.

(5) No litigation is pending or, to the best of Countrywide's knowledge, threatened, against Countrywide that would materially and adversely affect the execution, delivery or enforceability of the Pooling and Servicing Agreement or the ability of Countrywide to sell the Mortgage Loans or to perform any of its other obligations under the Pooling and Servicing Agreement in accordance with the terms thereof.

(6) No consent, approval, authorization or order of any court or governmental agency or body is required for the execution, delivery and performance by Countrywide of, or compliance by Countrywide with, the Pooling and Servicing Agreement or the consummation of the transactions contemplated thereby, or if any such consent, approval, authorization or order is required, Countrywide has obtained the same.

(7) Countrywide intends to treat the transfer of the Mortgage Loans to the Depositor as a sale of the Mortgage Loans for all tax, accounting and regulatory purposes.

(8) Countrywide is a member of MERS in good standing, and will comply in all material respects with the rules and procedures of MERS in connection with the servicing of the MERS Mortgage Loans for as long as such Mortgage Loans are registered with MERS.

SCHEDULE III

CWMBS, Inc.
CWMBS Reperforming REMIC Trust Certificates
Series 2005-R1
Representations and Warranties as to the Mortgage Loans

Countrywide Home Loans, Inc. ("Countrywide") hereby makes the representations and warranties set forth in this Schedule III to the Depositor, the Master Servicer and the Trustee, as of the Closing Date, or if so specified herein, with respect to the Cut-off Date. Capitalized terms used but not otherwise defined in this Schedule III shall have the meanings ascribed thereto in the Pooling and Servicing Agreement (the "Pooling and Servicing Agreement") relating to the above-referenced Series, among Countrywide, as seller, Countrywide Home Loans Servicing LP, as master servicer, CWMBS, Inc., as depositor, and The Bank of New York, as trustee and custodian. With respect to each Mortgage Loan:

(1) The information set forth in the Mortgage Loan Schedule attached hereto as Schedule I is materially true and correct;

(2) All taxes, governmental assessments, insurance premiums, water, sewer and municipal charges, which previously became due and owing have been paid, or an escrow of funds has been established for every such item which remains unpaid and which has been assessed but is not yet due and payable;

(3) The terms of the Mortgage Note and Mortgage have not been impaired, waived, altered or modified in any respect, except by a written instrument which has been recorded, if necessary to protect the interests of the Trustee, for the benefit of the Certificateholders, and which has been delivered to the Trustee. The substance of any such waiver, alteration or modification has been approved by the issuer of any related Insurance Policy and the title insurer, to the extent required by the policy, and its terms are reflected on the Mortgage Loan Schedule. No Mortgagor has been released, in whole or in part, except in connection with an assumption agreement approved by the issuer of any related guaranty certificate and the title insurer, to the extent required by the policy, and which assumption agreement is part of the Mortgage Loan File delivered to the Trustee and the terms of which are reflected in the Mortgage Loan Schedule;

(4) The Mortgage Loan is not subject to any right of rescission, set-off, counterclaim or defense, including without limitation the defense of usury, nor will the operation of any of the terms of the Mortgage Note or the Mortgage, or the exercise of any right thereunder, render either the Mortgage Note or the Mortgage unenforceable, in whole or in part, or subject to any right of rescission, set-off, counterclaim or defense, including without limitation the defense of usury, and no such right of rescission, set-off, counterclaim or defense has been asserted with respect thereto;

(5) The Mortgage has not been satisfied, canceled, subordinated or rescinded, in whole or in part, and the Mortgaged Property has not been released from the

lien of the Mortgage, in whole or in part, nor has any instrument been executed that would effect any such release, cancellation, subordination or rescission;

(6) The Mortgage Note and Mortgage are either on FHA, VA or RHS instruments or on forms otherwise acceptable to the FHA, VA, RHS or GNMA, as the case may be. The Mortgage Note and the Mortgage and related documents are genuine, and each is the legal, valid and binding obligation of the maker thereof enforceable in accordance with its terms. All parties to the Mortgage Note and the Mortgage had legal capacity to enter into the Mortgage Loan and to execute and deliver the Mortgage Note and the Mortgage, and the Mortgage Note and the Mortgage have been duly and properly executed by such parties;

(7) All the documents executed in connection with the Mortgage Loan including, but not limited to, the Mortgage Note and the Mortgage are free of fraud and any misrepresentation, are signed by the persons they purport to be signed by, and witnessed or, as appropriate, notarized by the persons whose signatures appear as witnesses or notaries, and each such document constitutes the valid and binding legal obligation of the signatories and is enforceable in accordance with its terms;

(8) Any and all requirements of any federal, state or local law including, without limitation, usury, truth-in-lending, real estate settlement procedures, consumer credit protection, equal credit opportunity or disclosure laws applicable to the Mortgage Loan have been complied with, and the Seller shall maintain in its possession, available for the Trustee's inspection, and shall deliver to the Trustee upon demand, evidence of compliance with all such requirements. All inspections, licenses and certificates required to be made or issued with respect to all occupied portions of the Mortgaged Property and, with respect to the use and occupancy of the same, including but not limited to certificates of occupancy and fire underwriting certificates, have been made or obtained from the appropriate authorities;

(9) The Mortgaged Property is located in the state identified in the Mortgage Loan Schedule and consists of a contiguous parcel of real property with a detached single family residence erected thereon, or a two- to four-family dwelling, or an individual condominium unit in a condominium project, or an individual unit in a planned unit development or a townhouse; provided, however, that any condominium project or planned unit development shall conform with the applicable FHLMC, HUD or VA requirements regarding such dwellings, and each residence or dwelling that is a mobile home or a manufactured dwelling complies with FHA or VA guidelines, as applicable. As of the respective appraisal date for each Mortgaged Property, no portion of the Mortgaged Property was being used for commercial purposes. If the Mortgaged Property is a condominium unit or a planned unit development (other than a de minimus planned unit development) such condominium or planned unit development project meets FHLMC, HUD or VA eligibility requirements or is located in a condominium or planned unit development project which has received FHLMC, HUD or VA project approval and the representations and warranties required by FHLMC, HUD or VA with respect to such condominium or planned unit development have been made and remain true and correct in all respects;

(10) The Mortgage is a valid, subsisting and enforceable first lien on the Mortgaged Property, including all buildings on the Mortgaged Property and all installations and mechanical, electrical, plumbing, heating and air conditioning systems located in or annexed to such buildings, and all additions, alterations and replacements made at any time with respect to the foregoing. The lien of the Mortgage is subject only to:

(a) the lien of current real property taxes and assessments not yet due and payable;

(b) covenants, conditions and restrictions, rights of way, easements and other matters of the public record as of the date of recording acceptable to mortgage lending institutions generally and specifically referred to in the lender's title insurance policy delivered to the originator of the Mortgage Loan and (i) referred to or otherwise considered in the appraisal made for the originator of the Mortgage Loan and (ii) which do not adversely affect the Appraised Value of the Mortgaged Property set forth in such appraisal; and

(c) other matters to which like properties are commonly subject which do not materially interfere with the benefits of the security intended to be provided by the mortgage or the use, enjoyment, value or marketability of the related Mortgaged Property;

(11) Any security agreement, chattel mortgage or equivalent document related to and delivered in connection with the Mortgage Loan establishes and creates a valid, subsisting and enforceable first lien and first priority security interest on the property described therein and the Seller has full right to sell and assign the same to the Depositor.

(12) The proceeds of the Mortgage Loan have been fully disbursed, except for escrows established or created due to seasonal weather conditions, and there is no requirement for future advances thereunder. Except for escrow payments, including without limitation, taxes and insurance payments, the Seller has not advanced funds, or induced, solicited or knowingly received any advance of funds by a party other than the Mortgagor, directly or indirectly, for the payment of any amount required by the related Mortgage Note, except for interest accruing from the date of the Mortgage Note or date of disbursement of the Mortgage proceeds, whichever is greater, to the day which precedes by one month the Due Date of the first installment of principal and interest. All costs, fees and expenses incurred in making or closing the Mortgage Loan and the recording of the Mortgage were paid, and the Mortgagor is not entitled to any refund of any amounts paid or due under the Mortgage Note or Mortgage;

(13) The Seller is the sole owner of record and holder of the Mortgage Loan and the related Mortgage Note and the Mortgage are not assigned or pledged, and the Seller has good and marketable title thereto and has full right and authority to transfer and sell the Mortgage Loan to the Depositor. The Seller is transferring the Mortgage

Loan free and clear of any and all encumbrances, liens, pledges, equities, participation interests, claims, charges or security interests of any nature encumbering such Mortgage Loan;

(14) Each Mortgage Loan was originated in accordance with the guidelines of FHA, VA, RHS or GNMA in effect at the time that such Mortgage Loan was originated. The Mortgage Loan was originated by a savings and loan association, a savings bank, a commercial bank, a credit union, an insurance company, or similar institution which is supervised and examined by a federal or state authority or by a mortgagee approved by the Secretary of Housing and Urban Development pursuant to Sections 203 and 211 of the National Housing Act. All parties which have had any interest in the Mortgage Loan, whether as mortgagee, assignee, pledgee or otherwise, are (or, during the period in which they held and disposed of such interest, were) (1) in compliance with any and all applicable licensing requirements of the laws of the state wherein the Mortgaged Property is located, and (2) organized under the laws of such state, or (3) qualified to do business in such state, or (4) federal savings and loan associations or national banks having principal offices in such state, or (5) not doing business in such state;

(15) As of the Cut-off Date, approximately 28.23%, 16.04%, 13.73% and 10.72% of the Mortgage Loans are 30 or more days contractually delinquent, 60 or more days contractually delinquent, 90 or more days contractually delinquent, and 120 or more days contractually delinquent, respectively. As of the Closing Date, with respect to each of the Mortgage Loans, (i) such Mortgage loan is not more than 30 days delinquent as of the Cut-off Date, or (ii) the related mortgagor will have made (1) at least one monthly payment (A) in the three calendar months immediately preceding the Cut-off Date or (B) in the two calendar months immediately preceding the Cut-off Date and the calendar month including the Closing Date, and (2) payments that equal, in the aggregate, at least three monthly payments (A) in the six calendar months immediately preceding the Cut-off Date or (B) in the five calendar months immediately preceding the Cut-off Date and the month including the Closing Date or (iii) if subject to a confirmed bankruptcy or loss mitigation plan, at least two distinct payments under such plan within four months of the Closing Date (except to the extent such payments have not come due since the commencement of such confirmed plan). As of the Cut-off Date, no mortgagor under any Mortgage Loan was the subject of a case under Chapter 7 of the Bankruptcy Code.

(16) Each FHA Mortgage Loan, is fully-insured by the FHA, which insurance is in full force and effect, and the Mortgage Loan is not subject to any defect which would diminish or impair the FHA insurance, and all prior transfers, if any, of the Mortgage Loan have been, and the transactions herein contemplated are, in compliance with the FHA regulations, and no circumstances exist with respect to the FHA Mortgage Loans which would permit the FHA to deny coverage under the FHA insurance;

(17) Each VA Mortgage Loan is guaranteed by the VA, which guaranty is in full force and effect, and the Mortgage Loan is not subject to any defect which would diminish or impair the VA guaranty (other than a potential valuation of the mortgaged property), and all prior transfers, if any, of the Mortgage Loan have been, and the

transactions herein contemplated are, in compliance with the VA regulations, and no circumstances exist with respect to the VA Mortgage Loan which would permit the VA to deny coverage under the VA guaranty;

(18) Each RHS Mortgage Loan is guaranteed by the RHS, which guaranty is in full force and effect, and the Mortgage Loan is not subject to any defect which would diminish or impair the RHS guaranty (other than a potential valuation of the mortgaged property), and all prior transfers, if any, of the Mortgage Loan have been, and the transactions herein contemplated are, in compliance with the RHS regulations, and no circumstances exist with respect to the RHS Mortgage Loan which would permit the RHS to deny coverage under the RHS guaranty

(19) The Mortgage Loan is covered by an ALTA lender's title insurance policy or other generally acceptable form of policy of insurance acceptable to FHLMC or GNMA, as applicable, issued by a title insurer acceptable to FHLMC or GNMA, as applicable, and qualified to do business in the jurisdiction where the Mortgaged Property is located, insuring the Seller, its successors and assigns, as to the first priority lien of the Mortgage in the original principal amount of the Mortgage Loan, subject only to the exceptions contained in clauses (a), (b) and (c) of paragraph (10) of this Schedule III. The Seller is the sole insured of such lender's title insurance policy, and such lender's title insurance policy is in full force and effect and will be in force and effect upon the consummation of the transactions contemplated by the Pooling and Servicing Agreement. No claims have been made under such lender's title insurance policy, and no prior holder of the Mortgage, including the Seller, has done, by act or omission, anything which would impair the coverage of such lender's title insurance policy;

(20) There are no mechanics' or similar liens or claims which have been filed for work, labor or material (and no rights are outstanding that under the law could give rise to such liens) affecting the related Mortgaged Property which are or may be liens prior to, or equal or coordinate with, the lien of the related Mortgage which are not insured against by the title insurance policy referenced in paragraph (19) above;

(21) Except as insured against by the title insurance policy referenced in paragraph (19) above, all improvements which were considered in determining the Appraised Value of the Mortgaged Property lay wholly within the boundaries and building restriction lines of the Mortgaged Property and no improvements on adjoining properties encroach upon the Mortgaged Property. No improvement located on or being part of the Mortgaged Property is in violation of any applicable zoning law or regulation;

(22) The Mortgage contains customary and enforceable provisions such as to render the rights and remedies of the holder thereof adequate for the realization against the Mortgaged Property of the benefits of the security provided thereby, including, (i) in the case of a Mortgage designated as a deed of trust, by trustee's sale, and (ii) otherwise by judicial foreclosure. There is no homestead or other exemption available to a Mortgagor which would interfere with the right to sell the Mortgaged Property at a trustee's sale or the right to foreclose the Mortgage;

(23) As of the date of origination, the Mortgaged Property was lawfully occupied under applicable law;

(24) The Mortgage Note is not and has not been secured by any collateral, pledged account or other security except the lien of the corresponding Mortgage and the security interest of any applicable security agreement or chattel mortgage referred to in paragraph (11) above;

(25) In the event the Mortgage constitutes a deed of trust, a trustee, duly qualified under applicable law to serve as such, has been properly designated and currently so serves and is named in the Mortgage, and no fees or expenses are or will become payable by the Mortgagee to the trustee under the deed of trust, except in connection with a trustee's sale after default by the Mortgagor;

(26) The Assignment is in recordable form and is acceptable for recording under the laws of the jurisdiction in which the Mortgaged Property is located;

(27) As of the Closing Date, the Mortgaged Property is undamaged by water, fire, earthquake or earth movement, windstorm, flood, tornado or other casualty so as to affect adversely the value of the Mortgaged Property as security for the Mortgage Loan or the use for which the premises were intended;

(28) Approximately 14.26% of the Mortgage Loans, based on the aggregate Cut-off Date principal balance of the Mortgage Loans, had Loan-to-Value Ratios at origination exceeding 100% and none of the Mortgage Loans had Loan-to-Value Ratios at origination exceeding 125%;

(29) To the best of Seller's knowledge, there is no proceeding pending or threatened for the total or partial condemnation of the related Mortgaged Property;

(30) With respect to each Mortgage Loan and the appraisal thereof at the time of origination, secured by a purchase money Mortgage (or a refinance Mortgage, if a new appraisal is required), such appraisal and the appraiser satisfied the requirements of FHA, VA or RHS guidelines, as applicable;

(31) The Mortgaged Property securing each Mortgage Loan is insured by an insurer acceptable to FHLMC or GNMA, as applicable, against loss by fire and such hazards as are covered under a standard extended coverage endorsement, in an amount which is not less than the lesser of 100% of the insurable value of the Mortgaged Property and the outstanding principal balance of the Mortgage Loan, but in no event less than the minimum amount necessary to fully compensate for any damage or loss on a replacement cost basis; if the Mortgaged Property is a condominium unit, it is included under the coverage afforded by a blanket policy for the project; the insurance policy contains a standard clause naming the originator of such mortgage loan, its successor and assigns, as insured mortgagee; if upon origination of the Mortgage Loan, the improvements on the Mortgaged Property were in an area identified in the Federal Register by the Federal Emergency Management Agency as having special flood hazards,

a flood insurance policy meeting the requirements of the current guidelines of the Federal Insurance Administration is in effect with a generally acceptable insurance carrier, in an amount representing coverage not less than the least of (A) the outstanding principal balance of the Mortgage Loan, (B) the full insurable value and (C) the maximum amount of insurance which was available under the Flood Disaster Protection Act, as amended; and the Mortgage obligates the mortgagor thereunder to maintain all such insurance at the mortgagor's cost and expense and the Seller has not acted or failed to act so as to impair the coverage of any such insurance policy or the validity, binding effect and enforceability thereof;

(32) As of the Closing Date, the Seller does not intend to institute foreclosure proceedings with respect to any Mortgage Loan that is contractually delinquent based solely on such Mortgage Loan's delinquent status as of the Cut-off Date, no Mortgage Loan is currently in foreclosure and no foreclosure proceedings have been instituted;

(33) Each Mortgage Loan constitutes a qualified mortgage under Section 860G(a)(3)(A) of the Code and Treasury Regulations Section 1.860G-2(a)(1) and (3);

(34) No action, inaction, or event has occurred and no state of fact exists or has existed that resulted or will result in the exclusion from, denial of, or defense to coverage under any applicable insurance policy or FHA insurance, VA guaranty or RHS guaranty, irrespective of the cause of such failure of coverage;

(35) No Mortgage Loan is subject to the requirements of the Home Ownership and Equity Protection Act of 1994;

(36) No proceeds from any Mortgage Loan were used to purchase single-premium credit insurance policies;

(37) No Mortgage Loan originated on or after October 1, 2002 has a prepayment penalty term longer than three years after its origination and no Mortgage Loan originated prior to that date has a prepayment penalty longer than five years after its origination;

(38) The Seller currently operates or actively participates in an on-going business (A) to originate single family mortgage loans ("Loans"), and/or (B) to make periodic purchases of Loans from originators or sellers, and/or (C) to issue and/or purchase securities or bonds supported by the Loans, a portion of which Loans are made to borrowers who are:

(a) low-income families (families with incomes of 80% or less of area median income) living in low-income areas (a census tract or block numbering area in which the median income does not exceed 80 percent of the area median income); or

(b) very low-income families (families with incomes of 60% or less of area median income);

(39) Each Mortgage Loan had an original principal balance which conforms to Freddie Mac loan limits;

(40) For each Mortgage Loan, the servicer furnished, in accordance with the Fair Credit Reporting Act and its implementing regulations, accurate and complete information (*i.e.* favorable and unfavorable) on its borrowers' credit files to Equifax, Experian and Trans Union Credit Information Company (three of the credit repositories), or their successors, on a monthly basis;

(41) With respect to any Mortgage Loan originated on or after October 1, 2002 and prior to March 7, 2003, no such loan is secured by property located in the State of Georgia;

(42) No Mortgage Loan that is secured by property located in the State of New York (a) had an original principal balance of \$300,000 or less, and (b) was originated on or after April 1, 2003 with terms that included an APR or points and fees that equal or exceed the threshold for "high-cost home loans" as defined in Section 6-L of the New York State Banking Law;

(43) No Mortgage Loan is a cooperative share mortgage loan;

(44) No selection procedure reasonably believed by the Seller to be adverse to the interests of the Certificateholders, was used in selecting the Mortgage Loans for inclusion in the Trust Fund; provided, however, that the Mortgage Loans were selected from the pool of mortgage loans originated in connection with the program;

(45) All individual insurance policies contain a standard mortgagee clause naming the Seller, its successors and assigns, as mortgagee. All premiums thereon have been paid. Each Mortgage obligates the Mortgagor thereunder to maintain all such insurance at the Mortgagor's cost and expense, and upon the Mortgagor's failure to do so, authorizes the holder of the Mortgage to obtain and maintain such insurance at the Mortgagor's cost and expense and to seek reimbursement therefor from the Mortgagor;

(46) No Mortgage Loan has a shared appreciation feature, or other contingent interest feature;

(47) No Mortgage Loan is a VA vendee loan, an FHA co-insured loan, or a reverse mortgage. No more than [2]% of the Mortgage Loans contain provisions currently in effect which may constitute a "buydown";

(48) Each Mortgage Loan at the time it was made complied in all material respects with applicable local, state, and federal laws, including, but not limited to, all applicable predatory and abusive lending laws;

(49) Each mobile home and manufactured home constituting any portion of the Mortgaged Property constitutes real property under applicable state law and such home is a “single family residence” as defined in Section 25(c)(10) of the Code;

(50) With respect to any Mortgage loan that was originated with negative amortization, the negative amortization period has elapsed and such Mortgage Loan is a level-payment mortgage loan;

(50) None of the Mortgage Loans are “high cost” loans as defined by applicable predatory and abusive lending laws.

With respect to any representation that is made to the best of the Seller’s knowledge or as to which the Seller has no knowledge, if it is discovered by the Seller, the Master Servicer or the Trustee that the substance of such representation and warranty is inaccurate and such inaccuracy materially and adversely affects the value of the related Mortgage Loan then, notwithstanding the Seller’s lack of knowledge with respect to the substance of such representation and warranty being inaccurate at the time the representation and warranty was made, such inaccuracy shall be deemed a breach of the applicable representation or warranty.

SCHEDULE IV
CWMBS, Inc.
CWMBS Reperforming REMIC Trust Certificates
Series 2005-R1
Representations and Warranties of the Master Servicer

Countrywide Home Loans Servicing LP (“Countrywide Servicing”) hereby makes the representations and warranties set forth in this Schedule IV to the Depositor, the Seller and the Trustee, as of the Closing Date. Capitalized terms used but not otherwise defined in this Schedule IV shall have the meanings ascribed thereto in the Pooling and Servicing Agreement (the “Pooling and Servicing Agreement”) relating to the above-referenced Series among Countrywide Home Loans, Inc., as seller, Countrywide Home Loans Servicing LP, as master servicer, CWMBS, Inc., as depositor, and The Bank of New York, as trustee and custodian.

(1) Countrywide Servicing is duly organized as a limited partnership and is validly existing and in good standing under the laws of the State of Texas and is duly authorized and qualified to transact any and all business contemplated by the Pooling and Servicing Agreement to be conducted by Countrywide Servicing in any state in which a Mortgaged Property is located or is otherwise not required under applicable law to effect such qualification and, in any event, is in compliance with the doing business laws of any such state, to the extent necessary to ensure its ability to enforce each Mortgage Loan, to service the Mortgage Loan in accordance with the terms of the Pooling and Servicing Agreement and to perform any of its obligations under the Pooling and Servicing Agreement in accordance with the terms thereof.

(2) Countrywide Servicing has the full partnership power and authority to service each Mortgage Loan, and to execute, deliver and perform, and to enter into and consummate the transactions contemplated by the Pooling and Servicing Agreement and has duly authorized by all necessary partnership action on the part of Countrywide Servicing the execution, delivery and performance of the Pooling and Servicing Agreement; and the Pooling and Servicing Agreement, assuming the due authorization, execution and delivery thereof by the other parties thereto, constitutes a legal, valid and binding obligation of Countrywide Servicing, enforceable against Countrywide Servicing in accordance with its terms, except that (a) the enforceability thereof may be limited by bankruptcy, insolvency, moratorium, receivership and other similar laws relating to creditors’ rights generally and (b) the remedy of specific performance and injunctive and other forms of equitable relief may be subject to equitable defenses and to the discretion of the court before which any proceeding therefor may be brought.

(3) The execution and delivery of the Pooling and Servicing Agreement by Countrywide Servicing, the servicing of the Mortgage Loans by Countrywide Servicing under the Pooling and Servicing Agreement, the consummation of any other of the transactions contemplated by the Pooling and Servicing Agreement, and the fulfillment of or compliance with the terms thereof are in the ordinary course of business

of Countrywide Servicing and will not (A) result in a material breach of any term or provision of the certificate of limited partnership, partnership agreement or other organizational document of Countrywide Servicing or (B) materially conflict with, result in a material breach, violation or acceleration of, or result in a material default under, the terms of any other material agreement or instrument to which Countrywide Servicing is a party or by which it may be bound, or (C) constitute a material violation of any statute, order or regulation applicable to Countrywide Servicing of any court, regulatory body, administrative agency or governmental body having jurisdiction over Countrywide Servicing; and Countrywide Servicing is not in breach or violation of any material indenture or other material agreement or instrument, or in violation of any statute, order or regulation of any court, regulatory body, administrative agency or governmental body having jurisdiction over it which breach or violation may materially impair the ability of Countrywide Servicing to perform or meet any of its obligations under the Pooling and Servicing Agreement.

(4) Countrywide Servicing is an approved servicer of conventional mortgage loans for FHLMC and is a mortgagee approved by the Secretary of Housing and Urban Development pursuant to sections 203 and 211 of the National Housing Act.

(5) No litigation is pending or, to the best of Countrywide's Servicing knowledge, threatened, against Countrywide Servicing that would materially and adversely affect the execution, delivery or enforceability of the Pooling and Servicing Agreement or the ability of Countrywide Servicing to service the Mortgage Loans or to perform any of its other obligations under the Pooling and Servicing Agreement in accordance with the terms thereof.

(6) No consent, approval, authorization or order of any court or governmental agency or body is required for the execution, delivery and performance by Countrywide Servicing of, or compliance by Countrywide Servicing with, the Pooling and Servicing Agreement or the consummation of the transactions contemplated thereby, or if any such consent, approval, authorization or order is required, Countrywide Servicing has obtained the same.

(7) Countrywide Servicing is a member of MERS in good standing, and will comply in all material respects with the rules and procedures of MERS in connection with the servicing of the MERS Mortgage Loans for as long as such Mortgage Loans are registered with MERS.

(8) To the extent the Master Servicer services a Mortgage Loan that is an FHA Loan, a VA Loan or an RHS Loan, the Master Servicer (i) is an approved seller/servicer of conventional mortgage loans for FHLMC and is an FHA Approved Mortgagee in good standing to service mortgages, is a VA Approved Lender or, as applicable RHS approved lender, and has not been suspended as a mortgagee or servicer by the FHA, VA or RHS and has the facilities, procedures and experienced personnel

necessary for the sound servicing of mortgage loans of the same type as the Mortgage Loans, and (ii) it is, and shall remain for as long as it is servicing the Mortgage Loans hereunder, in good standing as an FHA Approved Mortgagee, a VA Approved Lender and, as applicable, an RHS approved lender, and to service mortgage loans for HUD or FHLMC, and no event has occurred, including but not limited to a change in insurance coverage, which would make the Master Servicer unable to comply with HUD, FHLMC, FHA, VA or RHS eligibility requirements or which would require notification to any of HUD, FHLMC, FHA, VA or RHS.

(9) No information, certificate of an officer or other statement, in each case, furnished in a writing or report delivered to the Trustee by the Master Servicer in connection with the transactions contemplated hereby contains any untrue statement of a material fact or omits to state a material fact necessary in order to make the statements contained therein, in light of the circumstances under which they were made, not misleading (except to the extent that any such information, certificate, statement or report has been corrected or superseded in writing by the Master Servicer as of the Closing Date, it being understood (i) that the Master Servicer has delivered no certificate of an officer prior to the Closing Date and (ii) that any representations, warranties and indemnifications as to the accuracy and completeness of the Offering Memorandum made by the Master Servicer in agreements and Officers' Certificates delivered by the Master Servicer on the Closing Date in connection with the transactions contemplated by this Agreement shall be interpreted such that the information in the Offering Memorandum is deemed to correct and/or supersede as of the Closing Date, within the meaning of this parenthetical, any information, certificate, statement or report delivered by the Master Servicer to the Trustee prior to the Closing Date that is inconsistent with the information in the Offering Memorandum or that was omitted from such information, statement or report delivered prior to the Closing Date).

(10) As of the Closing Date, the Master Servicer does not intend to institute foreclosure proceedings with respect to any Mortgage Loan that is contractually delinquent based solely on such Mortgage Loan's delinquent status as of the Cut-off Date, no Mortgage Loan is currently in foreclosure and no foreclosure proceedings have been instituted.

SCHEDULE V
Form of Master Servicer Remittance Report

SCHEDULE VI

Reserved

SCHEDULE VII

Mortgage Loans

Available Upon Request

**IN THE UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:)	
)	
)	
John Q. Public and	)	CASE NO.
Mary Public,	)	OUR FILE NO.
)	
Debtors.)	
_____)	
)	
CHAPTER 13 TRUSTEE, Steven G. Tate,)	
and John & Mary Public	)	ADV. PROC. NO.
Plaintiffs,)	
)	
vs.)	
)	
TRUSTMARK NATIONAL BANK;)	
BAC HOME LOANS SERVICING, L.P.,)	
Individually and as Servicer for THE BANK)	
OF NEW YORK MELLON TRUST)	
COMPANY, N.A., AS TRUSTEE FOR)	
CERTIFICATEHOLDERS OF CWMBS)	
2005-R1; THE BANK OF NEW YORK)	
MELLON TRUST COMPANY, N.A.,)	
individually and as Trustee for)	
CERTIFICATEHOLDERS OF CWMBS)	
2005-R1; and UNKNOWN DEFENDANTS)	
1 through 10,)	
)	
Defendants.)	
)	

**COMPLAINT TO DETERMINE SECURED STATUS,
REMOVE CLOUD FROM TITLE, SANCTIONS, AND OTHER RELIEF**

COME NOW Plaintiffs, _____, by and through counsel, and file this Complaint to Determine Secured Status, Remove Cloud from Title, Sanctions, and Other Relief and in support thereof states as follows:

JURISDICTION & VENUE

1. This is an adversary proceeding brought pursuant Rule 7001 of the Federal Rules of Bankruptcy Procedure.
2. This Court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. §§ 157 and 1334 and 11 U.S.C. §§ 105 and 542.
3. This adversary proceeding is a core proceeding as defined by 28 U.S.C. § 157.

4. Venue is proper under 29 U.S.C. § 1409.

PARTIES

5. Plaintiff Steven G. Tate is the Chapter 13 Trustee in the Western District of North Carolina and is the duly appointed Trustee in the underlying bankruptcy case of the debtors in case number _____. O. Max Gardner, III has been appointed special counsel to the Plaintiff Steven G. Tate.

6. Plaintiffs John and Mary Public are citizens and residents of Shelby, NC and are the debtors in Chapter 13 Bankruptcy Case number _____, filed in the Western District of North Carolina, Shelby Division, on _____.

7. The Trustee and the Debtors (as Plaintiffs) have standing to bring this action pursuant to 11 U.S.C. §§ 323, 1302, and 1330.

8. Defendant Trustmark National Bank is a National Bank and FDIC-Insured Subsidiary of Trustmark Corporation with its principal place of business located at 248 East Capitol Street, Jackson, MS 39201. Defendant may be served with process of this Court upon any officer of the corporation by mailing a copy of the summons and complaint to the principal place of business. Individually this defendant will be referred to as "TNB" herein below.

9. Defendant BAC Home Loans Servicing, L.P. is a subsidiary of Bank of America, N.A. with its principal place of business located at 6400 Legacy Drive, Plano, Texas 75024. Defendant may be served with process of this Court upon any officer of the corporation by mailing a copy of the summons and complaint to the principal place of business. Defendant is being sued in its individual capacity and as Servicer for The Bank of New York Mellon, N.A. as Trustee for Certificateholders of CWMBS 2005-R1. Individually this defendant will be referred to as "BAC" herein below.

10. Defendant The Bank of New York Mellon Trust Company, N.A. is a National Bank with its principal place of business located at 700 South Flower Street, Suite 200, Los Angeles, California 90017. Defendant may be served with process of this Court upon any officer of the corporation by mailing a copy of the summons and complaint to the principal place of business. Defendant is being sued in its individual capacity and as Trustee for Certificateholders of CWMBS 2005-R1. Individually this defendant will be referred to as "BONY" herein below.

11. Unknown Defendants 1 through 10 are corporate entities and/or individuals that may have a legal interest in the promissory notes, deed of trust, assignments or the real property which is the subject of this proceeding and/or who may be responsible for the acts complained of herein.

12. Collectively the defendants named above will be referred to as "Defendants."

FACTS

The Debtors' Mortgage

13. On or about October 31, 2000, Debtors executed a promissory note (the "Note") payable to Realty Mortgage Corporation¹ and a deed of trust (the "Deed of Trust") conveying their certain real property to RMC in trust to secure repayment of the Note. The Deed of Trust was recorded in the land records in the Office of the Register of Deeds for Cleveland County, North Carolina in Book 2155 at Page 199. The Note and Deed of Trust are attached hereto as Exhibits "A" and "B," respectively.

14. The subject real property is more particularly described as follows:

Lot 18 of Block 3 of the New Addition to the City of Shelby, Cleveland County, North Carolina, according to a map or plat of said addition, recorded at plat book 5 at page 15 of the land records in the Office of the Register of Deeds for Cleveland County.

15. On or about October 31, 2000, the Note was endorsed by RMC without recourse to Trustmark National Bank.

16. The Deed of Trust was assigned by RMC to Trustmark National Bank by virtue of an assignment dated October 31, 2000, and recorded in Book 2155, Page 300 of the land records in the Office of the Register of Deeds for Cleveland County, North Carolina. Such assignment is attached hereto as Exhibit "C."

17. Several years after the execution of the Note, Debtors were asked and did execute a "restated, amended and replacement" promissory note which was payable to Countrywide Home Loans, Inc. (referred to as "Countrywide") in the principal amount of \$68,244.81.

18. The promissory note was titled "Amended and Restated Note." Said promissory note stated that "[i]n return for a loan received from Lender [Countrywide], Borrower promises to pay the principal sum of ... \$68,244.81 ... plus interest, to the order of Lender." A copy of the Amended and Restated Note is attached hereto as Exhibit "D." The Plaintiffs allege that no loan proceeds were received by the Borrowers/Debtors from Countrywide.

19. The Amended and Restated Note was dated October 31, 2000, however, the first payment due under the promissory note was January 1, 2007. Plaintiffs allege that the Amended and Restated Note was purposefully misdated, but executed in late 2006.

20. On December 28, 2009, a document entitled "Corporation Assignment of Deed of Trust/Mortgage" was executed by Courtney Bullard who was represented to be an Assistant Secretary of Trustmark National Bank. The document purportedly assigned the Deed of Trust to The Bank of New York Mellon fka The Bank of New York as Trustee for the Certificateholders of CWMBS 2005-R1 (the "Trustmark-BONY Assignment"). Said document was recorded in the land records in the Office of the Register of Deeds for Cleveland County, North Carolina, on December 30, 2009, in Book 2524 at Page 30369. A copy of the assignment is attached hereto as Exhibit "E."

21. The trust is controlled by and subject to the *Pooling and Servicing Agreement Dated as of March 1, 2005*, for "CWMBS Reperforming Loan REMIC Trust Certificates, Series

¹ Realty Mortgage Corporation (RMC) is a Mississippi corporation which was engaged in the business of mortgage origination and lending. RMC filed a petition for chapter 11 bankruptcy relief on February 7, 2009, in the United States Bankruptcy Court for the Southern District of Mississippi, case number 09-00544-NPO. The bankruptcy case remains active as of the filing of this complaint.

2005-R1, between CWMBS, Inc., Depositor, Countrywide Home Loans, Inc., Seller, Countrywide Home Loans Servicing LP, Master Servicer, and the Bank of New York, Trustee and Custodian." A true and correct copy of the fully executed Pooling and Servicing Agreement ("PSA") is attached hereto as Exhibit "F."

22. Article I of the PSA defines the term Cut-off Date as March 1, 2005, and Closing Date as March 31, 2005.² Section 2.01(a) states that "The Seller [Countrywide Home Loans, Inc.], concurrently with the execution and delivery hereof, hereby sells, transfers, assigns, sets over and otherwise conveys to the Depositor [CWMBS, Inc.], without recourse, all of the right, title and interest of the Seller in and to (i) the Mortgage Loans"³ The full PSA can also be found at the following link: _____ on the Official website of the Securities Commission of the United States.

23. The Trustmark-BONY Assignment was not executed and delivered prior to the Cut-off Date, or any possible contractual extension thereof, and as a result is invalid pursuant to the terms of the PSA, the applicable Federal REMIC tax laws, the commercial Trust Laws of the State of New York.

The Debtors' Bankruptcy

24. Debtors filed a chapter 13 petition and related schedules on February 3, 2010. The plan proposed, *inter alia*, that the pre-petition arrears and a continuing mortgage payment would be paid to BAC; however, the amount owed, the ownership of the note, and the secured status of the alleged owner and holder were all Scheduled as "disputed" on Schedule D and in the plan.

25. On April 5, 2010, BAC caused to be filed a proof of claim (Clm. #9-1) in the bankruptcy case. Said proof of claim identified the creditor as BAC Home Loans Servicing, L.P. as Servicer for The Bank of New York Mellon, N.A. The claim was signed by Michael McCormick who identified himself as an attorney with the Georgia law firm of McCalla & Rhymer. A copy of the proof of claim is attached hereto as Exhibit "G."

26. Attached to the proof of claim were the Note, the Amended and Restated Note, and the Deed of Trust. From the proof of claim and its attachments, it was unclear who held the underlying debt or the Deed of Trust and in fact no proof of any ownership of the same by the Trust was attached to the said claim.

27. On April 19, 2010, Trustee and the Debtors filed a Joint Objection to Proof of Claim of BAC. In the objection, the parties alleged that BAC caused to be filed a proof of claim which included and attempted to recover duplicate amounts for escrow shortages and furthermore alleged that there was no proof of the ownership of the note and deed of trust by the alleged Trust.

28. A hearing was scheduled for June 23, 2010; however, on the motion of counsel for BAC it was continued and rescheduled for August 18, 2010.

29. BAC, by and through counsel, thereafter filed an Amended Proof of Claim (Clm. #9-2) herein on August 2, 2010. A copy of the Amended Proof of Claim is attached hereto as Exhibit "H." This Amended Proof of Claim was filed without the consent of the Plaintiffs, without the approval of the Court, and in violation of Rule 9014, which Rule does NOT incorporate Rule 7015 of the Bankruptcy Rules.

² See Ex. "F," pages 23 and 19.

³ See Ex. "F," page 51.

30. Attached to the Amended Proof of Claim was a document entitled "Assignment of Deed of Trust" which had been executed by Roberta Hook who presented herself as an Assistant Vice President of RMC. The document was dated May 5, 2010, and recorded in the land records in the Office of the Register of Deeds, Cleveland County, North Carolina, in Book 2525 at Page 5502.

31. Said document purported to assign the Deed of Trust from RMC to The Bank of New York Mellon f/k/a The Bank of New York as Trustee for the Certificateholders of CWMBS 2005-R1. The document was executed and recorded after the date of the petition, the original proof of claim and the objection by the Plaintiffs. The purported assignment set forth in the document did not occur before the Cut-off Date of the PSA, or any contractual extension thereof. Furthermore, RMC had no interest in the note or the deed of trust to assign as of May 5, 2010. The Plaintiffs further alleged that such a post-petition assignment violated Section 362(a)(4) and (a)(5) of the Bankruptcy Code.

32. Based upon the Amended Proof of Claim and the "assignment" by RMC, the Plaintiffs filed an Amended Objection to Proof of Claim alleging among other things that BAC lacked standing as a secured creditor to file the Proof of Claim or Amended Proof of Claim; that the Amended Proof of Claim was invalid for the reasons stated herein; and that the Assignment attached to the Amended Proof of Claim constituted a willful violation of the Automatic Stay. As a result of the filing of this Amended Objections, the hearing was continued by consent of the parties from August 18, 2010 to December 17, 2010.

33. On December 17, 2010, a hearing was held by this Court where the Plaintiffs presented the Objection and Amended Objection to the proof of claim. In support thereof, Plaintiffs moved to introduce into evidence all of the documents referred to herein, which were all entered into evidence. Defendant offered the testimony of Joy Mason, litigation specialist employed by BAC, and certain documents which were allowed and entered into evidence.

34. Having considered all matters properly presented the Court ruled that BAC failed to prove that BONY held both the Note and the Deed of Trust; therefore, it was not a secured creditor and did not have standing to file a secured claim in this matter. The Court therefore sustained the Objection to the Proof of Claim without further leave to amend and awarded sanctions of \$22,358.89 for the automatic stay violation and for filing a fraudulent claim under Rule 9011 of the Bankruptcy Rules.

COUNT I - DETERMINATION OF SECURED STATUS

35. The allegations set forth in paragraphs 1 through 32 above are incorporated herein by reference.

36. As determined by this Court following an evidentiary hearing on Trustee's Amended Objection to Proof of Claim, neither BAC nor BONY hold a perfected secured claim upon Debtor's residence.

37. In addition to this Court's prior findings, the Note and Deed of Trust were not transferred into the Trust prior to the Cut-off Date, or any contractual extension thereof, as set forth in the PSA.

38. At no time relevant hereto did BONY or the CWMBS Repurchasing Loan REMIC Trust Certificates, Series 2005-R1 hold both the Note and Deed of Trust. Therefore, the loan could not have been serviced by Countrywide or its successor BAC, and BAC did not have standing to file the Proof of Claim or Amended Proof of Claim.

39. Pursuant to 11 U.S.C. § 506(d) the lien is void. Therefore, any claim of Defendants should be deemed unsecured and the deed of trust void and/or satisfied.

COUNT II - REMOVE CLOUD FROM TITLE

40. The allegations set forth in paragraphs 1 through 39 above are incorporated herein by reference.

41. Based upon the foregoing allegations, Trustee alleges that the Deed of Trust recorded at Page 2155, Book 199, in the land records in the Office of the Register of Deeds, Cleveland County, North Carolina, secures nothing for its alleged holder BONY and, is therefore, a cloud on the title.

42. Trustee requests an order of this Court finding that the Deed of Trust is a cloud upon the title of Debtors and that it shall be stricken from the land records in the Office of the Register of Deeds, Cleveland County, North Carolina. Further, Trustee requests such other relief to which she or this bankruptcy estate may be entitled.

COUNT III - VIOLATION OF THE AUTOMATIC STAY

43. The allegations set forth in paragraphs 1 through 42 above are incorporated herein by reference.

44. Despite having its claim disallowed by this Court, BAC continues to attempt to collect the underlying indebtedness from Debtors. Such collection would come from the property of the estate.

45. The automatic stay of 11 U.S.C. § 362 has neither been terminated nor otherwise modified with respect to any of the Defendants or property of the estate.

46. BAC's efforts to continue to collect the underlying debt are a prior and continuing violation of the automatic stay.

47. Trustee is entitled to an award of actual damages in the amount of any funds wrongfully collected from the estate, punitive damages in an amount sufficient to punish BAC and the costs associated with this action, including reasonable attorneys' fees.

COUNT IV - FRAUD UPON THE COURT

48. The allegations set forth in paragraphs 1 through 47 above are incorporated herein by reference.

49. On August 2, 2010, with the intent to defraud this Court, the Trustee and the Debtors, BAC caused to be filed an Amended Proof of Claim (CIm. #9-2), in which it included, as an attachment, a document which it hoped would support its claim as being secured. Said document was a purported Assignment of Deed of Trust executed by Roberta Hook who misrepresented herself to be an Assistant Vice President of RMC. Said assignment was executed on May 5, 2010, and purported to assign to BONY the underlying deed of trust and the indebtedness secured thereby.

50. Roberta Hook is not and has never been employed by RMC. Upon information and belief, Roberta Hook was employed by BAC as of May 5, 2010.

51. The assignment was prepared by Prommis Solutions, a back-office operation and de-facto owner and operator of McCalla & Rhymer, the Georgia law firm. Furthermore,

the addresses for the Grantor, RMC, and Grantee, BONY were stated as being the same, being 7105 Corporate Drive, Plano, Texas 75024, which is an office location of BAC.

52. At the hearing on the objection to proof of claim, and the amended proof of claim, counsel for BAC, Michael McCormick, identified this assignment as a "wildcard assignment." As Mr. McCormick described, the "wildcard assignments" were created by his firm and used for the benefit of their clients when his firm received a file from the lender or servicer where the client was not identified as the beneficiary under the deed of trust or assignee under any assignment of deed of trust. Mr. McCormick further stated that since the proper documents were not in the initial referral of the case from an entity he referred to as LPS Default Solutions LLC, it was the standard practice of his firm to prepare such "wildcard assignments" for execution through the LPS Desktop system. Once the document was "uploaded" in the LPS Desktop system, Mr. McCormick stated that he did "not know who actually signed it or notarized the signature" and that his firm subsequently received the executed document through a Federal Express transmittal package.

53. As agents and counsel of BAC, Michael McCormick and McCalla & Rhymer, presented to this Court a paper (i.e. the proof of claim and amended proof of claim with the attachments) which was signed by Mr. Jedynak and who, in doing so, certified "that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, - (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; (2) the claims, defenses, and other legal contentions therein are warranted by existing law ...; and (3) the allegations and other factual contentions have evidentiary support"⁴

54. However, as stated by Mr. McCormick at the hearing on Plaintiffs' objection to proof of claim and the amended claim, his firm did not conduct (and do not regularly conduct) searches of the any records of the trust or any other parties to determine the status of the underlying mortgage obligation.

55. The Plaintiffs therefore request that Court invoke the powers granted to it by 11 U.S.C. § 105(1) and issue such order, process or judgment necessary to address the fraud of BAC and BONY and to prevent any future fraud or abuse of process. In the alternative, the Plaintiffs request this Court to waive the pre-notice time requirements of Rule 9011 of the Bankruptcy Rules and to impose sanctions under that Rule.

WHEREFORE, PREMISES CONSIDERED, Trustee, prays that this Court enter its order granting judgment for the following:

A. A determination that neither BAC nor BONY hold both the Note and Deed of Trust;

B. A finding that the Deed of Trust is either void or satisfied and an order to the clerk to strike it from the land records;

C. A finding that BAC has violated the automatic stay of 11 U.S.C. § 362 and order an award of actual damages in the amount of any funds wrongfully collected from the estate, punitive damages in an amount sufficient to punish BAC and the costs associated with this action, including reasonable attorneys' fees;

D. A finding that BAC and BONY purposefully committed fraud upon this Court and order such sanctions and other remedies necessary to address such fraud and to prevent any future fraud or abuse of process; and

⁴ Fed.R.Bankr.P. 9011(b).

E. Such other relief to which the Trustee and this bankruptcy estate may be entitled.

Dated this _____ day of _____, 20__.

O. Max Gardner III
MaxGardnerLaw PLLC
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(704) 487-0616 / FAX (704) 487-0619
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Exhibit 5

The Ruling on Cross Motions for Summary Judgment Exhibit that follows is an example of a state court order that will preclude such litigation in Bankruptcy Court. This is a classic res judicata, collateral estoppel and Rooker-Feldman type of case.

STATE OF VERMONT
WASHINGTON COUNTY

FILED
874

GMAC COMMERCIAL MORTGAGE
CORP.,
Plaintiff,

v.

R&G PROPERTIES, INC., et al.,
Defendants.

SUPERIOR COURT
Docket No. 3-1-04 Wncv

SUPERIOR COURT
WASHINGTON COUNTY

RECEIVED

JUN 15 2006

DINSE, KNAPP &
McANDREW, P.C.

RULING ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

This is a foreclosure case in which GMAC Commercial Mortgage (GMAC) argues that it is entitled to foreclosure after an alleged default by R&G Properties, Inc. (R&G) on a mortgage agreement and underlying promissory note evidencing a \$2,150,000 loan.¹

Undisputed Facts

In November 2000, R&G borrowed \$2,150,000.00 from Column Financial, Inc. The note requires R&G to make equal monthly payments of principal and interest of \$16,303.63 until December 1, 2010, at which time all remaining principal and accrued interest becomes due. Promissory Note ¶ 1.01. To secure the loan, R&G mortgaged the real and personal property related to five of its mobile home parks. There is no dispute that R&G failed to make payments according to the note's terms from December 2002 to June 2003, creating a default. GMAC sent R&G a notice of default and acceleration dated June 23, 2003. See *id.* ¶ 1.04 (defining events of

¹ In 2006, venue in a related case originally filed in Chittenden Superior Court was transferred to this county to facilitate the determination of any issues overlapping with those in this case. R&G Properties, Inc. v. Column Financial, Inc., S0566-03CnC, docketed in Washington County as No. 88-2-06 Wncv. To the extent it is necessary to distinguish between these two cases, the case originally filed in Chittenden County will be referred to as the "Chittenden Case."

6/1/06

default and acceleration). R&G did not satisfy the indebtedness then due. Shortly thereafter GMAC initiated this case for foreclosure.

Analysis

R&G's failure to make timely payments of principal and interest breached the payment terms of the note and the mortgage agreement, putting it in default. This default subjects the mortgage agreement to foreclosure. *See* Mortgage Agreement ¶ 3.1. R&G raises numerous issues in opposition to foreclosure, but nowhere denies that it failed to comply with its obligations under the note and mortgage agreement. Before deciding those issues, the court will address R&G's motion to stay this case, and its motion to amend its answer.

1. Motion to Stay

Venue in the related case in which R&G is the plaintiff (the Chittenden case) recently was changed to Washington County to facilitate the determination of any issues overlapping with those of this case. Both cases arise out of the same note and mortgage agreement. In its motion to stay, R&G argues that the change of venue itself suggests that the foreclosure action should be stayed until a claim of bad faith can be decided by a jury. The court fails to see why the change of venue should delay this litigation when its purpose is to streamline it. The defenses to foreclosure are raised in this case, and can be addressed without a stay. R&G's claims related to bad faith (which appear in both cases) are disposed of in the contemporaneous ruling in the Chittenden case at 2–3. There is no reason to stay this case. R&G's motion to stay is denied.

2. Motion to Amend

R&G also requests permission to amend its answer, ostensibly to assert additional affirmative defenses. Again, R&G says this motion is justified by the change of venue of the

Chittenden case. R&G does not otherwise explain why it needs to amend the complaint, or what the additional affirmative defenses are. R&G's motion to amend is denied.

3. GMAC's Status and Authority

Several of the issues R&G raised in opposition to foreclosure relate to GMAC's status and authority in relation to the note and mortgage. The following facts are undisputed. Column Financial, Inc., the originator of the loan, sold it and others to Credit Suisse First Boston Mortgage Securities Corp., which deposited them into a trust. Undivided interests in the trust were sold to "certificateholders" in a public offering or through private placement as fixed-income obligations. Pursuant to a "pooling and servicing agreement" dated April 1, 2001, Wells Fargo Bank Minnesota, N.A. (Wells Fargo) functions as trustee, and GMAC functions as "servicer" and "special servicer." As servicer, GMAC collects all loan payments. Pooling and Servicing Agreement § 3.02, at 77. It is fully authorized to "foreclose upon . . . the ownership of any property securing such Loans as come into and continue in default" *Id.* § 3.09(a), at 98. More generally, GMAC has "full power and authority, acting alone, to do or cause to be done any and all things in connection with such servicing and administration which it may deem necessary or desirable." *Id.* § 3.01(b), at 76. There is no genuine dispute that GMAC seeks foreclosure in this case in its status as servicer under the pooling and servicing agreement.

At the beginning of this litigation, there was some confusion as to whether GMAC was the holder or owner of the promissory note. In its summary judgment motion, however, GMAC has made abundantly clear that it is neither; rather, it is the servicer as described above. Nevertheless, R&G argues that GMAC must prove that it is the owner or holder of the note based, apparently, solely on GMAC's initial mistaken allegations that it is the owner or holder of the note. These arguments need not be addressed further; the record is clear that GMAC is

foreclosing in its status as servicer pursuant to the terms of the “pooling and servicing agreement.”²

4. Contractual Authority to Foreclose

R&G also argues that nothing in the pooling and servicing agreement creates any authority in GMAC to foreclose loan. As described above, however, that agreement specifically gives GMAC full authority to foreclose.

5. Certificateholders as Necessary Parties

Citing Davis v. Hemingway, 29 Vt. 438 (1857), R&G argues that the trust beneficiaries, the myriad certificateholders, must be joined as necessary parties prior to any foreclosure. Davis stands for the general rule that trust beneficiaries ordinarily are necessary parties “to a bill to foreclose the equity” by the mortgagee-trust. Id. at 441. This is a rule, however, with well established exceptions that apply squarely in the circumstances of this case.

Generally, courts do not consider trust beneficiaries necessary parties in cases like this, and thus do not require their joinder, where their interests are adequately represented by the present party and they have not sought to intervene, or there are so many beneficiaries that joining them would be unduly burdensome. *See, e.g.,* White v. MacQueen, 195 N.E. 832, 835 (Ill. 1935); Winter v. Trust Co. of Florida, 124 So. 35, 35–36 (Fla. 1929); Mortgage Guarantee Co. v. Atlantic City Jewish Community Center, 181 A. 700, 702–03 (N.J. Ch. 1935). There is no real question about whether GMAC is fully capable of adequately representing the interests of the certificateholders in this case, and none of them have sought intervention. There is no apparent diversity of interests among the certificateholders, or between the certificateholders and

² The court concludes that the affidavits and other evidence submitted in support of summary judgment in this and the Chittenden Case overwhelmingly make clear that there is no genuine dispute of material fact with regard to GMAC’s status and authority to enforce the promissory note and mortgage agreement. Similarly, it is undisputed that Wells Fargo is the holder of the note, while GMAC is the servicer.

GMAC. GMAC, of course, is the entity specifically authorized to conduct the foreclosure by the pooling and servicing agreement. Other than citing the general rule, R&G has not explained why GMAC should be required to join in this case the individual certificateholders. The certificateholders are not necessary parties in these circumstances.

6. Additional Discovery

R&G argues that summary judgment is premature in this case because it needs to conduct more discovery, and the court has not yet ruled on a February 2004 motion to compel discovery. The only motion to compel of which the court is aware was filed in the Chittenden case. That motion is disposed of in the contemporaneous ruling in the Chittenden case at 3–4. There is no apparent need for additional discovery in this case related to summary judgment on the issue of foreclosure.

7. Other Affirmative Defenses

R&G claims that GMAC's summary judgment motion should be denied because GMAC has failed to "dispose" of certain of R&G's affirmative defenses, "such as waiver and set-off." Other than mentioning these defenses by name, R&G does not set forth any facts to suggest what these claims are based upon.

Under Rule 8(c), the party relying on an affirmative defense has the burden of establishing it. V.R.C.P. 8(c); *see also* Brattleboro v. Traveler Ins. Co., 141 Vt. 402, 404 (1982) ("the burden of establishing waiver or estoppel is on the party asserting the waiver or estoppel").

R&G's argument that summary judgment on liability should be denied because GMAC has not disposed of some of R&G's affirmative defenses does little more than improperly shift the burden of proof onto GMAC. An affirmative defense is, after all, a defense, not a necessary

component of the plaintiff's case. One court has explained the parties' obligations in these circumstances as follows:

When a party moves for a summary judgment of (sic) the issue of liability, the non-movant is thereby placed on notice that *all* arguments and evidence opposing a finding of liability must be presented to properly resolve that issue. Whether a defense counters directly the elements of a claim or otherwise excuses liability (i.e. an affirmative defense), it must be presented and supported when the embracing issue of "liability" is considered for judgment. A summary judgment on the issue of liability encompasses all affirmative defenses and implicitly challenges the non-movant to establish a basis for finding that the defenses are both applicable and supported by the sufficient facts.

Pantry, Inc. v. Stop-n-Go Foods, Inc., 796 F.Supp. 1164, 1167 (S.D.Ind. 1992). *See also*, Midwest Oilseeds, Inc. v. Limagrain Genetics Corp., 387 F. 3d 705, 714 (8th Cir. 2004) (nonmoving party "had an affirmative burden to identify specific facts in the record showing its defenses raised a triable issue"); United States v. Mottolo, 26 F.3d 261, 263 (1st Cir. 1994) ("At summary judgment on the issue of liability, unproffered affirmative defenses to liability normally are deemed abandoned."). GMAC had no obligation to raise and disprove R&G's affirmative defenses. By failing to address them in response to the summary judgment motion, R&G has waived them.

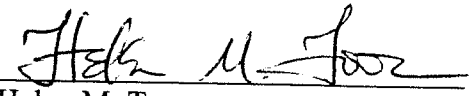
8. Perfection of Security Interest Under UCC

R&G suggests that GMAC's motion for summary judgment should be denied because there is a genuine dispute of fact regarding whether the security interest in R&G's personal property has been perfected under the UCC. R&G does not explain this argument in any detail. More importantly, it does not explain how this issue—whether the security interest is perfected or unperfected—creates a defense to foreclosure, and hence is material. The court concludes that any such dispute of fact is immaterial to the motions under consideration.

Order

The court concludes that GMAC is entitled to foreclosure. R&G's motion to stay is denied. R&G's motion to amend is denied. GMAC's motion for summary judgment is granted. R&G's motion for summary judgment is denied.

Dated at Montpelier this 1st day of June, 2006.


Helen M. Toor
Superior Court Judge

**IN THE UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:)	
)	
)	CHAPTER 13 CASE NO.
)	OUR FILE NO.
)	
Debtor.)	
_____)	
)	
)	ADV. PROC. NO.
)	
Plaintiff,)	
)	
vs.)	
)	
)	
)	
Defendant.)	

**DEFENDANT'S FIRST REQUEST FOR ADMISSIONS
(PROOF OF OWNERSHIP OF THE MORTGAGE NOTE and PROPER TRANSFERS)**

Pursuant to Rule 36 of the Federal Rules of Civil Procedure, which is made applicable to this Adversary Proceeding by Rule 7036 of the Federal Rules of Bankruptcy Procedure, Debtor/Defendant hereby demands that the Plaintiff, within thirty (30) days after service hereof, admit or specifically deny for the purposes of the above-captioned Adversary Proceeding and subject to all pertinent objections as to admissibility which may be interposed during further proceedings, the truth of the following facts.

In the event that any request is denied in whole or in part, you should set forth the reasons for such denial and identify the persons having knowledge thereof and the documents relating thereto.

DEFINITIONS

- A. "You" means the Plaintiff _____.
- B. "Debtor/Defendant" means _____.
- C. "You" or "Your" means Plaintiff _____, its agents, employees, attorneys, servants, predecessors and/or successors in interest and all others acting on its behalf.
- D. "Original Mortgage Note" means the promissory note in the amount of \$_____, dated _____, and signed by Debtor/Defendant.

REQUEST FOR ADMISSIONS

1. Referring to the original mortgage note which is the subject of Plaintiff's Motion for Relief from Stay, the full name of the original Lender listed on the said note in the amount of \$_____, dated _____, and signed by Debtor/Defendant is _____.

RESPONSE:

2. Plaintiff is not the lender named in the original mortgage note which is the subject of this case.

RESPONSE:

3. Plaintiff is not the holder of the original mortgage note.

RESPONSE:

4. Plaintiff is not the owner of the original mortgage note.

RESPONSE:

5. The original lender has not transferred possession of the original mortgage note or any rights thereunder to Plaintiff.

RESPONSE:

6. Plaintiff is not in possession of the original mortgage note.

RESPONSE:

7. The original mortgage note has not been lost or destroyed.

RESPONSE:

8. The original lender has not filed an affidavit attesting to the loss of the original mortgage note or its destruction.

RESPONSE:

9. Plaintiff does not have a signed Power of Attorney authorizing it to file any type of affidavit attesting to the loss of the original mortgage note or its destruction.

RESPONSE:

10. Plaintiff never had possession of the original mortgage note before it was allegedly lost.

RESPONSE:

11. Plaintiff has no actual knowledge as to who lost the original mortgage note.

RESPONSE:

12. The original mortgage note in this case is part of a securitized trust composed of more than one mortgage loan.

RESPONSE:

13. The securitized trust was created by a Pooling and Servicing Agreement.

RESPONSE:

14. The Pooling and Servicing Agreement includes mandatory rules as to the time for the transfer of all original mortgage notes and security instruments (mortgages and deeds of trust) to the Master Document Custodian for the Trust.

RESPONSE:

15. The original mortgage note was in fact transferred and delivered to the Master Document Custodian for the Trust.

RESPONSE:

16. The original mortgage note was received by the Master Document Custodian for the Trust prior to the final date for the delivery of the same as set forth in the conveyancing rules of the Pooling and Servicing Agreement.

RESPONSE:

17. The Master Document Custodian filed a written report with the Trustee for the securitized trust in which it attested to the actual possession and custody of the original mortgage note in this case.

RESPONSE:

18. If the original mortgage note in this case included an allonge, then the said allonge was permanently affixed to the said note.

RESPONSE:

19. An allonge cannot be permanently affixed to a mortgage note by way of a paper clip, staple or scotch tape.

RESPONSE:

20. An allonge was affixed to the original mortgage note in this case because there was insufficient room at the bottom or foot of the original mortgage note for any endorsements.

RESPONSE:

21. The named Depositor for the securitized trust in this case actually transferred the original mortgage note to the Master Document Custodian for the trust.

RESPONSE:

22. The Sponsor for the securitized trust in this case actually transferred the original mortgage note to the Depositor for the trust.

RESPONSE:

23. The Originator for the mortgage loan in this case transferred the original mortgage note to the Sponsor for the securitized trust.

RESPONSE:

24. The Master Document Custodian for the securitized trust in this case verified in writing to the Trustee for the trust that it had confirmed an unbroken chain of transfers and deliveries of the original mortgage note from the Originator to the Sponsor, from the Sponsor to the Depositor, from the Depositor to the Trustee for the trust, and from the Trustee to the Master Document Custodian for the trust.

RESPONSE:

25. The Trustee for the securitized trust in this case is the lawful owner and possessor of the original mortgage note.

RESPONSE:

26. No party, other than the Trustee for the securitized trust in this case, has any legal claims or rights in the original mortgage note.

RESPONSE:

27. Any and all documents that purport to transfer the original mortgage note from the Originator to you would not be consistent with the mandatory conveyancing rules in the Pooling and Servicing Agreement for the trust that actually owns the original mortgage note.

RESPONSE:

28. MERS has never claimed any beneficial rights or any form of ownership rights in the original mortgage note.

RESPONSE:

29. MERS is not the holder of the original mortgage note in this case.

RESPONSE:

30. Any rights MERS may have had in the original mortgage note were transferred to the Master Document Custodian for the securitized trust when the trust was formed or shortly thereafter.

RESPONSE:

31. MERS has no business records as to the receipt of any payments on the original mortgage note.

RESPONSE:

32. MERS has no business records as to the application of payments on the original mortgage note.

RESPONSE:

33. MERS has no employees who have ever serviced the original mortgage loan in this case.

RESPONSE:

34. As between MERS and the Trustee for the securitized trust, the Trustee has all rights of ownership and possession with respect to the original mortgage note.

RESPONSE:

35. The securitized trust that owns the original mortgage note in this case issued bonds to various parties who thereby acquired an ownership interest in the corpus of the trust.

RESPONSE:

36. The corpus of the trust consisted and does consist of original mortgage notes such as the note in this case.

RESPONSE:

37. The bonds issued by the trust were rated by Fitch, Moody's or Standard & Poor's.

RESPONSE:

38. The investment-grade bonds issued by the trust could not have been sold without such ratings by Fitch, Moody's or Standard & Poor's.

RESPONSE:

39. In rating the bonds, Fitch, Moody's or Standard & Poor's represented and confirmed to the potential bond buyers that the Master Document Custodian actually had physical possession of all original mortgage notes to be delivered to the trust, including the note in this case.

RESPONSE:

40. In rating the bonds, Fitch, Moody's or Standard & Poor's represented and confirmed to the potential bond buyers that all of the original mortgage notes had been properly transferred and delivered to the Master Document Custodian in an unbroken chain of transfers and deliveries from the originator to the intermediate parties and from such parties to the said Master Document Custodian for the trust.

RESPONSE:

41. In rating the bonds, Fitch, Moody's or Standard & Poor's represented and confirmed to the potential investment-grade bond buyers that all of the original mortgage notes had been transferred to the trust in true sales from each party in the chain of transfers and deliveries.

RESPONSE:

42. The Prospectus for the trust in this case represents that the mortgage loans are owned by the trust and are bankruptcy remote from any claims against the originators of the said loans.

RESPONSE:

43. The Prospectus for the trust in this case represents that each transfer and delivery of the original mortgage notes from the originator to the sponsor, from the sponsor to the depositor and from the depositor to the Master Document Custodian for the trust was a true and arms-length sale.

RESPONSE:

43. The Prospectus for the trust in this case represents that the trust is the lawful owner and possessor of all original mortgage notes included in the trust, including the original mortgage loan in this case.

RESPONSE:

This the ____ day of _____, 2009.

Law Offices of O. Max Gardner III, P.C.
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FAX (704) 487-0619
e-mail: maxgardner@maxgardner.com

**IN THE UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

Debtor.

Plaintiff,

vs.

Defendant.

**CHAPTER 13 CASE NO.
OUR FILE NO.**

ADV. PROC. NO.

SUBPOENA DUCES TECUM FOR DEPOSITION

TO:

YOU ARE COMMANDED to appear before a person authorized by law to take depositions on **Friday, February 27, 2009 at 1:00 p.m. at the Law Offices of O. Max Gardner III, P.C., 403 South Washington Street, Shelby, North Carolina 28150** for the taking of your deposition in this action upon oral examination for purposes of discovery and use at trial, and all other lawful purposes.

YOU ARE COMMANDED to have with you at that time, available for inspection and copying, the following items:

1. Your current resume or curriculum vitae.
2. Your W-2 forms for the years 2006, 2007 and 2008.
3. All payroll checks you have received in 2009 from any employer.
4. Any corporate resolution or other document showing your position or authority with Mortgage Electronic Registration Systems, Inc.
5. Any corporate resolution or other document showing your position or authority with GMAC Mortgage, LLC.
6. Any corporate resolution or other document showing your position or authority with Cimarron Mortgage Company d/b/a The Mortgage Warehouse.

7. Any corporate resolution or other document showing your position or authority for any corporation.

8. Any document showing your job description, including letters, evaluations, offers, etc. from any employer during 2006, 2007 and 2008.

9. Any log or list you keep regarding mortgage assignments signed or initialed by you.

10. Any log or list you keep regarding any notarized documents signed or initialed by you.

11. A copy of your Official Notary Authorization and the Notary Handbook issued by the authorizing state agency.

12. All assignments of mortgages you have signed in Bankruptcy cases before the Western District of North Carolina in the past 60 months.

13. The most recent fifty (50) assignments of mortgages you have signed as a representative of Mortgage Electronic Registration Systems, Inc., or any other capacity.

14. All documents relied on by you in executing the Assignment of Mortgage from Mortgage Electronic Registration Systems, Inc. to Deutsche Bank National Trust Company f/k/a Bankers Trust Company of California, N.A. on January 24, 2009.

If you fail to appear, you may be in contempt of court.

You are subpoenaed to appear by the following attorney, and unless excused from this subpoena by this attorney or the court, you shall respond to the subpoena as directed.

Dated this _____ day of _____, 2009.

O. Max Gardner III
Law Offices of O. Max Gardner III, P.C.
Attorney for the Debtor/Plaintiff
NC State Bar #6164
P.O. Box 1000, Shelby, NC 28151-1000
(704) 487-0616 / FAX (704) 487-0619
e-mail maxgardner@maxgardner.com

I am attaching the NC Statute re filing a false or fictitious real estate claim. This statute is modeled after our UDAP statute. You learn something every day. I am certainly going to add a new claim for relief from every false assignment and note transfer that I find from this day forward. Check your own state laws for similar statutes. My contact with the Legislative Office in Raleigh told me these statutes were pretty uniform in all of the states.

OMGIII



3 of 30 DOCUMENTS

GENERAL STATUTES OF NORTH CAROLINA
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*** STATUTES CURRENT THROUGH THE 2009 REGULAR SESSION ***
*** ANNOTATIONS CURRENT THROUGH APRIL 30, 2010 ***

CHAPTER 47B. REAL PROPERTY MARKETABLE TITLE ACT

Go to the North Carolina Code Archive Directory

N.C. Gen. Stat. § 47B-6 (2010)

§ 47B-6. Registering false claim

No person shall use the privilege of registering notices hereunder for the purpose of asserting false or fictitious claims to real property; and in any action relating thereto if the court shall find that any person has intentionally registered a false or fictitious claim, the court may award to the prevailing party all costs incurred by him in such action, including a reasonable attorney's fee, and in addition thereto may award to the prevailing party treble the damages that he may have sustained as a result of the registration of such notice of claim.

HISTORY: 1973, c. 255, s. 1.

G – STAY VIOLATION

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME: TRAN, LUOM VAN CHAPTER 13 CASE NO. 05-40914
TRAN, TRACEY MICHELLE OUR FILE NO.

ADDRESS: 388 Parris Drive
Forest City, NC 28043

SSN: --- -- 6994 & --- -- 9493
DEBTORS.

LUOM VAN TRAN and wife, Adversary Proc. No. 06-4013
TRACEY MICHELLE TRAN

Plaintiffs,

versus

LADCO LEASING,

Defendants.

**Complaint Seeking Damages in Core Adversary Proceeding
(Demands for Payment)**

Introduction

1. This is an action for actual and punitive damages filed by the debtors pursuant to Section 362 of the Bankruptcy Code, the Fair Debt Collection Practices Act, 15 U.S.C. Section 1692 et seq. (hereinafter referred to as "FDCPA"), and the North Carolina Unfair and Deceptive Act and Practices Laws, G.S. Section 75-50 et seq., (hereinafter referred to as "Acts" and "UDAP").

2. This action is also filed to enforce the Order of Confirmation duly entered in this Chapter 13 case and to enforce and to implement other Bankruptcy Code provisions and Rules related thereto.

Jurisdiction and Venue

3. Jurisdiction is conferred on this Court pursuant to the provisions of Section 1334 of Title 28 of the United States Code in that this proceeding arises in and is related to the above-captioned Chapter 13 case under Title 11 and concerns property of the Debtors in that case.

4. This Court has both personal and subject matter jurisdiction to hear this case pursuant to Section 1334 of Title 28 of the United States Code, Section 157(b)(2) of Title 28 of the United States Code, and pursuant to the Order entered by the Judges of the United States District Court for the Western District of North Carolina on July 30, 1984 (the Referral Order), which Order was entered in accordance with the Bankruptcy Amendments and Federal Judgeship Act of 1984.

5. This Court has supplemental jurisdiction to hear all state law claims pursuant to Section 1367 of Title 28 of the United States Code.

6. This Court also has jurisdiction to hear the Fair Debt Collection Practices Act violations pursuant to Section 1692 of Title 15 of the United States Code; thus, federal subject matter jurisdiction is properly founded upon Section 1331 of Title 28 of the United States Code.

7. This matter is primarily a core proceeding and therefore the Bankruptcy Court has jurisdiction to enter a final order. However, in the event this case is determined to be a non-core proceeding then and in that event the Plaintiff consents to the entry of a final order by the Bankruptcy Judge.

8. Venue lies in this District pursuant to Section 1391(b) of Title 28 of the United States Code.

Parties

9. The Plaintiffs in this case were and are debtors under Chapter 13 of Title 11 of the United States Code in case number 05-40914, which case is presently pending before this court. The Plaintiffs are hereinafter referred to as the Plaintiffs or the debtors.

10. The Defendant, LADCO Leasing., (hereinafter "LADCO") is a corporation organized and existing under the laws of the State of California with its principal place of business located at 555 St. Charles Place, Suite 200, Thousand Oaks, CA 91360.

11. The Chapter 13 case of the Plaintiffs was commenced by the filing of a voluntary petition with the Clerk of this Court on August 10, 2005.

12. The 341(a) meeting of creditors was held in Shelby, North Carolina on September 16, 2005.

13. The Chapter 13 plan of the Plaintiffs was subsequently confirmed by order of this Court dated October 7, 2005.

14. The Chapter 13 plan as confirmed included a debt to Nova Information Systems, Inc. (collecting for LADCO) in the amount of \$1,642.26 which was scheduled as an unsecured claim for the debtors' terminated credit card equipment and service.

15. On or about September 1, 2005, the attorney for the debtors, O. Max Gardner III, caused a written notice of his representation of the debtors, of the filing of the Chapter 13 case, and of the automatic stay to be mailed to all the creditors in this proceeding, including Nova Information Systems, Inc., via first class mail, postage prepaid.

16. The Trustee in this case caused a written notice of the filing, of the automatic stay, and of the 341 meeting of creditors to be mailed to all parties on the master mailing matrix by first class mail and that such notice was in fact received by Nova Information Systems, Inc.

17. The debtors allege upon information and belief that the notice mailed by the Trustee included the following warning to all creditors: "**CREDITORS MAY NOT TAKE CERTAIN ACTIONS:** The filing of the bankruptcy case automatically **stays** certain collection and other actions against the debtor, debtor's property, and certain co-debtors. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be **penalized.**"

18. The debtors aver that all of these documents were served on the Defendants and received by the Defendants including other documents filed in this case.

19. The claim of LADCO is identified on the records of the Trustee as Nova Information Systems, Inc., claim number 0039. LADCO filed a sworn proof of claim for the unsecured claim in the amount of \$1,318.78 on the courts records as claim number 09.

20. Subsequent to filing their bankruptcy case, the debtors received a demand for payment from LADCO. The Plaintiffs aver that on or about September 1, 2005, their attorney sent a letter via certified mail, return receipt requested, to LADCO advising the Vice President, Fred Ricketts that the debtors rejected the contract for credit card processing under their chapter 13 plan and asked to contact him to make arrangements to return the equipment.

21. The debtors since received four more statements from LADCO with billing dates of

September 29, 2005, October 28, 2005, November 29, 2005 and December 28, 2005 demanding payment for the subject debt.

22. The Plaintiffs have been harassed and damaged by the Defendants' repeated and continued actions in that they have been and continue to be forced to expend their time and expenses toward the defense of this contested matter.

**First Claim for Relief
(Violation of the Automatic Stay)**

23. The allegations in paragraphs 1 through 22 of this complaint are realleged and incorporated herein by this reference.

24. The actions of the Defendants in causing the improper demands for payment to be sent to the debtors, constitute a gross violation of the automatic stay as set forth in 11 U.S.C. Section 362(a)(3).

25. As a result of the above violations of 11 U.S.C. Section 362, the Defendants are liable to the Plaintiffs for actual damages, punitive damages and legal fees.

**Second Claim for Relief
(North Carolina Unfair and Deceptive Acts and Practices)**

26. The allegations in paragraphs 1 through 25 of this complaint are realleged and incorporated herein by this reference.

27. The Plaintiffs are "consumers" as that term is defined by Article 2 of Chapter 75 of the North Carolina General Statutes.

28. The Plaintiffs' relationship with the Defendants arose out of a "consumer debt" as that term is defined in Article 2 of Chapter 75 of the North Carolina General Statutes.

29. The Defendants were and are "debt collectors" as that term is defined by applicable provisions of Article 2 of Chapter 75 of the North Carolina General Statutes.

30. Under the provision of Section 75-52 of the North Carolina General Statutes the Defendants were and are prohibited from engaging in any conduct the natural consequences of which is to oppress, harass or abuse any person.

31. The actions and conduct of the Defendants were and are oppressive and abusive in violation of the applicable provisions of Article 2 of Chapter 75 of the North Carolina General Statutes.

32. As a result thereof, the Defendants are liable for statutory damages in the sum of no less than \$2,000.00 for violation of N.C.G.S. Section 75-50, et seq. and the payment of legal fees and expenses.

**Third Claim for Relief
(Fair Debt Collection Practices Act)**

33. The allegations in paragraphs 1 through 32 of this complaint are realleged and incorporated herein by this reference.

34. The Defendants violated the FDCPA. Defendants' violations include but are not limited to engaging in any conduct the natural consequences of which is to harass, oppress, or abuse any person in connection with the collection of a debt, 15 U.S.C. Section 1692d.

35. As a result of the above violations of the FDCPA, the Defendants are liable to the Plaintiffs for actual damages, statutory damages of \$1,000.00, and attorney's fees.

WHEREFORE, the Plaintiffs having set forth their claims for relief against the Defendants respectfully pray of the Court as follows:

- A. That the Plaintiffs have and recover against the Defendants a sum to be determined by the Court in the form of actual damages;
- B. That the Plaintiffs have and recover against the Defendants a sum to be determined by the Court in the form of statutory damages;
- C. That the Plaintiffs have and recover against the Defendants a sum to be determined by the Court in the form of punitive damages;
- D. That the Plaintiffs have and recover against the Defendant all reasonable legal fees and expenses incurred by their attorney;
- E. That this Court order the Defendants to pay additional actual damages and statutory damages in a sum to be determined by the Court for violation of N.C.G.S. Section 75-50, et seq.;
- F. That this Court order the Defendants to pay additional actual damages and statutory damages in a sum to be determined by the Court for violating the FDCA pursuant to 15 U.S.C. Section 1692k;
- G. That the underlying debt to the Defendants be forever canceled and discharged;
and
- H. That the Plaintiffs have such other and further relief as the Court may deem just and proper.

Date this the 20th day of January 2006.



O. Max Gardner III
Law Offices of O. Max Gardner III, P.C.
Attorney for the Plaintiffs
N.C. State Bar No. 6164
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**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME:

**CHAPTER 13 NO.
OUR FILE NO.**

ADDRESS:

SSN: --- -- 9820 & --- -- 2764

Debtor(s).

**Male Debtor. and
Female Debtor**

Plaintiffs,

vs.

**LITTON LOAN SERVICING, LP AND
RONALD H. DAVIS, SUBSTITUTE TRUSTEE,**

Defendants.

**Complaint Seeking Damages in Core Adversary Proceeding for Violation of the
Automatic Stay, and Violation of State and Federal Laws
(Mortgage Reinstatement Demand for Payment)**

Introduction

1. This is an action for actual and punitive damages filed by the debtors pursuant to Section 362 of the Bankruptcy Code, the Fair Debt Collection Practices Act, 15 U.S.C. Section 1692 et seq. (hereinafter referred to as "FDCPA"), and the North Carolina Unfair and Deceptive Act and Practices Laws, G.S. Section 75-50 et seq., (hereinafter referred to as "Acts" and "UDAP").

2. This action is also filed to enforce the Order of Confirmation duly entered in this Chapter 13 case and to enforce and to implement other Bankruptcy Code provisions and Rules related thereto.

Jurisdiction and Venue

3. Jurisdiction is conferred on this Court pursuant to the provisions of Section 1334 of Title 28 of the United States Code in that this proceeding arises in and is related to the above-captioned Chapter 13 case under Title 11 and concerns property of the Debtors in that case.

4. This Court has both personal and subject matter jurisdiction to hear this case pursuant to Section 1334 of Title 28 of the United States Code, Section 157(b)(2) of Title 28 of the United States Code, and pursuant to the Order entered by the Judges of the United States District Court for the Western District of North Carolina on July 30, 1984 (the Referral Order), which Order was entered in accordance with the Bankruptcy Amendments and Federal Judgeship Act of 1984.

5. This Court has supplemental jurisdiction to hear all state law claims pursuant to Section 1367 of Title 28 of the United States Code.

6. This Court also has jurisdiction to hear the Fair Debt Collection Practices Act violations pursuant to Section 1692 of Title 15 of the United States Code; thus, federal subject matter jurisdiction is properly founded upon Section 1331 of Title 28 of the United States Code.

7. This matter is primarily a core proceeding and therefore the Bankruptcy Court has jurisdiction to enter a final order. However, in the event this case is determined to be a non-core proceeding then and in that event the Plaintiff consents to the entry of a final order by the Bankruptcy Judge.

8. Venue lies in this District pursuant to Section 1391(b) of Title 28 of the United States Code.

Parties

9. The Plaintiffs in this case were and are debtors under Chapter 13 of Title 11 of the United States Code in case number 01-40560, which case is presently pending before this court. The Plaintiffs are hereinafter referred to as the Plaintiffs or the debtors.

10. The Defendant, Litton Loan Servicing, LP, ("Litton") is a corporation organized and existing under the laws of the State of Delaware with its principal place of business located at 1013 Centre Road, Wilmington, DE 19805. Litton is the current servicer of the debtors' mortgage loan which is the subject of this action.

11. The Defendant Ronald H. Davis ("Davis") is a lawyer, citizen and resident of Mecklenburg County, North Carolina who purports to be the "Substitute Trustee" for the Deed of Trust dated December 22, 1999 which is the subject of this action.

Factual Allegations

12. On or about December 22, 1999, the Plaintiffs executed a Deed of Trust in favor of American Equity Mortgage of North Carolina, Inc. in the amount of \$73,800.00. The said Deed of Trust was recorded at Book 1263, Page 1543 of the Cleveland County Registry on January 3, 2000.

13. Upon information and belief, the subject debt was subsequently sold, transferred or assigned to Altegra Credit Company ("Altegra") before the filing of the debtors' Chapter 13 case, but an Assignment of Deed of Trust was not recorded at the Cleveland County Registry until August 13, 2001.

14. The Chapter 13 case of the Plaintiffs was commenced by the filing of a voluntary petition with the Clerk of this Court on June 28, 2001.

15. The 341(a) meeting of creditors was held in Shelby, North Carolina on August 17, 2001.

16. The Chapter 13 plan of the Plaintiffs was subsequently confirmed by order of this Court dated September 10, 2001.

17. The Chapter 13 plan as confirmed included a secured debt to Altegra in the amount of \$71,000.00 for the mortgage and \$3,231.21 for arrears through June, 2001.

18. Altega subsequently filed a proof of claim alleging that the principal balance of the mortgage was \$80,896.11 and that the arrears were \$3,477.51.

19. The claims of Altega are currently identified on the records of the Trustee as claim numbers 0003 (mortgage) and 0004 (arrears) in favor of Litton, since a Notice of Transfer of Claim was filed with the Court by the Trustee on or about January 14, 2002.

20. Upon information and belief, the subject loan was sold, transferred or assigned from Altega to Litton in approximately January of 2002 and Litton is currently the servicer.

21. On or about November 13, 2001, Altega filed a Motion for Relief from Stay alleging that the debtors were in default of their post petition mortgage payments.

22. The Debtors filed an objection and requested a hearing before the Bankruptcy Court.

23. A hearing was held on December 20, 2001 where it was announced that the parties had reached an agreement.

24. A consent order was never filed, and on or about February 4, 2002, a Motion for Re-hearing of Motion for Relief from Stay was filed by Litton.

25. A hearing was held on February 22, 2002 where it was announced that a consent order was circulating.

26. On or about March 29, 2002 a Consent Order was entered. The Consent Order provided for the cure of arrears and for an 18 month "future default" provision, which required the debtors to make their payments on time by the 25th month in which they became due. Under the Consent Order, if the debtors failed to make a timely payment, Litton would issue a notice of the debtors' right to cure the default within ten days. If the debtors then failed to cure the default within ten days, Litton would be granted an automatic release from the debtors' case to foreclose on the property without further notice or hearing. The Consent Order provided for the expiration of the "future default" provision after 18 months (or approximately September 2003).

27. In approximately June of 2003, the debtors, by their own admission, were in default of the terms of the March 29, 2002 Consent Order.

28. The Law Firm of Hutchens & Senter issued a Notice of Default on June 18, 2003 which stated that the debtors were in default in the amount of \$7,028.10, or ten regular payments from August 2002 to May, 2003.

29. The Law Firm of Hutchens & Senter issued an Amended Notice of Default on June 30, 2003 which stated that the debtors were in default in the amount of \$11,694.72 (amended to add 11 late charges, 10 cure payments that the debtors had allegedly failed to make under the Consent Order, and 11 regular payments from August 2002 to June 2003).

30. The debtors subsequently tendered monthly payments via Western Union Quick Collect, including but not limited to the following:

September 25, 2003	\$1,751.64.
October 30, 2003	\$586.00
December 10, 2003	\$583.88
January 20, 2004	\$586.00
February 25, 2004	\$586.00
April 24, 2004	\$725.75

June 27, 2004	\$586.00
July 31, 2004	\$586.00
August 28, 2004	\$586.00
October 30, 2004	\$586.00

31. The debtors allege that all of these payments, and possibly others, were accepted, processed and posted by Litton after the date of the Amended Notice of Default.

32. The March 29, 2002 Consent Order expired in September 2003.

33. Litton waived its right to execute a foreclosure action under the terms of the March 29, 2002 Consent Order by accepting, processing and posting payments from the debtors as indicated above. A transaction history request was sent to the Law Firm of Hutchens and Senter in January of 2005, but no transaction history has ever been provided.

34. On or about January 18, 2005 Davis sent the debtors an improper written Reinstatement demand in the amount of \$6,517.57. Said demand stated, "I must receive the full amount by the above date in my office in the form of a certified check or money order (**NO PERSONAL CHECKS ACCEPTED**). The check must be made out to Ronald H. Davis, Substitute Trustee." The demand further stated, "This is an attempt to collect the arrearage on your Deed of Trust debt. Any information obtained from you as a result of this letter will be used in said collection efforts." The demand was signed by Davis.

35. On or about February 1, 2005 Davis sent the debtors a second improper written Reinstatement demand in the amount of \$7,235.02. Said demand stated, "I must receive the full amount by the above date in my office in the form of a certified check or money order (**NO PERSONAL CHECKS ACCEPTED**). The check must be made out to Ronald H. Davis, Substitute Trustee." The demand further stated, "This is an attempt to collect the arrearage on your Deed of Trust debt. Any information obtained from you as a result of this letter will be used in said collection efforts." The demand was signed by Davis.

36. The Defendants did not seek relief from stay before proceeding with these improper Reinstatement demands.

37. The Plaintiffs have been harassed and damaged by the Defendants' actions in that they have been and continue to be forced to expend their time and expenses toward the defense of this contested matter and have feared losing their home.

First Claim for Relief (Violation of the Automatic Stay)

38. The allegations in paragraphs 1 through 37 of this complaint are realleged and incorporated herein by this reference.

39. The actions of the Defendants in causing the improper demands for payment to be sent to the debtors constitute a gross violation of the automatic stay as set forth in 11 U.S.C. Section 362(a)(3).

40. As a result of the above violations of 11 U.S.C. Section 362, the Defendants are liable to the Plaintiffs for actual damages, punitive damages and legal fees.

Second Claim for Relief (North Carolina Unfair and Deceptive Acts and Practices)

41. The allegations in paragraphs 1 through 40 of this complaint are realleged and

incorporated herein by this reference.

42. The Plaintiffs are "consumers" as that term is defined by Article 2 of Chapter 75 of the North Carolina General Statutes.

43. The Plaintiffs' relationship with the Defendants arose out of a "consumer debt" as that term is defined in Article 2 of Chapter 75 of the North Carolina General Statutes.

44. The Defendants were and are "debt collectors" as that term is defined by applicable provisions of Article 2 of Chapter 75 of the North Carolina General Statutes.

45. Under the provision of Section 75-52 of the North Carolina General Statutes the Defendants were and are prohibited from engaging in any conduct the natural consequences of which is to oppress, harass or abuse any person.

46. The actions and conduct of the Defendants were and are oppressive and abusive in violation of the applicable provisions of Article 2 of Chapter 75 of the North Carolina General Statutes.

47. As a result thereof, the Defendants are liable for statutory damages in the sum of no less than \$2,000.00 for violation of N.C.G.S. Section 75-50, et seq. and the payment of legal fees and expenses.

**Third Claim for Relief
(Fair Debt Collection Practices Act)**

48. The allegations in paragraphs 1 through 47 of this complaint are realleged and incorporated herein by this reference.

49. The Defendants violated the FDCPA. Defendants' violations include but are not limited to engaging in any conduct the natural consequences of which is to harass, oppress, or abuse any person in connection with the collection of a debt, 15 U.S.C. Section 1692d.

50. As a result of the above violations of the FDCPA, the Defendants are liable to the Plaintiffs for actual damages, statutory damages of \$1,000.00, and attorney's fees.

WHEREFORE, the Plaintiffs having set forth their claims for relief against the Defendants respectfully pray of the Court as follows:

- A. That the Plaintiffs have and recover against the Defendants a sum to be determined by the Court in the form of actual damages;
- B. That the Plaintiffs have and recover against the Defendants a sum to be determined by the Court in the form of statutory damages;
- C. That the Plaintiffs have and recover against the Defendants a sum to be determined by the Court in the form of punitive damages;
- D. That the Plaintiffs have and recover against the Defendant all reasonable legal fees and expenses incurred by their attorney;
- E. That this Court order the Defendants to pay additional actual damages and statutory damages in a sum to be determined by the Court for violation of N.C.G.S. Section 75-50, et seq.;

- F. That this Court order the Defendants to pay additional actual damages and statutory damages in a sum to be determined by the Court for violating the FDCPA pursuant to 15 U.S.C. Section 1692k;
- G. That the underlying debt to the Defendants be forever canceled and discharged;
and
- H That the Plaintiffs have such other and further relief as the Court may deem just and proper.

Date this the _____ day of January 2005.

O. Max Gardner III
Law Offices of O. Max Gardner III, P.C.
Attorney for the Plaintiffs
N.C. State Bar No. 6164
P.O. Box 1000
Shelby, NC 28151-1000
Phone (704) 487-0616
Fax (704) 487-0619
maxgardner@maxgardner.com

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
ASHEVILLE DIVISION**

IN THE MATTER OF:

NAME: RYMER, SHELLY RENEE

**CHAPTER 13 CASE NO. 07-10487
OUR FILE NO. #12235**

**ADDRESS: 162 GOVERNORS VIEW, LOT 17
ASHEVILLE, NC 28805**

SSN: xxx-xx-2487

DEBTORS.

SHELLY RENEE RYMER

Adversary Proc. No. _____

Plaintiff,

versus

**David Yourick, individually and
d/b/a SONNY'S Used Cars,**

Defendant.

**Complaint Seeking Damages in Core Adversary Proceeding
for Violation of the Automatic Stay
(Vehicle Disabling Device)**

Introduction

1. This is an action for actual and punitive damages filed by the Debtors pursuant to Sections 362(k) of the United States Bankruptcy Code.
2. This action is also filed to enforce the Automatic Stay and to preserve property of the Bankruptcy estate that is critical to the successful reorganization of the Debtor under Chapter 13.

Jurisdiction and Venue

3. Jurisdiction is conferred on this Court pursuant to the provisions of Section 1334 of Title 28 of the United States Code in that this proceeding arises in and is related to the above-captioned Chapter 13 case under Title 11 and concerns property of the Debtor in that case.
4. This matter is a core proceeding and therefore the Bankruptcy Court has jurisdiction to enter a final order. However, in the event this case is determined to be a non-core proceeding then and in that event the Plaintiff consents to the entry of a final order by the Bankruptcy Judge.
5. Venue lies in this District pursuant to Section 1391(b) of Title 28 of the United States Code.

Parties

6. The Plaintiff in this case is a debtor under Chapter 13 of the Bankruptcy Code in case number 07-40241, which case is presently pending before this court. The Plaintiff is hereinafter referred to as the Plaintiff or the Debtor.

7. The Defendant, David Yourick, individually and d/b/a Sonny's Used Cars, is upon information and belief a citizen and resident of Burke County, North Carolina, who owns and operates a retail used care dealership at 100 Highlander Street in Morganton, North Carolina.

8. The Chapter 13 case of the Plaintiff was commenced by the filing of a voluntary petition with the Clerk of this Court on July 25, 2007.

9. The 341(a) meeting of creditors was held in Asheville on August 29, 2007.

10. The Chapter 13 plan as proposed includes a debt to Sonny's in the amount of \$7,500.00, which was scheduled as a secured claim to be bifurcated. The vehicle was duly described on Schedule B and proof of insurance was listed on the plan.

11. The car was equipped with a device that would prevent the car from starting unless codes were entered that were supplied by the Defendant. The Defendant would only give out the next months code when the customer made a payment for the month.

12. Prior to filing the Debtors Attorney contacted the Defendant via fax and phone to indicate that the Debtor was filing Chapter 13 Bankruptcy and to provide her with the codes to keep the car running. The Debtor was very concerned that once the Bankruptcy was filed the car would not start. The Debtor also works on Mount Mitchell and was concerned she would be stranded on the mountain if the car did not start.

13. On July 26, 2007, the office manager at the Plaintiff's attorney's office spoke with someone at Sonny's. She advised him that a bankruptcy had been filed and that the debtor needed the codes for the device. The person provided the office manager with those codes. She also advised him to consult an attorney about any legal issues about the continued use of the codes and the device.

14. On or about July 26, 2007, the attorney for the debtor, William S. Gardner, caused a written notice of his representation of the Debtor, of the filing of the Chapter 13 case, and of the automatic stay to be mailed to all the creditors in this proceeding, including Sonny's, via first class mail, postage prepaid. The notice mailed to Sonny's by the United States Postal System was not returned to the attorney for the debtor and therefore is presumed to have been received by Defendant.

15. The Trustee in this case caused a written notice of the filing, of the automatic stay, and of the 341 meeting of creditors to be mailed to all parties on the master mailing matrix by first class mail on or about. The Plaintiff is informed and believes that such notice was in fact received by Sonny's.

16. The Plaintiff alleges upon information and belief that the notice mailed by the Trustee included the following warning to all creditors: "**CREDITORS MAY NOT TAKE CERTAIN ACTIONS:** The filing of the bankruptcy case automatically **stays** certain collection and other actions against the debtor, debtor's property, and certain co-Debtors. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be **penalized**."

17. The Plaintiff alleges that all of these documents were served on the Defendant and

received by the Defendant.

18. On September 4, 2007 the Plaintiff contacted her attorney and advised that her car would not start over the Labor Day weekend. The car would not start because the necessary codes had not been provided by the Defendant and the device had disabled the car.

19. This occurred while the Plaintiff was working on Mount Mitchell. Because she could not drive back home, she was forced to spend the night in the Barracks on the mountain. She had to pay a fee in order to be allowed to spend the night. She also had to pay people to drive her up and down the mountain for work.

20. On September 4, 2007 the attorney for the Plaintiffs faxed a letter to the Defendant demanding that he provide the codes in order to mitigate damages caused by the shut down of the car. The fax was sent at 2:48 PM and a confirmation was sent back stating that the fax had been received.

21. The next day, David Yourick contacted the Plaintiff's attorney's office and provided the necessary codes to start the car. He stated that he has not been provided proof of insurance nor had any gotten any notice that the plan has been confirmed. He also stated that the codes he provided were only good for 60 days and that the car would shut down after 60 days.

Claim for Relief (Violations of the Automatic Stay)

22. The allegations in paragraphs 1 through 21 of this complaint are re-alleged and incorporated herein by this reference.

23. The actions of the Defendant in not providing the codes or disabling the device are violations of 11 U.S.C. Section 362(a)(3). The Defendant is improperly exercising control over property of the estate and is using the device in an attempt to collect the debt. The Defendant has had notice that the codes need to be provided each month or the device needs to be disabled so the car will not be shut down. Despite this actual notice the Defendant allowed the car to be shut down and seemed to imply from his September 5th statements that the car would continue to shut down until the plan was confirmed and/or his office was provided with proof of insurance.

24. The act of only providing a 60 day code on September 5, 2007 is a further act done in violation of 11 U.S.C. Section 362(a)(3). By only providing a temporary code, the Defendant continues to exercise control over the car. Unless this Court intervenes, the same thing will happen in 60 days and the debtor will be stranded when the car will not start.

25. As a result of the above violations of 11 U.S.C. Section 362, the Defendants are liable to the Plaintiff for actual damages, punitive damages and legal fees. The Defendant's refusal to provide more than a 60 day code shows the willfulness of this ongoing stay violation. The stay violation directly caused the Plaintiff actual damages in having to pay to sleep at the barracks and having to pay people to give her rides.

WHEREFORE, the Plaintiff having set forth their claims for relief against the Defendant respectfully pray of the Court as follows:

- A. That the Plaintiff have and recover against the Defendants a sum to be determined by the Court in the form of actual damages;
- B. That the Plaintiff have and recover against the Defendants a sum to be determined

by the Court in the form of statutory damages;

- C. That the Plaintiff have and recover against the Defendants a sum to be determined by the Court in the form of punitive damages;
- D. That the Plaintiff have and recover against the Defendants all reasonable legal fees and expenses incurred by their attorney;
- E That the Plaintiff have such other and further relief as the Court may deem just and proper.

Dated this the 12th Day of September 2007



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**UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
DURHAM DIVISION**

IN RE:)	
)	
Charles Christopher Garner and	)	Case No. 09-81998
Debbie Hussey Garner,)	
)	
Debtors.)	

MEMORANDUM OPINION
AND ORDER

This matter comes before the Court on the Motion for Sanctions against RSY Corporation dba Rick's Auto Marketing Center for violation of the automatic stay filed by Charles Christopher Garner and Debbie Hussey Garner (the "Debtors"). Sara Harrington appeared on behalf of the Debtors, Craig Haskell appeared on behalf of RSY Corporation dba Rick's Auto Marketing Center, and Benjamin Lovell appeared on behalf of the Chapter 13 Trustee. The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) and (O). After considering the evidence on record and the arguments of counsel, this Court makes the following findings of fact and conclusions of law pursuant to Rule 7052 of the Federal Rules of Bankruptcy Procedure:

FINDINGS OF FACTS

On February 5, 2009, Mr. Garner, the male debtor in this proceeding and RSY Corporation dba Rick's Auto Marketing Center ("RSY"), entered into a retail installment contract (the "Contract") to purchase a 1997 Dodge Ram 350 (the "Vehicle"), financing the sum of \$5,150.00 at 14% interest, with 35 bi-weekly payments in the amount of \$162.79. At the time of the sale, RSY installed an "On Time Payment Protection System" (the "Payment Protection

System” or the “System”) in the Vehicle. The Payment Protection System allows RSY to enforce timely payments by preventing the Vehicle from starting absent the entry of a numeric code which expires periodically. Prior to the bankruptcy filing, each time Mr. Garner made a bi-weekly payment, RSY issued a new code so that Mr. Garner could continue to use the Vehicle without interruption. If Mr. Garner failed to enter a valid code, the System would render the Vehicle inoperable. The System provides a three-day grace period during which time it emits a warning signal, a blinking red light and a beeping sound, placing the driver on notice that a new code must be entered.

On November 9, 2009, the Debtors filed a petition for relief under Chapter 13 of the Bankruptcy Code. The Debtors listed RSY as a secured creditor on Schedule D and on the creditor matrix. Simultaneously, the Debtors proposed a Chapter 13 plan which authorized the Trustee to garnish their wages in order to remit payments to RSY. The proposed plan included RSY as a secured creditor and provided for the claim to be paid in full at *Till* interest with pre-confirmation adequate protection payments in accordance with 11 U.S.C. § 1326(a)(1). The Debtors’ attorney served notice of the plan on RSY on November 9, 2009, at 4937 Highway 15-501, Carthage, NC 28327. On November 11, 2009, the Bankruptcy Noticing Center sent the “Notice of Chapter 13 Bankruptcy Case, Meeting of Creditors, & Deadlines” as well as a proof of claim form to RSY at this same address. Also on November 11, 2009, the Debtors’ attorney wrote RSY, enclosed documentation verifying the filing of the Debtors’ bankruptcy petition, and demanded that RSY make arrangements to remove the System immediately.

Two days after the bankruptcy filing, on November 13, 2009, a bi-weekly payment was due to RSY. On that day, Mr. Garner attempted to call the manager of RSY, Mr. Richard Yow

(“Mr. Yow”), to express his concerns about the operational status of the Vehicle. Mr. Yow was unavailable on November 13, 2009, but an agent of the RSY provided Mr. Garner with a code to temporarily maintain the operational use of the Vehicle and instructed Mr. Garner to call back at a later time to speak with Mr. Yow directly. Absent the entry of a new code, the System was scheduled to disable his Vehicle two weeks later, following the three-day grace period, on November 30, 2009. On November 18, 2009, Mr. Garner again contacted RSY by telephone. During this phone call, Mr. Garner spoke with Mr. Yow directly and requested that RSY remove the Payment Protection System from the Vehicle. Mr. Yow refused removal of the System and requested documentation of the bankruptcy filing. In response to this conversation, Mr. Garner contacted Debtors’ counsel, and counsel attempted to fax a notice to RSY on November 18, 2009, demanding that the System immediately be removed. RSY did not receive this fax as Debtors’ counsel inadvertently used an incorrect fax number.

On November 24, 2009, the Debtors filed this Motion for Sanctions for Violation of the Automatic Stay against RSY. Debtors’ counsel also contacted RSY multiple times by telephone and email before RSY agreed to the removal of the Payment Protection System on November 30, 2009. The Payment Protection System was not actually removed from the Vehicle until Wednesday, December 2, 2009.

Mr. Yow contends that he never received: (1) the initial mailing from the Bankruptcy Court, (2) the initial mailing from the Debtors’ attorney, or (3) the correspondence from the Debtors’ attorney demanding that the device be removed. At the hearing on the motion, Mr. Yow testified that he had no knowledge of the bankruptcy filing until the receipt of a faxed proof of claim form on November 25, 2009. Prior to this date, RSY was repeatedly served at its

correct address at 4937 Highway 15-501, Carthage, NC 28327 and none of the correspondence was returned to the sender undelivered. Absent strong evidence to the contrary, the court must presume that RSY received the documents mailed to it. *See Bosiger v. U.S.Airways*, 510 F.3d 442, 452 (4th Cir. 2007). RSY produced no such evidence. Furthermore, the court notes that Mr. Garner contacted RSY by telephone on two occasions prior to November 24, 2009.

Accordingly, the Debtors have established that RSY received adequate and timely notice of the bankruptcy filing and the Debtors' request that the Payment Protection System be removed.

ISSUE

The issue in this case is whether the failure to remove the Payment Protection System from the Vehicle, after a demand is made by Debtors' counsel, constitutes a violation of the automatic stay.

DISCUSSION

Upon a debtor's filing of a bankruptcy petition, the automatic stay provided by 11 U.S.C. § 362(a) operates to stay, among other things, all actions "to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under the title." 11 U.S.C. § 362(a)(6). The automatic stay also prohibits "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate." 11 U.S.C. § 362(a)(3). The automatic stay is a bedrock principle upon which the Code is built; the importance of § 362 cannot be over-emphasized. *Grady v. A.H. Robins Co.*, 839 F.2d 198, 200 (4th Cir. 1988). "The purpose of the automatic stay, in addition to protecting the relative position of creditors, is to shield the debtor from financial pressure during the pendency of the bankruptcy proceeding." *Winters By and Through McMahon v. George Mason Bank*, 94 F.3d 130, 133 (4th

Cir. 1996) (citation omitted). The automatic stay provides the debtor a breathing spell from creditors, affording the debtor time to reorganize. *Grady v. A.H. Robins Co.*, 839 F.2d at 200 (quoting House Report No. 95-595, 95th Cong. 1st Sess. 340-1 (1977)). Thus, the purpose of the automatic stay is two-fold: to preserve the relative positions and rights of creditors as established by the Bankruptcy Code and to protect the debtor, individually, from collection activities.

The scope of § 362(a) is broad and encompasses a vast range of creditor activity such as sending statements with payment coupons, improperly applying trustee payments, attempting to collect disallowed fees from a debtor via payoff letter, and assessing and collecting post-petition fees without notice to a debtor. *See, e.g., In re Cousins*, 404 B.R. 281, 289 (Bankr. S.D. Ohio 2009) (sending the debtor monthly statements with payment coupon violates § 362(a)(6)); *In re Sanchez*, 372 B.R. 289, 313 (Bankr. S.D.Tex. 2007) (applying payments that mortgage lender received from trustee to undisclosed charges is an exercise of control of property of the estate in violation of § 362(a)(3)); *In re McCromack*, 203 B.R. 521, 525-26 (Bankr. D.N.H. 1996) (including a disallowed attorney's fee obligation in escrow account balance violates the stay); *In re Stark*, 242 B.R. 866, 872 (Bankr. W.D.N.C. 1999) (attempting to collect inspection or monitoring fees by adding the fees to monthly statements violated § 362(a)(3)). A creditor is not only required to refrain from certain activity, but may be required to take affirmative action, such as discontinuing an automatic draft, to avoid violating § 362(a). *In re O'Neal*, 165 B.R. 859, 862 (Bankr. M.D.Tenn. 1994) (holding that a bank's automatic loan payment from a debtors' checking account authorized prepetition constitutes a violation of the stay under § 362(a)(6) absent the debtors' clear expression of voluntary consent post-petition). As § 362(a)(3) prohibits an act to "exercise control" over estate property, a creditor may violate the stay by failing to

return property that the creditor obtained prepetition. *See, e.g., In re Brown*, 237 B.R. 316, 320 (Bankr. E.D. Va. 1999) (“Following the majority approach, the debtors were entitled to recover the truck upon filing bankruptcy.”)

In this case, the Debtors filed their bankruptcy petition on November 9, 2009, and RSY received notice of the Debtors’ bankruptcy filing on repeated occasions beginning on that date. Accordingly, since November 9, 2009, RSY had an obligation to stay any acts to collect on its prepetition claim and to fully relinquish control over the property of the estate. RSY did not remove the Payment Protection System until the Debtors filed this motion for sanctions, and in doing so, RSY violated the automatic stay. *See In re Peterkin*, 2009 WL 1076816, No. 08-06060, slip op. at 2 (Bankr. E.D.N.C. 2009) (finding that, upon a bankruptcy filing, creditor should provide debtor with a system code to enable debtor to deliver the vehicle to creditor for removal of a disabling system, the cost of which should be borne by creditor).

On a most basic level, RSY installed the Payment Protection System on the Vehicle to control the Vehicle. By refusing to promptly remove the Payment Protection System upon the Debtors’ post-petition request, RSY exercised control over estate property in violation § 362(a)(3). “Control, necessarily requires a creditor to exercise some authority or influence over the property in derogation of the estate.” *In re Harchar*, 393 B.R. 160, 170 (Bankr. N.D. Ohio 2008). The determination as to whether control has been exercised over property of the estate must be based upon the particular facts of the case. *U.S. v. Harchar*, 371 B.R. 254, 263 (N.D. Ohio 2007). Here, while Mr. Garner had the use of his vehicle on the petition date, he was required to contact RSY every two weeks in order to continue to use his vehicle post-petition; therefore, he requested that the Payment Protection System be removed. RSY was Mr. Garner’s

only source for the numeric codes necessary for the continuous use of the Vehicle. Without the entry of a valid code, the Vehicle would be completely disabled, clearly impairing the estate. The circumstances in this case can be likened to a situation in which a debtor was required to contact a creditor every two weeks to request that a vehicle *not* be repossessed. The court concludes that RSY had both authority and influence over the Vehicle such that it exercised control over property of the estate in violation of the automatic stay.

RSY's actions also violated § 362(a)(6) as actions to collect on a claim that arose prepetition. Prior to filing, Mr. Garner contacted RSY every other week to remit a payment and, in return, to obtain a new code for the Payment Protection System. By requiring him to continue to request a code every two weeks post-petition while his payments were being made by the Trustee through the Chapter 13 plan, RSY asserted coercive pressure for payment of a claim that arose prior to the petition date. Prepetition, the Payment Protection System served no purpose other than to assist in the collection of a debt by disabling the Vehicle in the event that RSY did not receive a payment every other week, thereby imposing continuous pressure on Mr. Garner to remain current on his payments to RSY. Similarly, the Payment Protection System served no purpose post-petition other than to pressure Mr. Garner to remit payment on his prepetition debt to RSY. *See In re Jessamey*, 330 B.R. 80, 85 (Bankr. D. Mass. 2005) ("Where a collection mechanism was set in motion before the bankruptcy filing, postpetition 'inaction' is more properly understood as an extension into the postpetition era of the collection campaign commenced prepetition."). The effect of requiring Mr. Garner to contact RSY every two weeks for a code is not unlike that of sending a debtor a monthly statement with a payment coupon when the debt is being paid inside a Chapter 13 plan. *See In re Cousins*, 404 B.R. at 288-89.

RSY's efforts to collect on its debt that arose prepetition and that is now being paid through the Chapter 13 plan jeopardizes the Debtors' efforts to reorganize and is contrary to the fundamental purposes of the automatic stay: to provide the debtor with a breathing spell from creditors and to preserve the relative rights of creditors as established by the Bankruptcy Code.

Section 362(k) provides that "an individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages." 11 U.S.C. § 362(k). A violation of a stay is "willful" under this section of the Bankruptcy Code if it is done intentionally and with knowledge of the bankruptcy filing. *Green Tree Servicing, LLC v. Taylor*, 369 B.R. 282, 286 (Bankr. S.D.W.Va. 2007); *In re Preston*, 333 B.R. 346, 349 (Bankr. M.D.N.C. 2005). An individual seeking damages has the burden of establishing by a preponderance of the evidence that (1) the action taken was in violation of the automatic stay, (2) the violation was willful, and (3) the violation caused actual damages.

RSY's refusal to remove the Payment Protection System constitutes an intentional, and therefore willful, violation of the automatic stay pursuant to § 362(k) of the Bankruptcy Code. As a result, the Debtors are entitled to be compensated for actual damages. The Debtors failed to present the Court with evidence of a specific amount of lost wages or expenses, such as cost of transportation. The only evidence available to the court is that of attorney's fees incurred in connection with this motion. As a result of the lack of evidence of actual damages, the Court finds that the Debtors are entitled to recover nominal damages in the amount of \$10.00 for lost wages and \$1,500.00 for attorney's fees pursuant to § 362(k)(1).

CONCLUSION

Based upon the foregoing, the Debtors' Motion is granted. RSY is hereby ORDERED to pay monetary damages in the amount of \$10.00 to the Debtors and attorney's fees in the amount of \$1,500.00 to the Debtors' attorney, Sara W. Harrington, within ten (10) days after the entry of this order.

Late on a Car Loan? Meet the Disabler

By JONATHAN WELSH

Jamie De Lisle's Buick had been warning her for days, first with a flashing yellow light, then a flashing red light. But the 31-year-old mother of two from Collinsville, Ill., was too busy to heed the distress signals. It was only when Mrs. De Lisle began hearing an incessant beeping that she took notice: If she didn't make her car payment that day, the vehicle wouldn't start the next day.

Scott PollackThe repo man has found a new hiding place -- inside your car. Increasingly, used-car dealers are installing remote disabling devices that keep the cars from starting if the buyer gets too far behind on payments.

These so-called disablers, palm-sized devices that are placed under dashboards and wired into ignitions, once were limited to what industry insiders call the "buy here -- pay here" segment: the kinds of small used-car lots that line state highways, strung with lights and multicolored pennants. But as the economic downturn deepens, larger, more mainstream dealerships are using the devices as a condition of financing.

Even as the recession has fueled the used-car market, it has made it harder for auto buyers to obtain credit. Eager to book sales, dealers and finance companies are expanding their own financing operations, and the use of disablers helps them prod customers to make timely payments. Satellite-based locators are often built into the remote systems, though some dealerships say they don't make use of that capability.

The companies that sell the disablers, with brand names including On Time and PayTeck, say that the use of such devices not only expands lending but also helps financially strapped customers change their ways for the better. Don Lavoie, president and CEO of Sekurus Inc., the Murrieta, Calif.,

company that markets the On Time device, calls the starter-disabling technology "a behavior-modification method." The company says sales of the devices rose about 25% in 2008 compared with the year earlier, and it expects sales to double this year.

The Cellphone Principle

Mr. Lavoie points out that few people neglect to pay their cellphone bills, because they know the phone will stop working if they do. Applying the same principle to cars helps move auto-loan payments higher on the consumer's list of priorities, he says.

It also helps a broader range of customers qualify for loans, he says. "Typical customers may have no established credit or they may have dings on their credit," Mr. Lavoie says. The used-car market in the U.S. has ranged between 35 million and 45 million vehicle sales annually in recent years. About 20 million of those go to customers considered subprime because of their credit history, Mr. Lavoie says.

Advantage for Repo?

In the past, many dealers weren't willing to take the risk of extending credit to certain customers. But Mr. Lavoie and dealers who have installed his company's disabler say more buyers do pay on time when they have the devices in their cars. Of course, the built-in satellite-based locators could also make it easier for repo men to find the vehicles.

Customers have at best mixed feelings about the systems. "Sometimes I tell our friends our car is under house arrest," says Michelle Gibbs, a 36-year-old resident of Blue Springs, Mo. Although the remote device on her silver Honda Accord has never actually shut down the car, she compares it to "those ankle bracelets they put on you when you've done something bad."

At the same time, she says, the remote kill switch in her car seems like a reasonable price to pay when she doesn't think she could qualify for a car loan elsewhere. The device's persistent reminders, she says, have kept her from missing payment deadlines on a number of occasions. "For the most part we've liked it, because it has helped us build better credit," Ms. Gibbs says.

But consumer-advocacy groups such as the Consumer Federation of America say the devices represent a disturbing new layer of surveillance and could potentially endanger drivers if the devices leave them stranded when the cars get shut down.

John Van Alst, a lawyer with the National Consumer Law Center, calls the practice of remote disabling "electronic repossession" and says it represents a kind of intimidation, as well as creating extra hassles for people who are already financially strapped. "These devices are effective because of the threat they represent," says Mr. Van Alst. He says that some customers who seek financing from used-car dealers have given up on more traditional financing sources too soon.

He also is worried that the devices could become more a rule than an exception. "It could be the way of the future," he says. Now that the devices are becoming common in the used-car business, in time they could turn up on new cars as well. "Maybe they'll put one on my refrigerator," he says, only half in jest.

Dealers who sell cars with the On Time hardware are quick to point out that the system doesn't shut down vehicles that are running. After the driver has missed a payment, the device doesn't allow the engine to start once the car is turned off. Still, the dealers say this rarely happens. The disablers can be removed when the cars are paid off; some can also be used as anti-theft devices.

Why Most Customers Pay

Leon Green, owner of Buy Now, a Kansas City, Mo., dealership, says customers have rarely missed their payments since he began installing disablers. The possibility of suddenly losing mobility has proved enough of an incentive to keep most customers paying on time, Mr. Green says. As a result, he says, his company's cash flow has improved, and he's able to acquire better used vehicles at wholesale auctions.

Donald Birger, president of InstaCredit Automart, which sold more than 3,000 vehicles in 2008 through its two dealerships in Collinsville, Ill., and O'Fallon, Mo., says he initially was "leery" of the remote disabling systems, in part because he thought customers might object. But buyers don't seem to mind that much. "We have not lost a sale due to our use of the device," he says.

**IN THE UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:)	
)	
	)	CASE NO.
JAMES SMITH and JANE SMITH,	)	OUR FILE NO.
)	
Debtors.)	
<hr style="width:40%; margin-left:0"/>)	
JAMES SMITH and JANE SMITH,	)	ADV. PROC. NO.
)	
Plaintiffs,)	
)	
vs.)	
)	
CLEVELAND REGIONAL MEDICAL CENTER,)	
a North Carolina nonprofit corporation,)	
)	
Defendant.)	

**COMPLAINT FOR EMPLOYMENT DISCRIMINATION and
FOR VIOLATION OF THE AUTOMATIC STAY**

Introduction

1. This is an action for actual and punitive damages filed by the debtor pursuant to 11 U.S.C. § 525. This is also an action for actual and punitive damages filed by the debtor pursuant to Section 362 of the Bankruptcy Code, more commonly referred to as the "automatic stay."

2. This action is also filed to enforce the Order of Confirmation duly entered in this Chapter 13 case, the Plan duly approved by this Court, and to enforce and to implement other Bankruptcy Code provisions and Rules related thereto.

Jurisdiction and Venue

3. Jurisdiction is conferred on this Court pursuant to the provisions of Section 1334 of Title 28 of the United States Code in that this proceeding arises in and is related to the above-captioned Chapter 13 case under Title 11 and concerns property of the Debtors in that case.

4. This Court has both personal and subject matter jurisdiction to hear this case pursuant to Section 1334 of Title 28 of the United States Code, Section 157(b)(2) of Title 28 of the United States Code.

5. This Court also has jurisdiction of this matter pursuant to the Order entered by the Judges of the United States District Court for the Western District of North Carolina on July 30, 1984 (the Referral Order), which Order was entered in accordance with the Bankruptcy Amendments and Federal Judgeship Act of 1984.

6. This matter is primarily a core proceeding and therefore the Bankruptcy Court has jurisdiction to enter a final order.

7. However, in the event this case is determined to be a non-core proceeding then and in that event the Plaintiff consents to the entry of a final order by the Bankruptcy Judge.

8. Venue lies in this District pursuant to Section 1391(b) of Title 28 of the United States Code.

Parties

9. James Smith is a debtor in the above captioned Chapter 13 bankruptcy case and at all times material hereto was a resident of Cleveland County, North Carolina. James Smith is hereinafter referred to as "Smith," the "Plaintiff" or the "Debtor."

10. Defendant is a North Carolina corporation qualified to conduct business in the state of North Carolina and at all material times hereto was conducting business within Cleveland County, North Carolina, and was acting as the employer of Smith.

Facts

11. Smith was hired to work for Defendant in or about July, 2009.

12. Prior to being hired to work for Defendant (in or about April, 2009), Smith was hospitalized with Defendant (hereinafter the "Hospitalization"). The Hospitalization caused a large bill to be owed by Smith to Defendant (hereinafter the "Medical Bill").

13. While Smith was employed by Defendant he was told he had to pay the Medical Bill.

14. Smith advised Defendant he could not pay the entire bill and could only make payments on the bill.

15. The payment plan proposed by Smith was rejected by Defendant.

16. Smith advised Defendant he had no alternative but to file bankruptcy and, had in fact sought the advice of a bankruptcy lawyer.

17. Smith further advised Defendant if Defendant wanted more money than what he proposed on paying per month he would indeed file bankruptcy.

18. On or about August 1, 2009, James Smith and Jane Smith filed a voluntary petition under Bankruptcy Chapter 13.

19. On or about August 1, 2009, the attorney for the debtor, O. Max Gardner III, caused a written notice of his representation of the debtor, of the filing of the Chapter 13

case, and of the automatic stay to be mailed to all the creditors in this proceeding, including Defendant, via first class mail, postage prepaid.

20. The Trustee in this case caused a written notice of the filing, of the automatic stay, and of the 341 meeting of creditors to be mailed to all parties on the master mailing matrix by first class mail and that such notice was in fact received by Defendant.

21. The notice mailed by the Trustee included the following warning to all creditors: "**CREDITORS MAY NOT TAKE CERTAIN ACTIONS:** The filing of the bankruptcy case automatically **stays** certain collection and other actions against the debtor, debtor's property, and certain co-debtors. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be **penalized**."

22. All of the above documents were served on the Defendant and received by the Defendant.

23. On or about August 15, 2009, Defendant subsequently terminated Smith's employment after receiving notice of Smith's bankruptcy (the Unlawful Termination) and after giving Smith one more chance to pay the outstanding bill.

24. The Unlawful Termination constituted a violation of 11 U.S.C. § 525.

25. The Unlawful Termination caused damages to Plaintiff in a sum in excess of \$10,000, including but not limited to income and employee benefits.

26. The Plaintiff has incurred further legal expenses in order to prosecute this action and is entitled to an award of attorney fees and costs.

First Claim for Relief (Violation of the Automatic Stay)

27. The allegations in paragraphs 1 through 26 of this complaint are realleged and incorporated herein by this reference.

28. The actions of the Defendant in demanding payment of a debt included in his bankruptcy constitute a gross violation of the automatic stay as set forth in 11 U.S.C. Section 362(a) and all relevant sub-sections thereof.

31. As a result of the above violations of 11 U.S.C. Section 362, the Defendant is liable to the Plaintiff for actual damages, punitive damages and legal fees.

Second Claim for Relief (Employment Discrimination)

32. The allegations in paragraphs 1 through 31 of this complaint are realleged and incorporated herein by this reference.

33. The actions of the Defendant in terminating the employment of the debtor constitute employment discrimination pursuant to 11 U.S.C. Section 525.

34. As a result of the above violations of 11 U.S.C. Section 525, the Defendant is liable to the Plaintiff for actual damages, punitive damages and legal fees.

WHEREFORE, the Plaintiff having set forth his claims for relief against the Defendant respectfully prays of the Court as follows:

- A. That the Plaintiff have and recover against the Defendant a sum to be determined by the Court in the form of actual damages;
- B. That the Plaintiff have and recover against the Defendant a sum to be determined by the Court in the form of statutory damages;
- C. That the Plaintiff have and recover against the Defendant a sum to be determined by the Court in the form of punitive damages;
- D. That the Plaintiff have and recover against the Defendant all reasonable legal fees and expenses incurred by his attorney;
- E. That the underlying debt to the Defendant be forever canceled and discharged; and
- F. That the Plaintiff have such other and further relief as the Court may deem just and proper.

Dated this _____ day of _____, 2009.

O. Max Gardner III
Gardner & Gardner PLLC
Attorney for the Debtor/Plaintiff
NC State Bar #6164
P.O. Box 1000, Shelby, NC 28151-1000
(704) 487-0616 / FAX (704) 487-0619
e-mail maxgardner@maxgardner.com

JURY DEMAND IS HEREBY MADE FOR ALL ISSUES SO TRIABLE.

**IN THE UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:)	
)	
Joe Debtor,)	CASE NO.
)	OUR FILE NO.
)	
Debtor.)	
<hr style="width:40%; margin-left:0"/>)	
Joe Debtor,)	ADV. PROC. NO.
)	
Plaintiff,)	
)	
vs.)	
)	
JPMC SPECIALTY MORTGAGE, LLC,)	
a/k/a CHASE HOME FINANCE,)	
)	
Defendant.)	

COMPLAINT FOR STAY VIOLATION AND FOR AN ACCOUNTING OF FUNDS

(In this case JPMC Specialty Mortgage for attempted to collect an escrow shortage. JPMC and failed to file a Notice of Transfer of the Tax Collector's Claim)

JOE DEBTOR (the "Plaintiff") sues JPMC SPECIALITY MORTGAGE, LLC, a/k/a CHASE HOME FINANCE, ("JPMC") for violations of Title 11 of the United States Code and for an Accounting, and would state:

INTRODUCTION

1. This is an action for damages filed by the debtors pursuant to Section 362(a)(4), (a)(5) and (a)(6) of the Bankruptcy Code and Rules 7001 & 2016 of the Federal Rules of Bankruptcy Procedure and for injunctive relief to prohibit future violations of the Bankruptcy Code, and for an accounting of all funds JPMC has received from the estate on account of the note and mortgage that are the subject of this adversary proceeding.
2. This action is also filed to enforce and to implement provisions of the Confirmed Chapter 13 Plan and other Bankruptcy Code provisions and Rules related thereto.

JURISDICTION AND VENUE

3. Jurisdiction is conferred on this Court pursuant to the provisions of Sections 157 and 1334 of Title 28 of the United States Code, and Sections 362, 506, 524(i), 1306, 1322, 1328 of the Bankruptcy Code, and Rules 7001 and 2016 of the Bankruptcy

Rules.

4. This matter is a core proceeding and therefore the Bankruptcy Court has jurisdiction to enter a final order.
5. Venue lies in this District pursuant to Section 1391(b) of Title 28 of the United States Code.

PARTIES

6. The Plaintiff in this adversary is Debtor in the Chapter 13 case currently pending before the Court styled *In re Debtor*, xxx-01234 (the "Main Case").
7. The Defendant, JPMC, is a foreign corporation with its principal place of business located at 194 Wood Avenue South, 2nd Floor, Iselin, NJ 08830. JPMC is the mortgage servicer of the note and mortgage that is the subject of this adversary proceeding.

FACTUAL ALLEGATIONS

8. On or about February 5, 2004, the Plaintiff executed a mortgage in favor of Ameriquest Mortgage Company for the principal amount of \$65,600.00 to purchase his home located at 5120 Stagecoach Road, Shelby, North Carolina (the "Home"). The mortgage is recorded in Deed Book 5273, at Page 1540 in the Office of the Cleveland County Register of Deeds (the "Note and Mortgage," respectively).
9. After the purchase, the Plaintiff began to fall behind on his mortgage payments.
10. In an attempt to save his Home from foreclosure, the Plaintiff filed the Main Case on December 4, 2007.
11. Subsequently, JPMC filed an Amended Proof of Claim 3 in the main case, alleging a secured indebtedness in the amount of \$74,125.75 (the "Total Debt") and \$18,747.44 in pre-petition arrearage (the "Arrearage"). A copy of the Itemization of Total Debt and Arrearage as of the Time of Filing submitted with Amended Claim No. 3, attached hereto as Exhibit 1, shows as follows:

ESTIMATED SECURED DEBT

Unpaid Principal Balance	\$59,716.41
Arrearage Total	\$18,747.44
TOTAL ESTIMATED SECURED DEBT	\$74,125.74
Arrearage: Mortgage Payments:	
16 @ \$640.24 from 09/01/06 to 12/01/07	\$10,243.84
Previous Accrued Late Charges	\$1,037.07
Property Inspection	\$209.50
NSF Fees	\$73.92
Foreclosure Fees & Costs	\$1,090.72
Appraisal	\$9.75

Previous Bankruptcy Attorney Fees	\$975.00
Escrow Advances	\$3,973.87
Foreclosure Attorney Fees	\$533.76
Post Petition / Pre Confirmation Legal Fees	\$600.00

TOTAL ARREARAGE AMOUNT DUE: \$18,747.44

(See Exhibit 1)

12. On December 5, 2007, the Plaintiff filed his Chapter 13 Plan, which proposed to pay JPMC the regular monthly mortgage payment of \$640.24 ("Monthly Payment") and pay the full arrearage as stated in the Proof of Claim pro rata over the life of a sixty (60) month plan. The Plan also included a debt of \$470.32 for the delinquent pre-petition 2007 property taxes owed on his home.
13. On February 28, 2008, the Court, after notice and hearing, entered its Order Confirming Chapter 13 Plan Allowing Claims and Directing Distributions (the "Confirmation Order"). The JPMC regular monthly payment and arrears were fully provided for in the Confirmation Order. The Debtor had also provided for the delinquent 2007 Property taxes in the Confirmation Order in the amount of \$470.32. A copy of the Confirmation Order is attached as Exhibit 2.
14. On February 18, 2009, JPMC sent the Debtor a Statement attempting to collect an alleged escrow shortage and to raise the Debtor's monthly mortgage payment to \$1,025.60 in violation of the automatic stay provisions of the Bankruptcy Code. The attempt to collect is attached as Exhibit 3.
15. The Debtor has never had an escrow account with JPMC as part of the mortgage payment. Upon investigation, Wright discovered that JPMC had paid the 2007 and 2008 property taxes directly to the Tax Collector.
16. JPMC failed to file a Notice of Transfer of the Tax Collector's Claim pursuant to Fed.R.Bankr.P. 3001(e)(2) prior to the purchase and attempt to collect the pre-petition property tax claims for year 2007.
17. Plaintiff reserves the right to amend this Complaint to allege additional causes of action as well as add additional parties as evidence obtained during discovery may allow.

COUNT I

STAY VIOLATION – 11 U.S.C. § 362

18. The Plaintiff incorporates and realleges the allegations contained in the factual allegations above.
19. To the extent that JPMC attempted to collect the pre-petition property taxes by raising the post petition mortgage payment of the Plaintiff to recover an escrow shortage, it has violated the automatic stay provisions of the Bankruptcy Code. Such charges were not approved by or provided for in the Court's Order Confirming Chapter 13 Plan.

20. In bringing this action for violation of the automatic stay, Plaintiff has incurred attorneys' fees and costs in addition to the injunctive relief allowed under 11 U.S.C. § 362 (a)(4), (a)(5) and (a)(6). Plaintiff is entitled to an award of actual damages, punitive damages and reasonable attorneys' fees and costs under 11 U.S.C. § 362(k)(1).

COUNT II

VIOLATION OF FED.R.BANKR.P. 3001(e)(2)

21. The Plaintiff realleges the allegations contained in the factual allegations above.
22. Fed.R.Bankr.P. 3001(e)(2) provides for the mandatory notice to the Clerk of the Court of any transfer of claim. In relevant part the Rule provides:

(2) Transfer of a Claim Other Than for Security after Proof Filed

If a claim other than one based on a publicly traded note, bond, or debenture has been transferred other than for security after the proof of claim has been filed, evidence of the transfer shall be filed by the transferee. The clerk shall immediately notify the alleged transferor by mail of the filing of the evidence of transfer and that objection thereto, if any, must be filed within 20 days of the mailing of the notice or within any additional time allowed by the court. If the alleged transferor files a timely objection and the court finds that, after notice and a hearing, the claim has been transferred other than for security, it shall enter an order substituting the transferee for the transferor. If a timely objection is not filed by the alleged transferor, the transferee shall be substituted for the transferor.

23. Failure to provide the required notice to the Clerk of the post petition transfer invalidates the purchase of the tax claim.

RELIEF REQUESTED

Plaintiff respectfully requests that this Court:

1. Enter Judgment against JPMC;
2. Find JPMC in violation of 11 U.S.C. § 362(a)(4), 362(a)(5) and 362(a)(6) and orders of this Court and order punitive damages;
3. Order an accounting against JPMC requiring full accounting of any and all funds received and distributed from and to any source relating to the Note and Mortgage;
4. Find JPMC liable for any attorneys' fees and costs associated with bringing this adversary pursuant to 11 U.S.C. § 362(k);
5. Find that JPMC has violated the terms of the Confirmed Plan and 11 U.S.C. § 1327;
6. Find that JPMC has violated Fed.R.Bankr.P. 3001(e)(2) and order the alleged transfer

of the property tax claims invalid;

7. Any and all other relief the Court deems necessary and just.

Dated this _____ day of _____, 2009.

O. Max Gardner III
Gardner & Gardner PLLC
Attorney for the Debtor/Plaintiff
NC State Bar #6164
P.O. Box 1000, Shelby, NC 28151-1000
(704) 487-0616 / FAX (704) 487-0619
e-mail maxgardner@maxgardner.com

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME: **CHAPTER 13 CASE NO.**
OUR FILE NO.

ADDRESS:

SSN:

DEBTORS.

Adversary Proc. No. _____

Plaintiffs,

versus

Defendants.

**FIRST INTERROGATORIES AND REQUEST FOR PRODUCTION
OF DOCUMENTS FROM THE PLAINTIFFS TO THE DEFENDANTS
(Stay Violation Case)**

COME NOW the above-named debtors and Plaintiffs herein, by and through their attorney of record, and herewith serve upon the Defendants in this case the following written interrogatories and request for production of documents pursuant to the provisions of Rules 7001, 7033 and 7034 of the Rules of Bankruptcy Procedure and Rules 33 and 34 of the Federal Rules of Civil Procedure as provided for and set forth in the foregoing rules. Answers to these Interrogatories and Request for Production of Documents must be furnished within forty-five (45) days of the service of the Summons and Complaint or within thirty (30) days of the service of these Interrogatories, whichever is later.

DEFINITIONS AND INSTRUCTIONS

A. If there is insufficient space after each interrogatory for you to provide a full and complete answer, then you should state your full and complete answer on a separate page, identify the page, and attach the page to your response as a properly identified and marked exhibit thereto.

B. Document means all writings of any kind, including the originals and all other non-identical copies, whether different from the originals by reason of any notation made on such copies or otherwise, including but not limited to correspondence, memoranda, notes, diaries, desk or other calendars, statistics, letters, telegrams, minutes, business records, personal records, accountants' statements, account statements, contracts, reports, credit

reports, studies, checks, statements, receipts, invoices, bills, return charts, summaries, pamphlets, books, interoffice and intraoffice communications, notations of any sort of conversations or meetings, telephone call meetings or other communications, written agreements, bulletins, printed matter, computer printouts, teletypes, telefaxes, invoices, worksheets, all drafts, alterations, modifications, changes and amendments of any kind of the foregoing, graphic or oral records or representations of any kind (including, without limitation, tapes, cassettes, discs, recordings, electronic mail records, computer memory records such as hard disk drives and master back-up tapes, diskettes, or other devices such as zip drive records).

C. The term "act" as used herein includes acts of every kind and description.

D. The term "identify" or "describe" when used in reference to a "document" means to state:

- a. The type of document (e.g., letter, memorandum, report, electronic mail records, notes, etc.);
- b. The date of the document;
- c. The name of the parties or parties who originated the document, their past or present position with the Defendants, their general duties and responsibilities, their current physical location with the company, and their e-mail, telephone number and telephone extension;
- d. The name and address of the current custodian of the document;
- e. The name and current address of each signatory thereon;
- f. The reason, in detail, for the preparation of the document;
- g. The subjects or subjects covered by the document;
- h. The names, business addresses and titles of the persons to whom the document writing was directed; and
- i. The name and address and title of each person who originated, read or received the document.

E. The term "identify" as used herein in connection with a "person" or "persons" means to state the names, titles, the present employer of such "person" or "persons," the relationship of such person to any of the Defendants, and such person's current business address and business telephone number.

F. The term "identify" as used herein with respect to or in connection with an "act" means:

- a. Furnish the date and place of the act;
- b. Identify the person acting, the person for who the act was performed, and the person against whom the act was directed; and
- c. Describe in detail the act.

G. The terms "describe" or "state" as used herein means:

- a. Describe or state fully by reference to underlying facts rather than by ultimate facts or conclusions of law;
- b. Particularize as to

- i. Time;

- ii. Date;
- iii. Manner; and
- iv. Place.

H. The term "oral communication" means and includes any face-to-face conversation, meeting, conference, telephone conversation, telephone conversation, cell-phone conversation, computer conversation with voice mail, or any one for more of these or related devices.

I. The term "person" or "persons" means and includes all natural persons, public and private corporations, associates, wholly owned affiliates or subsidiary corporations or any other form of a business association, and any other type of entity and the agents, employees, officers, deputies and representatives thereof.

J. The terms "you" or "your" shall refer to any one or all of the named Defendants and any related or affiliated companies associated in any way therewith.

K. All requests shall be deemed to include any documents made by, held by or maintained in files of any predecessor, successor, employee, agent or assignee of either one or all of the Defendants.

L. The term "the transactions" or "the transactions" or "account" or "accounts" when used without qualification herein means the transactions and accounts between or among the debtors and the named Defendants any and all related activities and agents or assigns of either party.

M. If the space provided at each interrogatory is not sufficient for your answer, then use additional sheets, numbered consecutively after each such interrogatory, and inserted in the proper order of all copies filed and served. For example, in the case of Interrogatory number 1, any additional sheets for your answers would be numbered as 1-A, 1-B, 1-C, etc.

N. Each of the following requests for production and interrogatories is intended to be a continuing request to produce and interrogatory. As a result, the debtors hereby demand that, in the event at any later date you obtain any additional facts, or form any conclusions, opinions or contentions different from those set forth in your responses herein, then you shall amend your answers to such responses promptly and sufficiently in advance of any trial date, to fully set forth such differences and to produce and documents in connection therewith.

INTERROGATORIES AND REQUEST FOR PRODUCTION OF DOCUMENTS

1. Please identify by name, bankruptcy case number, and bankruptcy district, any and all cases where the Defendant(s) named herein have been found to have violated the automatic stay or where the Defendant(s) have settled a stay violation case by way of the payment of any United States currency to the debtor(s) or the attorney for the debtor(s). This question relates to any such actions taken within five (5) years of the date of the filing of the Complaint in this contested case.

ANSWER:

2. As to each bankruptcy case identified in Interrogatory No. 1, please state whether or not the matter was resolved by a settlement or a court order and state the specific terms and conditions of every settlement and of every court order or settlement agreement that was subsequently approved by any court order. Please identify any and all parties or attorneys of the Defendants who approved, drafted or recommended the said settlements and the names of all parties who endorsed the settlement checks.

ANSWER

3. State whether or not you received any notice of this bankruptcy case on or after the filing date and if so state the type and nature of said notice or notices and describe what actions were taken upon the receipt of each such notice.

ANSWER:

4. State when this account was transferred from the transferor to the transferee herein for collection and identify all parties and documents associated with or related to the transfer.

ANSWER:

5. If this case was transferred or assigned to your collection division or department or to your bankruptcy division or department then state and describe all steps and documents employed to identify the case as a current bankruptcy account and describe in detail all actions taken thereafter to determine if the debt was involved in a pending bankruptcy case. Identify any and all parties who were responsible for these review and identification procedures.

ANSWER:

6. Describe in detail how your collection system is organized to receive and process bankruptcy accounts including the written procedures and documents related to the said procedures with respect to a "due diligence" review of any and all such accounts.

Answer:

7. Describe all procedures taken by the Defendant(s) for the implementation of any and all stop codes for bankruptcy accounts identified as such and describe in detail any and all actions collection agents and employees must take when they are notified of a bankruptcy filing by any consumer.

ANSWER

8. State specifically what systems you use or have used to minimize improper collection and recovery efforts such as but not limited to BANKO, Bankruptcy Receivables Management, Choicepoint, Creditors Bankruptcy Service, Dolan Information, and E-Commerce Group/Lawcomm.

ANSWER:

9. Please attach all documents, manuals, protocols, procedures and training materials for any system identified in number 8.

ANSWER:

10. State when this case was first referred to your internal collection division and describe in detail when and under what circumstances the demands for payment were prepared and mailed to the debtors.

ANSWER

11. Describe in detail the system or systems you employ to identify bankruptcy files and to implement procedures to terminate the collection process in such cases.

ANSWER

12. Attach and identify copies of all Agreements between the transferor and the transferee regarding the purchase and sale of the subject account (including but not limited to all Asset and Purchase Agreements, all Forward Flow Agreements, all servicing agreements, and all pooling of account agreements).

Answer:

13. State whether or not the Defendant(s) have access to the Pacer System employed by the Federal Bankruptcy courts and if so identify and attach all documents related to the terms and conditions under which the Defendant(s) use this system.

Answer:

14. State the name, title or position, address and telephone number of each and every witness that you plan to call to testify at the hearing in this case and state the substance of the testimony expected from each such witness.

ANSWER

15. Identify with particularity each and every exhibit that you will seek to introduce into evidence at the hearing in this matter.

ANSWER

14. State each and every contention that you will present at the hearing in this matter as to why there is no violation of the automatic stay in this case.

ANSWER:

15. State the name, address and title of each and every party providing any information or documents with respect to the answers to these interrogatories.

Answer:

16. Identify all emails, voicemails, collection records, data records, statements, telephone recordings, or any other form of data related to or arising out of any matters or things involved this case.

ANSWER:

17. State whether or not any data or documents have been lost or destroyed that included any evidence that could or might be used in this case.

ANSWER:

18. Please explain in detail when, why, where, how and by whom any such evidence was destroyed:

ANSWER:

20. Please attach all statements provided by any party with respect to any allegation, matter or thing in this case.

ANSWER:

21. If any communications with any parties have been recorded, then please attach a transcript of the recording or the original recording along with the date of the recording, the name of the parties to the recording, the location where the recording was made, and the custodian of the original recording data.

ANSWER:

Dated this the _____ day of _____, 2008

O. Max Gardner III
Law Offices of O. Max Gardner III, PC
Attorney for Debtors
403 South Washington Street
PO Box 1000
Shelby NC 28151-1000
704.487.0616
maxgardner@maxgardner.com

NORTH CAROLINA
CLEVELAND COUNTY

RELEASE AND SETTLEMENT
AGREEMENT

This SETTLEMENT AGREEMENT AND RELEASE (the "Agreement") is made and executed as of the ____ day of _____, 2008, by and between John Q. Public and Mary E. Public ("Public") (with their heirs, agents, administrators, executors, trustees and assigns) and _____ ("Defendants") (and their heirs, agents and assigns); is intended to extinguish all liabilities, causes of action, or damages either past or present, known or unknown, if any, which the Publics may be entitled to pursue against the Defendants.

RECITALS:

The Publics have alleged that the Defendants committed acts which may constitute bankruptcy violations related to a bankruptcy case filed in the Western District of North Carolina, identified as Case Number _____ ("Bankruptcy Case").

The mutual desire of the parties is to resolve these matters to avoid litigation.

The Defendants agree to tender to the Publics the sum of \$_____ in damages and to the Publics' attorney the sum of \$_____ in legal fees, in satisfaction of all claims the Publics, and/or anyone deriving rights from the Publics, may have against the Defendants; and the Publics have agreed not to pursue litigation or further claims against Defendants. Any fees and expenses to which the attorney is entitled under the terms of his written fee agreement with the debtor(s) shall be deemed the sole and separate property of the attorney and to that extent the attorney shall have a lien on the said proceeds.

Defendants agree to cancel the subject debt (_____) as to the debtor and his non filing spouse.

NOW, THEREFORE, in consideration of the above recitals and the value set out above and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, and intending to be legally bound, Defendants and the Publics covenant and agree as follows:

1. The Publics hereby release and forever discharge Defendants of and from all claims, causes of actions, suits, debts, agreements, damages, judgments, executions, and demands whatsoever ("Claims"), in law or in equity, which the Publics may have or ever had or have now, known or unknown, which arise from, are based upon, or are related to any action committed related to the Publics' Bankruptcy Case by Defendants.

2. The Publics hereby covenant that, they will now and forevermore forbear and refrain from the institution or prosecution of any Claims, court proceedings or causes of action whatsoever arising at any time prior to the effective date of this Agreement against Defendants. This covenant may be pleaded as an absolute defense to any court pleading or action brought against Defendants by the Publics as of the date of this Agreement.

3. This Agreement releases any and all Claims based on any action or inaction of Defendants which occurred on or prior to the date of this Agreement.

4. This Agreement shall be construed under and in accordance with the laws of the State of North Carolina.

5. This settlement is made for the express purpose of avoiding the expense of litigation and to resolve the dispute among the parties and is not, nor shall it be construed as, an admission of liability on the part of Defendants.

6. The Publics acknowledge that they have (i) read this Agreement in its entirety and fully understand its tenor and effect, (ii) have discussed this Agreement with counsel, (iii) agree that this Agreement constitutes the entire agreement between the parties, and (iv) by their signatures represent that there have been no other promises or inducements made to them in connection with the execution of this Agreement other than the consideration set forth above.

IN WITNESS WHEREOF, John Q. Public and Mary E. Public have hereby executed this RELEASE AND SETTLEMENT AGREEMENT effective on the day and year written above.

Date

John Q. Public

Date

Mary E. Public

I HEREBY APPROVE THE TERMS AND CONDITIONS OF THE FOREGOING
RELEASE AND SETTLEMENT AGREEMENT.

O. Max Gardner, III
Counsel for Plaintiffs

I HEREBY APPROVE THE TERMS AND CONDITIONS OF THE FOREGOING
RELEASE AND SETTLEMENT AGREEMENT.

Dewey Cheatham
Counsel for Defendants

H – PREFERENCE RECOVERY

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME:

**CHAPTER 13 CASE NO.
OUR FILE NO.**

ADDRESS:

SSN:

DEBTORS.

Adversary Proc. No. _____

Plaintiffs,

versus

CHASE BANKCARD SERVICES, INC.,

Defendant.

Complaint to Recover Preference Payments by Consumer Debtor

Introduction

1. This is an action for recovery of aggregate payments made to an unsecured creditor within the 90 day preference period pursuant to 11 U.S.C. Section 547.
2. This action is also filed for recovery of actual and punitive damages by the debtor pursuant to Sections 105, 362, 542 and 1306 of the Bankruptcy Code.
3. This action is also filed to enforce the Order of Confirmation to be entered in this Chapter 13 case and to enforce and to implement other Bankruptcy Code provisions and Rules related thereto.

Jurisdiction and Venue

4. Jurisdiction is conferred on this Court by 28 U.S.C. Section 1334 in that this proceeding arises in and is related to the above-captioned Chapter 13 case under Title 11 and concerns property of the debtor in that case.
5. This action is brought by the Plaintiff as a consumer debtor to enforce rights under the Bankruptcy Code and is a core proceeding.
6. Venue lies in this District pursuant to Section 1391(b) of Title 28 of the United States Code.

Parties

7. The Plaintiff is a debtor under Chapter 13 of Title 11 in the above-captioned case.

8. The Defendant, Chase BankCard Services, Inc.. (hereafter "Chase"), is an entity engaged in the business of consumer credit lending in the State of North Carolina and, upon information and belief, maintains its principal place of business in some state other than the State of North Carolina.

Factual Allegations

9. The underlying Chapter 13 bankruptcy case was commenced by the filing of a petition with the Clerk of this Court on _____. On _____ the Bankruptcy Noticing Center notified Defendant of Plaintiffs' bankruptcy case.

10. The 341(a) meeting of creditors was held in Shelby, North Carolina on _____.

11. The Chapter 13 plan of the Plaintiff and Debtor herein was recommended for confirmation by the Chapter 13 Trustee at the 341(a) meeting of creditors.

12. Prior to the filing of this Chapter 13 case, the Plaintiff made aggregate payments of \$1500.00 to the Defendant, an unsecured creditor in said proceeding, during the 90 day preference period as set forth in 11 U.S.C. Section 547. The debtor was insolvent during this period of time and such payments have enabled the Defendant to receive more than such creditor would received if this case were a case under Chapter 7.

13. On or about _____, the attorney for the Plaintiff submitted via certified mail a demand letter to the Defendant requesting the turnover of the hereinbefore alleged preference payment. A copy of said letter is attached hereto as "Exhibit A" and is incorporated herein by this reference.

14. The attorney for the Plaintiff received Postal Service Form 3811 dated _____, evidencing receipt of the said demand letter by Chase. A copy of this form is attached hereto as "Exhibit B" and is incorporated herein by this reference.

15. Chase responded to the preference demand letter on or about _____ stating its refusal to refund the preference payment.

First Claim for Relief

16. The Plaintiff realleges and incorporates by reference paragraphs 1 through 15 above as if fully set out herein.

17. The Defendant has violated 11 U.S.C. Section 547 by its refusal to refund the aforementioned aggregate amount.

18. As a result of the above violations the Defendant is liable to the Plaintiff for the actual aggregate amount of \$1500.00, plus punitive damages of \$10,000.00, plus reasonable attorney's fees and expenses in the sum of no less than \$375.00 per hour.

Second Claim for Relief

19. The Plaintiff realleges and incorporates by reference paragraphs 1 through 18 above

as if fully set out herein.

20. The Plaintiff is informed and believes and therefore alleges that the actions of the Defendant constitute gross violations of the automatic stay as set forth in 11 U.S.C. Section 362(a)(3) which prohibits "any act to...exercise control over property of the estate."

21. As a result of the above violation of 11 U.S.C. Section 362, the Defendant is liable to the Plaintiff for actual damages, punitive damages and legal fees.

WHEREFORE, the Plaintiff having set forth her claims for relief against the Defendant respectfully prays of the Court as follows:

- a. The refund of the \$1500.00 obtained by Defendant as described above;
- b. The sum of \$10,000.00 to be paid by the Defendant in the form of punitive damages;
- c. The costs and reasonable attorney's fees in the sum of no less than \$375.00 per hour; and
- d. For such other and further relief as may be just and proper.

Dated this the _____ day of _____, 2008.

O. Max Gardner III
Law Offices of O. Max Gardner III, P.C.
Attorney for the Plaintiff
P.O. Box 1000
Shelby, NC 28151-1000
N.C. State Bar No. 6164
(704) 487-0616
FAX (704) 487-0619
maxgardner@maxgardner.com

NORTH CAROLINA
CLEVELAND COUNTY

RELEASE AND SETTLEMENT
AGREEMENT

This SETTLEMENT AGREEMENT AND RELEASE (the "Agreement") is made and executed as of the ____ day of _____, 2008, by and between John Q. Public and Mary E. Public ("Public") (with their heirs, agents, administrators, executors, trustees and assigns) and _____ ("Defendants") (and their heirs, agents and assigns); is intended to extinguish all liabilities, causes of action, or damages either past or present, known or unknown, if any, which the Publics may be entitled to pursue against the Defendants.

RECITALS:

The Publics filed a bankruptcy case in the Western District of North Carolina, identified as Case Number _____ ("Bankruptcy Case"). Subsequent to the debtors' filing of their bankruptcy case, the debtors filed Adversary Proceeding No. _____ in the Western District of North Carolina, which was an action for recovery of aggregate payments made to an unsecured creditor within the 90 day preference period pursuant to 11 U.S.C. Section 547.

The mutual desire of the parties is to resolve these matters to avoid litigation.

The Defendants agree to tender to the Publics the sum of \$_____ in damages and to the Publics' attorney the sum of \$_____ in legal fees, in satisfaction of all claims the Publics, and/or anyone deriving rights from the Publics, may have against the Defendants; and the Publics have agreed not to pursue litigation or further claims against Defendants. Any fees and expenses to which the attorney is entitled under the terms of his written fee agreement with the debtor(s) shall be deemed the sole and separate property of the attorney and to that extent the attorney shall have a lien on the said proceeds.

NOW, THEREFORE, in consideration of the above recitals and the value set out above and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, and intending to be legally bound, Defendants and the Publics covenant and agree as follows:

1. The Publics hereby release and forever discharge Defendants of and from all claims, causes of actions, suits, debts, agreements, damages, judgments, executions, and demands whatsoever ("Claims"), in law or in equity, which the Publics may have or ever had or have now, known or unknown, which arise from, are based upon, or are related to any action committed related to the Publics' Bankruptcy Case by Defendants.

2. The Publics hereby covenant that, they will now and forevermore forbear and refrain from the institution or prosecution of any Claims, court proceedings or causes of action whatsoever arising at any time prior to the effective date of this Agreement against Defendants. This covenant may be pleaded as an absolute defense to any court pleading or action brought against Defendants by the Publics as of the date of this Agreement.

3. This Agreement releases any and all Claims based on any action or inaction of Defendants which occurred on or prior to the date of this Agreement.

4. This Agreement shall be construed under and in accordance with the laws of the State of North Carolina.

5. This settlement is made for the express purpose of avoiding the expense of litigation and to resolve the dispute among the parties and is not, nor shall it be construed as, an admission of liability on the part of Defendants.

6. The Publics acknowledge that they have (i) read this Agreement in its entirety and fully understand its tenor and effect, (ii) have discussed this Agreement with counsel, (iii) agree that this Agreement constitutes the entire agreement between the parties, and (iv) by their signatures represent that there have been no other promises or inducements made to them in connection with the execution of this Agreement other than the consideration set forth above.

IN WITNESS WHEREOF, John Q. Public and Mary E. Public have hereby executed this RELEASE AND SETTLEMENT AGREEMENT effective on the day and year written above.

Date

John Q. Public

Date

Mary E. Public

I HEREBY APPROVE THE TERMS AND CONDITIONS OF THE FOREGOING
RELEASE AND SETTLEMENT AGREEMENT.

O. Max Gardner, III
Counsel for Plaintiffs

I HEREBY APPROVE THE TERMS AND CONDITIONS OF THE FOREGOING
RELEASE AND SETTLEMENT AGREEMENT.

Dewey Cheatham
Counsel for Defendants

I – OBJECTION TO PROOF OF CLAIM

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME: **CHAPTER 13 NO.
OUR FILE NO.**

ADDRESS:

SSN:

Debtor(s).

Debtor

Adversary Proceeding No.:

Plaintiff,

versus

HOMEQ SERVICING CORPORATION,

Defendant.

**Complaint Seeking Damages in Core Adversary Proceeding
for Improper Charges Included in Proof of Claim**

Introduction

1. This is an action for actual and punitive damages filed by the debtor pursuant to Sections 105, 362(a), 502(b) and 524 of the Bankruptcy Code, Rules 2016 and 9011 of the Bankruptcy Rules, the Fair Debt Collection Practices Act, 15 U.S.C. Section 1692 et seq. ("FDCPA"), and the North Carolina Unfair and Deceptive Acts and Practices Laws, G.S. Section 75-50 et seq., ("Acts" and "UDAP").

2. This action is also filed to enforce the Order of Confirmation duly entered in this Chapter 13 case and to enforce and to implement other Bankruptcy Code provisions and Rules related thereto.

Jurisdiction and Venue

3. Jurisdiction is conferred on this Court pursuant to the provisions of Section 1334 of Title 28 of the United States Code in that this proceeding arises in and is related to the above-captioned Chapter 13 case under Title 11 and concerns property of the debtor in that case.

4. This Court has both personal and subject matter jurisdiction to hear this case pursuant to Section 1334 of Title 28 of the United States Code, Section 157(b)(2) of Title 28 of the United States Code, and pursuant to the Order entered by the Judges of the United States District Court for the Western District of North Carolina on July 30, 1984 (the Referral Order), which Order was entered in accordance with the Bankruptcy Amendments and Federal Judgeship Act of 1984.

5. This Court has supplemental jurisdiction to hear all state law claims pursuant to Section 1367 of Title 28 of the United States Code.

6. This Court also has jurisdiction to hear the Fair Debt Collection Practices Act violations pursuant to Section 1692 of Title 15 of the United States Code; thus, federal subject matter jurisdiction is properly founded upon Section 1331 of Title 28 of the United States Code.

7. This matter is primarily a core proceeding and therefore the Bankruptcy Court has jurisdiction to enter a final order. However, in the event this case is determined to be a non-core proceeding then and in that event the Plaintiff consents to the entry of a final order by the Bankruptcy Judge.

8. Venue lies in this District pursuant to Section 1391(b) of Title 28 of the United States Code.

Parties

9. The Plaintiff in this case is a debtor under Chapter 13 of Title 11 of the United States Code in case number _____, which case is presently pending before this court.

10. The Defendant, HomEq Servicing Corporation ("HomEq") formerly known as The Money Store, is a New Jersey corporation engaged in the business of real estate mortgage servicing with its principal place of business located at 4837 Watt Avenue, North Highlands, CA 95660. HomEq is the servicer of the second deed of trust secured by the debtor's residence which is the subject of this proceeding.

Factual Allegations

11. On or about December 8, 1997 the debtor executed an equity line deed of trust in favor of _____ in the principal sum of \$11,675.00 for property improvements for property located at _____, North Carolina. The deed of trust was recorded at Book _____, Page _____ in the _____ County Registry on April 20, 1998. _____ sold, transferred or assigned all of its right, title and interest in the deed of trust to The Money Store (now HomEq).

12. The debtor filed a prior Chapter 13 bankruptcy petition with this court on or about _____. The chapter 13 case was assigned case number _____.

13. The prior chapter 13 plan as confirmed included a debt to The Money Store which was scheduled as a claim in the amount of \$10,800.00 secured by a second deed of trust on the residential real estate of the Plaintiff at _____, North Carolina with an estimated value of \$65,000.00. The plan provided for the cure of pre-petition arrears to The Money Store in the amount of \$324.57, with the Plaintiff to resume direct payments to The Money Store in _____.

14. The claims of The Money Store were identified on the records of the Trustee as claims numbered 0013 (mortgage) and 0015 (arrears).

15. During the pendency of the debtor's prior bankruptcy case, The Money Store received the total sum of \$296.14 in disbursements from the office of the Trustee in payment of the arrears.

16. The Money Store filed a Motion for Relief from Stay by and through _____ on or about _____. The Motion alleged that the debtor was in default of seven post-

petition mortgage payments in the amount of \$1087.80.

17. The debtor filed an Objection on _____.

18. The Motion for Relief from Stay was resolved by the terms of a consent order entered with the Court on _____.

19. The consent order provided for the debtor to cure 10 monthly payments in the total amount of \$1554.00 before _____.

20. The consent order further provided for a twelve month "future default" provision through and including _____.

21. The consent order also provided that in the event of a default of the consent order, The Money Store would be released from the automatic stay to foreclose on the real property without further notice or hearing.

22. The debtor avers that she complied with the terms of the consent order.

23. The debtor received a lawful discharge of her prior bankruptcy case on _____.

24. Upon information and belief, sometime subsequent to her discharge, The Money Store merged with HomEq.

25. The within Chapter 13 case of the Plaintiff was commenced by the filing of a voluntary petition with the Clerk of this Court on _____. The debtor alleges that the within Chapter 13 case was filed solely to save her home from an illegal and improper foreclosure by the holder of the first mortgage. In addition to the first and second mortgages and arrearages on her home, the only other debt listed in the debtor's petition is for _____ County property taxes.

26. The 341(a) meeting of creditors was held in Shelby, North Carolina on _____.

27. The Chapter 13 plan of the Plaintiff was subsequently confirmed by order of this Court dated _____.

28. The Chapter 13 plan as confirmed included a debt to HomEq which was scheduled as a claim in the amount of \$10,800.00 secured by a second deed of trust on the residential real estate of the Plaintiff at _____ with an estimated value of \$55,926.00. The plan provided for the cure of pre-petition arrears to HomEq in the amount of \$2100.00, with the Plaintiff to resume direct payments in the sum of \$155.40 per month to HomEq in _____.

29. The Defendant received notice of the 341(a) meeting from documents mailed by the Trustee's office and HomEq also received a "filed" copy of the Order of Confirmation, as well as other documents filed in this case from the debtor's attorney, the Trustee and the bankruptcy court. On _____ the Bankruptcy Noticing Center notified Defendant of Plaintiffs' bankruptcy case.

30. HomEq subsequently filed a sworn proof of claim with the Chapter 13 Trustee. The sworn proof of claim filed by HomEq is identified as claim numbers 0011 (mortgage) and 0013 (mortgage arrears) on the records of the Trustee. The address listed by HomEq on the claim was 1100 Corporate Center Drive, Raleigh, NC 27607. Claim number 0011 was filed by HomEq for the
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total outstanding mortgage liability in the amount of \$12,979.26. Claim number 0013 was filed by HomEq for the alleged pre-petition arrearages on the mortgage in the total amount of \$5,283.82.

31. HomEq's claim for arrears consists solely of 34 monthly payments of \$155.40—or arrears from _____ (31 months prior to the discharge of the debtor's first chapter 13 case) through _____ (the filing of her second case).

32. If HomEq's claim for arrears was correct, which the debtor expressly denies, the debtor would have been in default for 31 monthly payments by the time of the discharge of her first chapter 13 case.

33. HomEq would have this court believe that the alleged 31 month default began less than six months after the prior consent order dated _____ expired.

34. The Money Store took no further action to seek a release from the debtor's first chapter 13 case after the Motion for Relief from Stay filed on March 29, 2000, or to object to her discharge, despite an alleged 31 month default over more than half of the pendency of the first chapter 13 case.

35. The debtor alleges that the proof of claim grossly overstates the debtor's pre-petition default and is designed to extract additional and substantial profits, including improper interest, late fees, and possibly other fees and corporate advances, from the servicing of the debtor's mortgage loan and from the property of this bankruptcy estate to the detriment of the debtor.

36. Furthermore, HomEq failed to provide any written or printed documentation to support its claim for this substantial default, in violation of Rule 3001(c), and the claim is therefore improper.

37. On or about _____, the debtor filed an Objection to the proof of claim of HomEq. HomEq failed to file any timely response or otherwise appear before the default notice date of _____.

38. An Order was entered on _____ sustaining the debtor's objection to the claim of HomEq and the Trustee entered a Notice of Suspension of Payments to HomEq on _____.

39. The debtor subsequently entered into a settlement with Aurora Loan Services, Inc., the servicer of the first deed of trust on the debtor's residence, to resolve the issues of adversary proceeding number _____, filed with this Court on June 16, 2000. In the settlement, Aurora agreed to pay off the debtor's Chapter 13 plan.

40. The debtor filed a Motion to Reconsider the order entered on _____ sustaining the debtor's objection to the claim of HomEq. The debtor intended to have the claim of HomEq reinstated and paid in full in order for the debtor to retain any cause of action she may have against HomEq.

41. HomEq failed to file any timely response or otherwise appear at the hearing held on _____, and the motion to reconsider was granted by Order dated _____.

42. As of _____, the Trustee disbursed the total sum of \$5,875.86 to HomEq at 1100 Corporate Center Drive, Raleigh, NC 27607.

43. The Plaintiff alleges that prior and subsequent to the filing of this complaint she has engaged in numerous meetings with her attorney about this matter. The Plaintiff, who is a 73 year old widow surviving off of Social Security Benefits and part-time income as a housekeeper for Isothermal Community College, has been harassed and damaged by the actions of HomEq and has feared losing her home.

**FIRST CLAIM FOR RELIEF
VIOLATION OF THE AUTOMATIC STAY**

44. The allegations in paragraphs 1 through 43 of this complaint are realleged and incorporated herein by this reference.

45. The actions of HomEq in filing an improper proof of claim constitute a gross violation of the automatic stay as set forth in 11 U.S.C. Section 362(a)(3).

46. As a result of the above violations of 11 U.S.C. Section 362, HomEq is liable to the Plaintiff for actual damages, punitive damages and legal fees.

**SECOND CLAIM FOR RELIEF
VIOLATION OF THE NORTH CAROLINA UNFAIR AND DECEPTIVE ACTS
AND PRACTICES LAWS**

47. The allegations in paragraphs 1 through 46 of this complaint are realleged and incorporated herein by this reference.

48. The Plaintiff is a "consumer" as that term is defined by Article 2 of Chapter 75 of the North Carolina General Statutes.

49. The Plaintiff's relationship with HomEq arose out of a "consumer debt" as that term is defined in Article 2 of Chapter 75 of the North Carolina General Statutes.

50. HomEq was and is a "debt collector" as that term is defined by applicable provisions of Article 2 of Chapter 75 of the North Carolina General Statutes.

51. Under the provision of Section 75-52 of the North Carolina General Statutes HomEq was and is prohibited from engaging in any conduct the natural consequences of which is to oppress, harass or abuse any person.

52. The actions and conduct of HomEq were oppressive and abusive in violation of the applicable provisions of Article 2 of Chapter 75 of the North Carolina General Statutes.

53. As a result thereof, the Plaintiff avers that HomEq is liable for statutory damages in the sum of no less than \$2,000.00 for violation of N.C.G.S. Section 75-50, et seq. and the payment of legal fees and expenses.

**THIRD CLAIM FOR RELIEF
VIOLATION OF THE FAIR DEBT COLLECTION PRACTICES ACT**

54. The allegations in paragraphs 1 through 53 of this complaint are realleged and incorporated herein by this reference.

55. The Plaintiff is informed and believes and therefore alleges that the Defendant violated the FDCPA. Defendant's violations include but are not limited to engaging in any conduct the natural consequences of which is to harass, oppress, or abuse any person in connection with the collection of a debt, 15 U.S.C. Section 1692d.

56. As a result of the above violations of the FDCPA, the Defendant is liable to the Plaintiff for actual damages, statutory damages of \$1,000.00, and attorney's fees.

WHEREFORE, the Plaintiff having set forth her claims for relief against the Defendant respectfully prays of the Court as follows:

- A. That the Plaintiff have and recover against HomEq a sum in excess of \$10,000.00 in the form of actual damages;
- B. That the Plaintiff have and recover against HomEq a sum in excess of \$10,000.00 in the form of statutory damages;
- C. That the Plaintiff have and recover against the HomEq a sum in excess of \$10,000.00 in the form of punitive damages;
- D. That the Plaintiff have and recover against HomEq all reasonable legal fees and expenses incurred by her attorney;
- E. That this Court order HomEq to pay additional actual damages and statutory damages of \$2,000.00 for violation of N.C.G.S. Section 75-50, et seq.;
- F. That this Court order HomEq to pay additional actual damages and statutory damages of \$1,000.00 for violating the FDCPA pursuant to 15 U.S.C. Section 1692k;
- G. That the underlying debt to HomEq be forever canceled and discharged and the Defendant be ordered to release all liens on the residence of the debtor and mark "paid in full" on all loan documents with said documents to be delivered to the debtor with all liens duly canceled and released as an additional sanction provided for under Section 362(h) of Title 11 of the United States Code; and
- H. That the Plaintiff have such other and further relief as the Court may deem just and proper.

Date this the _____ day of _____, 2008.

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**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME: TRAMMELL JAMES LEE (Deceased) **CHAPTER 13 CASE NO. 04-41148**
TRAMMELL, REBECCA MCCRAW **OUR FILE NO. 11266**

ADDRESS: 1314 NORTH LAKEWOOD DRIVE
SHELBY, NC 28150

SSN: --- -- 8445 & --- -- 8043

DEBTORS

James Lee Trammell (Deceased) and wife,
Rebecca McCraw Trammell

Adversary Proc. No. 07-_____

Plaintiff,

versus

Nuvel Credit Company, LLC

Defendant.

**Complaint Seeking Damages in Core Adversary Proceeding
(Improper Charges Vehicle Deficiency Proof of Claim)**

Introduction

1. This is an action for actual and punitive damages filed by the debtors pursuant to Sections 105, 362, 501, 502, 503 and 506 of the Bankruptcy Code, and the Fair Debt Collection Practices Act, 15 U.S.C. Section 1692 et seq. (hereinafter referred to as "FDCPA").
2. This action is also filed to enforce the Order of Confirmation duly entered in this Chapter 13 case and to enforce and to implement other Bankruptcy Code provisions and Rules related thereto.

Jurisdiction and Venue

3. Jurisdiction is conferred on this Court pursuant to the provisions of Section 1334 of Title 28 of the United States Code in that this proceeding arises in and is related to the above-captioned Chapter 13 case under Title 11 and concerns property of the Debtors in that case.
4. This Court has both personal and subject matter jurisdiction to hear this case pursuant to Section 1334 of Title 28 of the United States Code, Section 157(b)(2) of Title 28 of the United States Code, and pursuant to the Order entered by the Judges of the United States District Court for the Western District of North Carolina on July 30, 1984 (the Referral Order), which Order was entered in accordance with the Bankruptcy Amendments and Federal Judgeship Act of 1984.

5. This Court has supplemental jurisdiction to hear all state law claims pursuant to Section 1367 of Title 28 of the United States Code.

6. This Court also has jurisdiction to hear the Fair Debt Collection Practices Act violations pursuant to Section 1692 of Title 15 of the United States Code; thus, federal subject matter jurisdiction is properly founded upon Section 1331 of Title 28 of the United States Code.

7. This matter is primarily a core proceeding and therefore the Bankruptcy Court has jurisdiction to enter a final order. However, in the event this case is determined to be a non-core proceeding then and in that event the Plaintiff consents to the entry of a final order by the Bankruptcy Judge.

8. Venue lies in this District pursuant to Section 1391(b) of Title 28 of the United States Code.

Parties

9. The Plaintiffs in this case were and are debtors under Chapter 13 of Title 11 of the United States Code in case number 04-41148 which case is presently pending before this court. The Plaintiffs are hereinafter referred to as the Plaintiffs or the debtors.

10. The Defendant, Nuvell Credit Corporation, LLC, (hereinafter "Nuvell") is a Limited Liability Company organized and existing under the laws of the State of Delaware and engaged in the business of automobile financing. Nuvell maintains a principal place of business located at 17500 Chenal Parkway, Little Rock, Arkansas 72223.

11. The Chapter 13 case of the Plaintiff was commenced by the filing of a voluntary petition with the Clerk of this Court on October 15, 2004.

12. The 341(a) meeting of creditors was held in Shelby, North Carolina on November 12, 2004.

13. The Chapter 13 plan of the Plaintiff was subsequently confirmed by order of this Court dated December 2, 2004.

14. The Chapter 13 plan as confirmed included a debt to Nuvell in the amount of \$10,527.15, which was scheduled as a claim secured by a 2003 Ford Focus with an estimated value of \$7605.00.

15. On or about June 14, 2006, Nuvell filed a Motion for Relief from Stay alleging in part that the subject vehicle was no longer necessary to the successful completion of the debtors' plan since the male debtor died and the debtors owned two other vehicles.

16. The debtors filed an Objection and Request for Hearing on June 26, 2006, due to the fact that the subject vehicle belonged to the female debtor's deceased husband and she wanted to keep it.

17. The female debtor consented to relief and a Consent Order granting Nuvell's Motion was entered by the Court on August 28, 2006.

18. The Consent Order granted relief from stay to Nuvell to repossess the 2003 Ford Focus with 120 days to file a deficiency claim.

19. The Consent Order did not provide for Nuvell's legal fees or expenses related to the Motion for Relief from Stay.

20. Nuvell filed an amended proof of claim on or about November 21, 2006 for the deficiency balance in the amount of \$5009.41.

21. The said amended proof of claim included an itemized spreadsheet indicating \$500.00 was being charged to the debtors for "attorney fees."

22. The said amended Proof of Claim also included a letter dated November 14, 2006 entitled "HOW WE CALCULATED YOUR DEFICIENCY." This letter also indicated \$500.00 was being charged to the debtors for "Attorney fees and legal expenses the law permits."

23. The amended proof of claim was signed by an agent for Nuvell identified as Tina McClain, "Bankruptcy Specialist."

24. On or about December 19, 2006, the attorney for the debtors sent a letter to the attention of Tina McClain requesting an itemized explanation for the \$500.00 in attorney fees.

25. On or about January 3, 2007, Tina McClain called the debtors' attorney and left a voice mail message stating that the \$500.00 in attorney fees was to "get relief from stay to get the car." Tina McClain stated that Nuvell charges these fees "in every case where they file a deficiency claim."

26. Nuvell is in violation of and inconsistent with the rulings of this Court in *Phelps v. Key Bank* (Case No. 97-40756); *Smith v. TMS Mortgage* (Case No. 00-31220); *In re Stark*, 242 B.R. 866 (W.D.N.C. 1999) and the Order in Aid of Case Administration entered by this Court on April 6, 2001.

27. Nuvell's violations further constitute a violation of the automatic stay, Sections 105 and 506 of Title 11, and the provisions of the FDCPA.

28. The female Plaintiff, a widow, has been damaged by the Defendant's actions in that she has been and continues to be forced to expend her time and expenses toward the defense of this contested matter.

29. The Plaintiff alleges that she has been harassed and has feared Nuvell has had some improper motive for charging the subject fees to the debtor.

First Claim for Relief (Violation of the Automatic Stay)

30. The allegations in paragraphs 1 through 29 of this complaint are realleged and incorporated herein by this reference.

31. The actions of Nuvell in imposing improper, unauthorized and unapproved fees and charges to the amended proof of claim, constitute a gross violation of the automatic stay as set forth in 11 U.S.C. Section 362(a)(3).

32. The imposition of the said unapproved fees constitutes unlawful and illegal bankruptcy fees in violation of the automatic stay and inconsistent with the decision of this court in *In re Stark*, 242 B.R. 866 (W.D.N.C. 1999).

33. As a result of the above violations of 11 U.S.C. Section 362, Nuvell is liable to the Plaintiffs for actual damages, punitive damages and legal fees.

Second Claim for Relief

(Fair Debt Collection Practices Act)

34. The allegations in paragraphs 1 through 33 of this complaint are realleged and incorporated herein by this reference.

35. Nuvell violated the FDCPA. Defendant's violations include but are not limited to engaging in any conduct the natural consequences of which is to harass, oppress, or abuse any person in connection with the collection of a debt, 15 U.S.C. Section 1692d.

36. As a result of the above violations of the FDCPA, the Defendant is liable to the Plaintiffs for actual damages, statutory damages of \$1,000.00, and attorney's fees.

**Third Claim for Relief
(Sections 105 and 506 of Title 11 of the United States Code)**

37. The allegations in paragraphs 1 through 36 of this complaint are realleged and incorporated herein by this reference.

38. The actions of Nuvell by charging post-petition legal fees and expenses as alleged herein without any prior notice or Court approval constitute willful, intentional, gross and flagrant violations of the provisions of Sections 105 and 506 of Title 11 of the United States Code and Rule 2016 of the Federal Rules of Bankruptcy Procedure which provides, in pertinent part, that: "An entity seeking interim or final compensation for services, or reimbursement of necessary expenses, from the estate shall file an application setting forth a detailed statement of (1) the services rendered, time expended and expenses incurred, and (2) the amounts requested."

39. As a result of the above violations, the Defendant is liable to the Plaintiffs for actual damages, punitive damages and legal fees.

**Fourth Claim for Relief
(Improper and Unauthorized Fees)**

40. The allegations in paragraphs 1 through 39 of this complaint are realleged and incorporated herein by this reference.

41. The actions alleged herein are acts in violation of Section 506 of Title 11 of the United States Code as the said fees charged by Nuvell were not part of the underlying agreement by and between Nuvell and the debtors, and the fees and costs are otherwise unreasonable and excessive.

42. The said fees are in violation of the ruling of this Court in Smith v. TMS Mortgage (Case No. 00-31220), Phelps v Key Bank (Case No. 97-40756) and the Order in Aid of Case Administration entered by this Court on April 6, 2001.

43. As a result of the above violation, Nuvell is liable to the Plaintiffs for actual damages, punitive damages and legal fees.

WHEREFORE, the Plaintiffs having set forth their claims for relief against the Defendant respectfully pray of the Court as follows:

- A. That the Plaintiffs have and recover against the Defendant a sum to be determined by the Court in the form of actual damages;
- B. That the Plaintiffs have and recover against the Defendant a sum to be determined

by the Court in the form of statutory damages;

- C. That the Plaintiffs have and recover against the Defendant a sum to be determined by the Court in the form of punitive damages;
- D. That the Plaintiffs have and recover against the Defendant all reasonable legal fees and expenses incurred by their attorney;
- E. That this Court order Nuvell to pay additional actual damages and statutory damages in a sum to be determined by the Court for violating the FDCPA pursuant to 15 U.S.C. Section 1692k;
- F. That the underlying debt to Nuvell be forever canceled and discharged; and
- G. That the Plaintiffs have such other and further relief as the Court may deem just and proper.

Date this the _____ day of March, 2007.



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**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME(S): CLUCAS, JOHN JOSEPH **CHAPTER 13 NO. 06-40261**
 CLUCAS, JEANNINE AMY **OUR FILE NO. 11792-B**

ADDRESS: 110 CANDLEWOOD DR.
 KINGS MOUNTAIN, NC 28086

SSN: --- -- 2207 & --- -- 9742 **DEBTOR(S).**

JOHN JOSEPH CLUCAS and wife, **ADVERSARY PROC: 06- _____**
JEANNINE AMY CLUCAS,

Plaintiffs,

versus

WASHINGTON MUTUAL BANK

Defendant.

**Complaint of the Debtor for Declaratory Judgment and for Damages
(Regarding Fee Language in Proof of Claim)**

Introduction

1. This is an action brought by the Plaintiffs for a Declaratory Judgment, injunctive and equitable relief as provided for by Rules 7001(1), 7001(7) and 7001 (9) of the Federal Rules of Bankruptcy Procedure. This is also an action for enforcement of the terms and conditions of the Plaintiffs' Chapter 13 Plan pursuant to Section 105(a) of the Bankruptcy Code.

2. The Plaintiffs are also seeking the recovery of actual and punitive damages from the Defendant pursuant to Section 362(k) of the Bankruptcy Code.

3. The Plaintiffs are also objecting to the Proof of Claim filed in this case by the Defendant pursuant to Rule 3007 of the Federal Rules of Bankruptcy Procedure and Sections 502 and 506 of the Bankruptcy Code.

Jurisdiction

4. This is a core proceeding as that term is defined by Section 157(b)(2) of Title 28 of the United States Code in that it concerns claims and matters arising out of the administration of this bankruptcy case and rights duly established under Title 11 of the United States Code and other applicable federal law.

5. This Court has both personal and subject matter jurisdiction to hear this case pursuant to Section 1334 of Title 28 of the United States Code, Section 157(b)(2) of Title 28 of the United States Code, and pursuant to the Order entered by the Judges of the United

States District Court for the Western District of North Carolina on July 30, 1984 (the Referral Order), which Order was entered in accordance with the Bankruptcy Amendments and Federal Judgeship Act of 1984.

6. Venue lies in this District pursuant to Section 1391(b) of Title 28 of the United States Code.

The Base Case and Parties

7. This case was commenced by the filing of a Chapter 13 petition with the Clerk of this court on May 10, 2006.

8. An Order for Relief under the provisions of Chapter 13 of Title 11 of the United States Code was duly entered by this Court upon the filing of the petition. This order served to invoke the provisions of Section 362(a) of Title 11 of the United States Code.

9. The 341(a) meeting of creditors was held on June 16, 2006 in Shelby, North Carolina.

10. The Defendant Washington Mutual Bank ("WAMU") is a Federally Chartered Bank with a principal office address of 9600 Oakdale Ave., Chatsworth, California 91311.

Factual Allegations

11. In the schedules filed with the petition in this case the Plaintiffs listed a debt to WAMU for the first deed of trust on their residential real estate in the amount of \$184,771.34. The debtors aver that at the time of the filing of their Chapter 13 case, they were current on their mortgage payments to WAMU.

12. The Defendant filed a Proof of Claim on June 5, 2006 in the amount of \$187,726.54 for the first deed of trust and in the amount of \$4708.40 for arrears. WAMU's arrearage claim included the April and May, 2006 mortgage payments, late charges and an alleged escrow shortage.

13. At the bottom of page two of WAMU's Proof of Claim is a statement that purports to be a disclaimer and reservation of rights, which reads as follows:

Please be advised that reasonable fees and costs for the review of the bankruptcy pleadings, review of client information, preparation and filing of the Proof of Claim will be charged to the lender/servicer for post-petition services rendered subsequent to the filing of this bankruptcy matter. Further, note that future fees and costs for bankruptcy related services are expected to accrue throughout the life of this bankruptcy case, and will be charged to the lender/servicer. If such fees and costs or charges are not paid through the bankruptcy, the lender reserves the right, at the lender's discretion, to seek future reimbursement for the fees, costs, and charges related to services rendered and expenses incurred pursuant to the terms provided for in the underlying security instrument, the bankruptcy code and other applicable law.

14. WAMU, through its Proof of Claim, is attempting circumvent the rulings of this Court and to arbitrarily charge legal fees and expenses to the Plaintiffs' mortgage loan when and if they deem the same to be necessary and without any prior notice to the Plaintiffs or prior approval by this Court.

15. WAMU is not permitted to charge such fees unless applied for by proper motion and notice, and heard and approved by this Court.

16. Rule 2016 of the Federal Rules of Bankruptcy Procedure provides, in pertinent part, that: "An entity seeking interim or final compensation for services, or reimbursement of necessary expenses, from the estate shall file an application setting forth a detailed statement of (1) the services rendered, time expended and expenses incurred, and (2) the amounts requested."

17. The local attorneys for WAMU are fully aware of the Local Orders of this Court regarding the inability to charge legal fees for the preparation and filing of a proof claim and of the necessity for filing a Rule 2016 motion for the approval of all post-petition legal and professional fees including property inspection, property preservations, and broker price opinions. In addition, the local attorneys for WAMU are also fully aware of the requirements of Section 506 of the Bankruptcy Code regarding the substantive requirements for a secured creditor establishing the right to the recovery of pre-confirmation legal fees and expenses in any Chapter 13 proceeding.

18. WAMU is attempting by fraud, deceit and abuse of the bankruptcy process to charge legal fees and expenses to the Plaintiffs that are unlawful, illegal and otherwise void.

19. The Plaintiffs believe and therefore allege that the actions of WAMU in this case constitute an unlawful attempt to collect a debt from the Plaintiffs in violation of the automatic stay and in a manner totally inconsistent with the Chapter 13 Plan, the Local Rules of this Court, the Administrative Orders of this Court, and countless published decisions entered by this Court for a period of more than 10 years.

20. The Plaintiffs are informed and believe and therefore allege that WAMU and the attorneys for WAMU are fully aware of the Rules and Decisions of this Court and have intentionally implemented the Proof of Claim fee procedures as a means and as a device to circumvent and evade those Rules and to perpetuate a fraud upon this Court, the Chapter 13 Trustees, the scheduled creditors in this case, and the Plaintiffs in this proceeding.

21. The Plaintiffs allege upon information and belief that the Defendant has acted in conspiracy with the local law firms and regional law firms and with other unknown parties to create and implement an illegal scheme, device and plan devised to avoid the published Rules, Orders and Decisions of this Court. The Plaintiffs also allege that this conspiracy has been executed by filing the Proof of Claim in this case by way of wire and mail fraud.

22. The Plaintiffs seek a Declaratory Judgment on the facts of this case and request the Court strike the disclaimer and reservation of rights language from the Proof of Claim, to enjoin the Defendant from engaging in the conduct complained of herein, to award damages and legal fees to the Plaintiffs, including punitive damages, and for such other and further relief as to the Court may seem just and proper.

WHEREFORE, the Plaintiffs respectfully pray of the Court as follows:

A. That pursuant to 28 U.S.C. 2201(a), the Court render a declaratory judgment declaring that the disclaimer and reservation of rights language be stricken from Defendant's Proof of Claim and enjoin the Defendant from using any such language in the future;

B. That the Court order the Defendant to produce for inspection and review all

similar Proof of Claims filed in any case in the Western District of North Carolina and to order any such similar language to be stricken and to enjoin the collection of such fees in all of those cases;

C. That Defendant be required to file any amended, modified or substitute claims in this case and in every other case in the Western District of North Carolina where such language has been included in or added to the Proof of Claim;

D. That the attorney for the Plaintiffs be awarded reasonable legal fees computed at his standard hourly rate of \$325.00 and at the hourly rate of \$95.00 for his legal assistants, plus expenses;

E. That the Plaintiffs recover their costs and expenses from the Defendant, including actual and punitive damages; and

F. That the Plaintiffs have such other and further relief as to the Court may seem just and proper.

Dated this the 19th day of June, 2006

A handwritten signature in black ink, appearing to read "O. Max Gardner III", with a stylized flourish at the end.

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**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME:

**Chapter 13 No.
Our File No.**

ADDRESS:

SSN:

Debtors.

Adv. Proc. No. _____

Plaintiffs,

versus

Defendant.

**Complaint Seeking Damages in Non-Core Adversary Proceeding
(Objection to Proof of Claim – Statute of Limitations)**

Introduction

1. This is an action for actual and punitive damages filed by the debtor pursuant to Sections 105, and 501 of the Bankruptcy Code, and Rules 3001(c) and 3001(e) of the Bankruptcy Rules.

2. This action is also filed to enforce the applicable Federal Rules of Bankruptcy Procedure to the extent the same apply to this case.

Jurisdiction and Venue

3. Jurisdiction is conferred on this Court pursuant to the provisions of Section 1334 of Title 28 of the United States Code in that this proceeding arises in and is related to the above-captioned Chapter 13 case under Title 11 and concerns property of the debtor in that case.

4. This Court has both personal and subject matter jurisdiction to hear this case pursuant to Section 1334 of Title 28 of the United States Code, Section 157(b)(2) of Title 28 of the United States Code.

5. This matter is a core proceeding and therefore the Bankruptcy Court has jurisdiction to enter a final order.

6. Venue lies in this District pursuant to Section 1391(b) of Title 28 of the United States Code.

Parties

7. The Plaintiff in this case is a debtor under Chapter 13 of Title 11 of the United States Code in case number _____, which case is presently pending before this court.

8. The Defendant, Asset Acceptance, LLC (Asset), is upon information and belief, a corporation allowed to engage in business in the Commonwealth of Pennsylvania, with its principal place of business located at 28405 Van Dyke Ave., Warren, MI 48093. The Plaintiff is informed and believes and therefore alleges that Asset is neither registered as a foreign corporation or as a debt collection agent in the State of North Carolina.

Factual Allegations

9. The debtor, _____, does not deny she opened an Account with Target National Bank (Target) several years ago. However, she further asserts that she has not utilized her account at Target since at least September of 1999, nor has any payment been made on the account since that time.

10. The Chapter 13 case of the Plaintiff was commenced by the filing of a petition with the Clerk of this Court on _____.

11. Debtor did not list Asset or Target her Schedules for the account number listed in this proof of claim, because she had to reason to believe that she owed this debt. This position was verified by the absence of any trade-lines in favor of Target or Asset on any of her pre-petition consumer credit reports. The only account listed for Asset on Debtor's petition is an account for which Debtor received a collection letter just prior to the bankruptcy filing for a debt listed as General Electric Money Bank on a Lowe's charge account, with an Asset account number of _____.

12. The 341(a) meeting of creditors was held in _____ on _____.

13. The Chapter 13 plan of the Plaintiff is scheduled for confirmation on _____.

14. Asset, through its Manager of the Bankruptcy and Probate Department, P.L. Conaton, filed a sworn proof of claim with US Bankruptcy Court on or about April 25, 2007. The sworn proof of claim filed by Asset is identified as claim number 1001 on the records of the Chapter 13 Trustee. A true and correct copy of the proof of claim is attached hereto as Exhibit "A". Claim number 1001 reflects a total alleged outstanding liability in the amount \$783.24. The proof of claim states the debt was incurred on May 27, 1999. A single untitled computer-generated document is attached to the Proof of Claim. The Proof of Claim reflects that Asset is the assignee of the claim from Target. No document is attached reflecting the alleged assignment between Target and Asset. No payment history or written credit card agreement between the debtor and Target or Asset is provided. The claim is in fact devoid of any of the required supporting documentation mandated by Rule 3001 of the Bankruptcy Rules.

15. The proof of claim, as filed, alleges a last payment date on the account as May 27, 1999. Pursuant to NCGS § _____, the statute of limitations for collecting this type of debt is four years from the last payment date. Accordingly, the statute for collecting this debt expired in 2003.

16. The debtor alleges that the proof of claim, as filed by Asset, is time-barred, is false and fraudulent to the extent that the Debtor does not owe the debt indicated in the claim and has not been filed in accordance with the Official Forms, the Bankruptcy Rules and the Bankruptcy Code.

17. Asset has filed two additional proofs of claim in the instant case, both of which also show last payment dates well past the statute for collecting the debts under Pennsylvania.

FIRST CLAIM FOR RELIEF FILING A FALSE PROOF OF CLAIM

18. The allegations in paragraphs 1 through 17 of this complaint are re-alleged and incorporated herein by this reference.

19. The Plaintiff is informed and believes and therefore alleges that the sworn proof of claim filed by Asset in this case is false, fraudulent, and is not a valid debt of the Debtor.

20. The Plaintiff is informed and believes and therefore alleges that Asset undertook no meaningful review procedures to determine if this claim was disqualified for collection before the preparation and filing of the said claim with this court.

21. As a result of the above acts and omissions, Asset is liable to the Plaintiff for actual damages and legal fees in an amount to be determined by the Court under Section 105 of Title 11.

22. The Plaintiff also alleges that the acts of Asset in attempting to collect a time-barred debt are in violation of the Fair Debt Collections Practices Act, 15 USC §1692 and of the North Carolina Unfair and Deceptive Act and Practices Laws, G.S. Section 75-50 et seq. The Plaintiff alleges that the Court should take judicial notice of these other statutory violations in connection with the sanctions imposed herein.

23. The Plaintiff also alleges that Asset has engaged in a course of conduct in which it routinely files claims for time-barred debts in an effort to collect unenforceable debt from debtors in bankruptcy. The Plaintiff alleges that the court should consider these actions taken by Asset in connection with the sanctions imposed.

SECOND CLAIM FOR RELIEF VIOLATION OF RULE 3001

24. The allegations in paragraphs 1 through 23 of this complaint are re-alleged and incorporated herein by this reference.

25. The Plaintiff alleges upon information and belief that Asset has failed to comply with the mandatory provisions of Rule 3001 in filing the proof of claim in this case without any written evidence of the underlying indebtedness without any proof of the proper assignment of the claim as required by the holding of this Court in *Rupp v Sears, Citibank and Resurgent Capital*, Case No 03-41470 WDNC by Order filed on or about March 9, 2006.

26. The Plaintiff further alleges that Asset intentionally failed to implement adequate bankruptcy controls which caused the unlawful and improper actions as alleged herein, which have caused the Plaintiff and her attorney to expend a significant amount of time and expense in attempting to resolve the issues at hand.

27. As a result, Asset is liable to the Plaintiff for monetary damages, punitive damages, cost, and legal fees as may be determined by the court under Section 105 of Title 11.

WHEREFORE, the Plaintiff having set forth her claims for relief against the Defendant respectfully prays of the Court as follows:

- A. That the Plaintiff shall have and recover against Asset actual damages that in the discretion of this Court is deemed appropriate;
- B. That the Plaintiff shall have and recover against Asset punitive damages that in the discretion of this Court are deemed appropriated.
- C. That the Plaintiff shall and recover against Asset all reasonable legal fees and expenses incurred by her attorney.
- D. That the underlying alleged debt to Asset if forever canceled and discharged and the Defenant is ordered to deliever to the debtor a proper release form;
- E. That Proof of Claim number 1, as filed by Asset, be stricken, with prejudice; and
- F. That the Plaintiff shall have such other and further relief as the Court may deem just and proper.

Date this the _____ day of September, 2007.

O. Max Gardner III
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**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME:

**CHAPTER 13 CASE NO.
OUR FILE NO.**

ADDRESS:

SSN:

DEBTOR

Adversary Proc. No. _____

Plaintiff

versus

Defendant

**COMPLAINT SEEKING DAMAGES IN CORE ADVERSARY PROCEEDING
(OBJECTION TO PROOF OF CLAIM – NO SUPPORTING DOCUMENTATION)**

Introduction

1. This is an action for actual and punitive damages filed by the Debtor pursuant to Sections 105(a), 362(a), 362(k) of the Bankruptcy Code, Rules 3001(c) and 3007(b) of the Rules of Bankruptcy Procedure, the Fair Debt Collection Practices Act, 15 U.S.C. Section 1692 et seq. ("FDCPA"), and the North Carolina Unfair and Deceptive Act and Practices Laws, G.S. Section 75-50 et seq., ("UDAP").

2. This action is also filed to enforce the Order of Confirmation duly entered in this Chapter 13 case and to enforce and to implement other Bankruptcy Code provisions and Rules related thereto.

Jurisdiction and Venue

3. Jurisdiction is conferred on this Court pursuant to the provisions of Section 1334 of Title 28 of the United States Code in that this proceeding arises in and is related to the above-captioned Chapter 13 case under Title 11 and concerns property of the Debtor in that case.

4. This Court has both personal and subject matter jurisdiction to hear this case pursuant to Section 1334 of Title 28 of the United States Code, Section 157(b)(2) of Title 28 of the United States Code, and pursuant to the Order entered by the Judges of the United States District Court for the Western District of North Carolina on July 30, 1984 (the Referral Order), which Order was entered in accordance with the Bankruptcy Amendments and Federal Judgeship Act of 1984.

5. This Court has supplemental jurisdiction to hear all state law claims pursuant to Section 1367 of Title 28 of the United States Code and Section 502(b)(1) of the Bankruptcy Code.

6. This Court also has jurisdiction to hear the Fair Debt Collection Practices Act violations

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pursuant to Section 1692 of Title 15 of the United States Code; thus, federal subject matter jurisdiction is properly founded upon Section 1331 of Title 28 of the United States Code.

7. This matter is primarily a core proceeding and therefore the Bankruptcy Court has jurisdiction to enter a final order. However, in the event this case is determined to be a non-core proceeding then and in that event the Plaintiff consents to the entry of a final order by the Bankruptcy Judge.

8. Venue lies in this District pursuant to Section 1391(b) of Title 28 of the United States Code.

Parties

9. The Plaintiff in this case was and is Debtor under Chapter 13 of Title 11 of the United States Code in case number _____, which case is presently pending before this Court. The Plaintiff is hereinafter referred to as the Plaintiff or the Debtor.

10. The Defendant, _____, (hereinafter "Creditor" or "Defendant") is a _____ corporation engaged in the business of _____ with its principal place of business located at _____.

11. The Chapter 13 case of the Plaintiff was commenced by the filing of a voluntary petition with the Clerk of this Court on _____. On or about _____, the Bankruptcy Noticing Center notified Defendant of Plaintiff's bankruptcy case.

12. The §341(a) meeting of creditors was held in Shelby, North Carolina on _____.

13. The Chapter 13 plan of the Plaintiff was subsequently confirmed by order of this Court dated _____.

14. The Chapter 13 plan as confirmed included a debt to Creditor in the amount of \$_____, which was scheduled as an unsecured claim.

15. The Defendant had notice of the bankruptcy filing and of the Order of Confirmation entered in this case.

16. The claim of Creditor is identified on the records of the Trustee as claim number 0023.

17. On or about _____, Creditor filed a sworn Proof of Claim in the amount of \$_____ for "money loaned". A true and correct copy of the Proof of Claim of Creditor is attached hereto as Exhibit "A" and is incorporated herein by this reference (hereinafter "Proof of Claim").

18. The sworn Proof of Claim was not supported by any written documents, notes, credit applications, account statements, or any other type of written or printed document as required by Rule 3001(c).

19. Rule 3001(c) of the Bankruptcy Rules provides that when "a claim is based on a writing" the "original or a **duplicate shall be filed with the proof of claim.**" The claim filed by Creditor in this case is fatally defective for failure to comply with this mandatory Rule.

20. Creditor, through its Proof of Claim, is attempting to circumvent the Rules of this Court by arbitrarily filing a sworn document without the required supporting evidence.

21. Creditor is not permitted to unilaterally file an unsupported claim based on the decision
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of this court in Richard Rupp v Citibank (Case Number 03-41470, W.D.N.C.).

22. The Debtor avers that Creditor is attempting by fraud, deceit and abuse of the bankruptcy process to receive disbursements from the property of the debtor's estate in bankruptcy in order to increase its profits.

23. The Debtor believes and therefore alleges that the actions of Creditor in this case constitute an unlawful attempt to collect a debt from the Debtor in violation of the automatic stay and in a manner totally inconsistent with the Chapter 13 Plan, the Bankruptcy Code and the Rules of Bankruptcy Procedure.

24. The Debtor is informed and believes and therefore alleges that Creditor and the attorneys for Creditor are fully aware of the Rules of this Court and have intentionally filed a Proof of Claim lacking the required supporting documentation to prove its claim as means and as a device to circumvent and evade those Rules and to perpetuate a fraud upon this Court, the Chapter 13 Trustee, the scheduled creditors in this case, and the Debtor in this proceeding.

25. The Debtor further avers that Proof of Claim filed by Creditor is obviously inflated in an attempt to receive more than it is legally entitled to through the bankruptcy proceedings.

26. The Plaintiff has been damaged by the Defendant's actions in that he has been and continues to be forced to expend his time and expenses toward the defense of this contested matter to protect his rights. The Plaintiff alleges that the actions of Creditor constitute harassment.

First Claim for Relief (Violation of the Automatic Stay)

27. The allegations in paragraphs 1 through 26 of this complaint are realleged and incorporated herein by this reference.

28. The actions of Creditor in filing an improper Proof of Claim in this case, constitute a gross violation of the automatic stay as set forth in 11 U.S.C. Section 362(a)(3).

29. As a result of the above violations of 11 U.S.C. Section 362, Creditor is liable to the Plaintiff for actual damages, punitive damages and legal fees.

Second Claim for Relief (Federal Rules of Bankruptcy Procedure Rule 3001(c))

30. The allegations in paragraphs 1 through 29 of this complaint are realleged and incorporated herein by this reference.

31. Rule 3001(c) of the Bankruptcy Rules provides that when "a claim is based on a writing" the "original or a **duplicate shall be filed with the proof of claim.**" The claim filed by Creditor in this case is fatally defective for failure to comply with this mandatory Rule.

32. As a result of the Defendant's violation of federal rules of procedure as alleged herein, the Defendant is liable to the Plaintiff for monetary damages and legal fees.

Third Claim for Relief (North Carolina Unfair and Deceptive Acts and Practices)

33. The allegations in paragraphs 1 through 32 of this complaint are realleged and incorporated herein by this reference.

34. The Plaintiff is "consumer" as that term is defined by Article 2 of Chapter 75 of the North Carolina General Statutes.

35. The Plaintiff's relationship with Creditor arose out of a "consumer debt" as that term is defined in Article 2 of Chapter 75 of the North Carolina General Statutes.

36. Creditor was and is a "debt collector" as that term is defined by applicable provisions of Article 2 of Chapter 75 of the North Carolina General Statutes.

37. Under the provision of Section 75-52 of the North Carolina General Statutes Creditor was and is prohibited from engaging in any conduct the natural consequences of which is to oppress, harass or abuse any person.

38. The actions and conduct of Creditor were oppressive and abusive in violation of the applicable provisions of Article 2 of Chapter 75 of the North Carolina General Statutes.

39. As a result thereof, Creditor is liable for statutory damages in the sum of no less than \$2,000.00 for violation of N.C.G.S. Section 75-50, et seq. and the payment of legal fees and expenses.

**Fourth Claim for Relief
(Fair Debt Collection Practices Act)**

40. The allegations in paragraphs 1 through 39 of this complaint are realleged and incorporated herein by this reference.

41. Creditor violated the FDCPA. Defendant's violations include but are not limited to engaging in any conduct the natural consequences of which is to harass, oppress, or abuse any person in connection with the collection of a debt, 15 U.S.C. Section 1692d.

42. As a result of the above violations of the FDCPA, the Defendant is liable to the Plaintiff for actual damages, statutory damages of \$1,000.00, and attorney's fees.

WHEREFORE, the Plaintiff having set forth his claims for relief against the Defendant respectfully prays of the Court as follows:

- A. That Defendant be required to file an amended, modified or substitute claim in this case supported by documentation;
- B. That this Court order Creditor to pay actual and punitive damages in a sum to be determined by the Court;
- C. That this Court order Creditor to pay additional actual damages and statutory damages in a sum to be determined by the Court for violation of N.C.G.S. Section 75-50, et seq.;
- D. That this Court order Creditor to pay additional actual damages and statutory damages in a sum to be determined by the Court for violating the FDCPA pursuant to 15 U.S.C. Section 1692k;
- E. That the attorney for the Plaintiff be awarded an additional non-base legal fee of \$ _____ for filing this complaint;
- F. That the Plaintiff have such other and further relief as the Court may deem just and proper.

Dated this the _____ day of _____, 2008.

A handwritten signature in black ink, appearing to read "O. Max Gardner III", with a stylized flourish at the end.

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RULE 3001. Proof of Claim

Effective Date December 1, 2011

* * * * *

(c) SUPPORTING INFORMATION.

(1) Claim Based on a Writing. When a claim, or an interest in property of the debtor securing the claim, is based on a writing, the original or a duplicate shall be filed with the proof of claim. If the writing has been lost or destroyed, a statement of the circumstances of the loss or destruction shall be filed with the claim.

(2) Additional Statements Required.

(A) If, in addition to its principal amount, a claim includes interest, fees, expenses or other charges incurred prior to the date of the petition, an itemized statement of the interest, fees, expenses, or charges shall be filed with the proof of claim.

(B) If a security interest is claimed in property of the debtor, the proof of claim shall include a statement of the amount necessary to cure any default as of the date of the petition.

(C) If a security interest is claimed in property that is the debtor's principal residence and an escrow account has been established in connection with the claim, the proof of claim shall be accompanied by an escrow account statement prepared as of the date of the filing of the petition, in a form consistent with applicable nonbankruptcy law.

(3) *Failure to Provide Supporting Information.* If the holder of a claim fails to provide the information required in subdivision (c) of this rule, the holder may not present that information, in any form, as evidence in any hearing or submission in any contested matter or adversary proceeding in the case, unless the failure was substantially justified or is harmless. In addition to or instead of this sanction, the court, after notice and hearing, may award other appropriate relief, including reasonable expenses and attorney's fees caused by the failure.

* * * * *

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME:

**CHAPTER 13 CASE NO.
OUR FILE NO.**

ADDRESS:

SSN:

DEBTOR

Adversary Proc. No. _____

Plaintiff

versus

Defendant

**COMPLAINT SEEKING DAMAGES IN CORE ADVERSARY PROCEEDING
(Objection to Proof of Claim – Not Timely Filed)**

Introduction

1. This is an action for actual and punitive damages filed by the Debtor pursuant to Section 362 of the Bankruptcy Code, Rule 3007(b) of the Rules of Bankruptcy Procedure and for violation of an Order entered in the Plaintiff's bankruptcy case granting a release to Creditor. This is also an action for damages pursuant to the Fair Debt Collection Practices Act, 15 U.S.C. Section 1692 et seq. ("FDCPA"), and the North Carolina Unfair and Deceptive Act and Practices Laws, G.S. Section 75-50 et seq., ("UDAP").

2. This action is also filed to enforce the Order establish the Bar Date for filing any deficiency claim pursuant to Section 105(a) of the Bankruptcy Code.

Jurisdiction and Venue

3. Jurisdiction is conferred on this Court pursuant to the provisions of Section 1334 of Title 28 of the United States Code in that this proceeding arises in and is related to the above-captioned Chapter 13 case under Title 11 and concerns property of the Debtor in that case.

4. This Court has both personal and subject matter jurisdiction to hear this case pursuant to Section 1334 of Title 28 of the United States Code, Section 157(b)(2) of Title 28 of the United States Code, and pursuant to the Order entered by the Judges of the United States District Court for the Western District of North Carolina on July 30, 1984 (the Referral Order), which Order was entered in accordance with the Bankruptcy Amendments and Federal Judgeship Act of 1984.

5. This Court has supplemental jurisdiction to hear all state law claims pursuant to Section 1367 of Title 28 of the United States Code.

6. This Court also has jurisdiction to hear the Fair Debt Collection Practices Act violations pursuant to Section 1692 of Title 15 of the United States Code; thus, federal subject matter jurisdiction is properly founded upon Section 1331 of Title 28 of the United States Code.

7. This matter is primarily a core proceeding and therefore the Bankruptcy Court has jurisdiction to enter a final order. However, in the event this case is determined to be a non-core proceeding then and in that event the Plaintiff consents to the entry of a final order by the Bankruptcy Judge.

8. Venue lies in this District pursuant to Section 1391(b) of Title 28 of the United States Code.

Parties

9. The Plaintiff in this case was and is Debtor under Chapter 13 of Title 11 of the United States Code in case number _____, which case is presently pending before this Court. The Plaintiff is hereinafter referred to as the Plaintiff or the Debtor.

10. The Defendant, Creditor (hereinafter "Creditor" or "Defendant") is a _____ corporation engaged in the business of _____ with its principal place of business located at _____.

11. The Chapter 13 case of the Plaintiff was commenced by the filing of a voluntary petition with the Clerk of this Court on _____. On or about _____, the Bankruptcy Noticing Center notified Defendant of Plaintiff's bankruptcy case.

12. The §341(a) meeting of creditors was held in Shelby, North Carolina on _____.

13. The Chapter 13 plan of the Plaintiff was subsequently confirmed by order of this Court dated _____.

14. The Chapter 13 plan as confirmed included a debt to Creditor in the amount of \$_____, which was scheduled as a claim secured by a 2001 Dodge Ram 1500 Truck.

15. The Defendant had notice of the bankruptcy filing and of the Order of Confirmation entered in this case.

16. The claim of Creditor is identified on the records of the Trustee as claim number _____.

17. On or about _____, Creditor was granted relief from stay to repossess the debtor's 2001 Dodge Ram 1500 Truck, by an Order that was entered by this Court on _____. The Order provided for 30 days for Creditor to file a deficiency claim.

18. Creditor filed a Proof of Claim for its deficiency claim in the amount of \$ _____ on or about _____, nearly two years following the entry of the order.

19. The said Proof of Claim should be stricken on the basis that the deficiency claim was not timely filed, is barred by the 30 day time period established in the Order and is therefore improper.

20. The Debtor avers that Creditor is attempting by fraud, deceit and abuse of the bankruptcy process to receive disbursements from the property of the debtor's estate in bankruptcy in order to increase its profits.

21. The Debtor believes and therefore alleges that the actions of Creditor in this case constitute an unlawful attempt to collect a debt from the Debtor in violation of the automatic stay and

in a manner totally inconsistent with the Chapter 13 Plan and the Order of this court.

22. The Plaintiff has been damaged by the Defendant's actions in that he has been and continues to be forced to expend his time and expenses toward the defense of this contested matter to protect his rights. The Plaintiff alleges that the actions of Creditor constitute harassment.

**First Claim for Relief
(Violation of the Automatic Stay)**

23. The allegations in paragraphs 1 through 22 of this complaint are realleged and incorporated herein by this reference.

24. The actions of Creditor in filing an untimely and improper Proof of Claim in this case, constitute a gross violation of the automatic stay as set forth in 11 U.S.C. Section 362(a)(3).

25. As a result of the above violations of 11 U.S.C. Section 362, Creditor is liable to the Plaintiff for actual damages, punitive damages and legal fees.

**Second Claim for Relief
(Contempt of Court Order)**

26. The allegations in paragraphs 1 through 25 are realleged and incorporated herein by this reference.

27. The conduct of the Defendant in attempting to file a purported deficiency claim nearly two years out of time constitutes an action in contempt and in violation of the Order Granting Relief from Stay to the Creditor and entered by this Court on or about _____.

28. The Plaintiff alleges that this Court has authority under Section 105(a) of Title 11 of the United States Code to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title."

29. The Plaintiff alleges that this Court should impose sanctions against the Defendant for attempting to file an untimely and improper claim for a purported deficiency.

**Third Claim for Relief
(North Carolina Unfair and Deceptive Acts and Practices)**

30. The allegations in paragraphs 1 through 29 of this complaint are realleged and incorporated herein by this reference.

31. The Plaintiff is "consumer" as that term is defined by Section 75-50(1) of the North Carolina General Statutes.

32. The Plaintiff's relationship with Creditor arose out of a "consumer debt" as that term is defined by Section 75-50(2) of the North Carolina General Statutes.

33. Creditor was and is a "debt collector" as that term is defined by applicable provisions of Article 2 of Chapter 75 of the North Carolina General Statutes.

34. Under the provision of Section 75-51(8) of the North Carolina General Statutes, the Creditor was and is prohibited from engaging in any conduct to take action that is otherwise not permitted by applicable law. The Creditor by filing the deficiency claim in this case after the bar date has engaged in such conduct.

35. The actions and conduct of Creditor were oppressive and abusive in violation of the

applicable provisions of Section 75-50 of the North Carolina General Statutes.

36. As a result thereof, Creditor is liable for statutory damages in the sum of no less than \$2,000.00 for each violation of the statute and the payment of legal fees and expenses, as provided by Section 75-56 of the North Carolina General Statutes.

**Fourth Claim for Relief
(Fair Debt Collection Practices Act)**

37. The allegations in paragraphs 1 through 36 of this complaint are realleged and incorporated herein by this reference.

38. The Plaintiff is a "consumer" as that term is defined by Section 1692a(3) of the FDCPA.

39. The Defendant in this case is as a "Debt Collector" as that term is defined by Section 1692a(6) of the FDCPA.

40. The filing of the Amended Proof of Claim in this case constituted a "communication" to collect a debt from the Plaintiff as that term has been defined by the FDCPA.

41. Creditor violated the FDCPA. Defendant's violations include but are not limited to the filing of the Amended Proof of Claim after the bar date for filing such claims as ordered by this court. Such action constituted the false representation as to the character, amount and legal status of the debt in violation of Section 1692(e)(2)(A) of the FDCPA.

42. The Plaintiff also alleges that the attempt to collect the deficiency claim after the claims bar date constitutes a violation of Section 1692f(1) of the FDCPA.

43. As a result of the above violations of the FDCPA, the Defendant is liable to the Plaintiff for actual damages, statutory damages of \$1,000.00, and attorney's fees, as provided for by Section 1692k of the FDCPA.

WHEREFORE, the Plaintiff having set forth his claims for relief against the Defendant respectfully prays of the Court as follows:

- A. That Defendant be precluded from filing an amended, modified or substitute claim in this case and that the Amended Claim for a purported deficiency be stricken;
- B. That this Court order Creditor to pay actual and punitive damages in a sum to be determined by the Court;
- C. That this Court order Creditor to pay additional actual damages and statutory damages in a sum to be determined by the Court for violation of N.C.G.S. Section 75-50, et seq.;
- D. That this Court order Creditor to pay additional actual damages and statutory damages in a sum to be determined by the Court for violating the FDCPA pursuant to 15 U.S.C. Section 1692k;
- E. That the attorney for the Plaintiff be awarded an additional non-base legal fee of \$ _____ for filing this complaint;
- F. That the Plaintiffs have such other and further relief as the Court may deem just and proper.

Dated this the _____ day of _____, 2008.



O. Max Gardner III
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**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME:

**CHAPTER 13 CASE NO.
OUR FILE NO.**

ADDRESS:

SSN:

DEBTOR

Plaintiff

Adversary Proc. No. _____

versus

Defendant

**COMPLAINT SEEKING DAMAGES IN CORE ADVERSARY PROCEEDING
(Objection to Proof of Claim – Fraudulent Claim)**

Introduction

1. This is an action for actual and punitive damages filed by the Debtor pursuant to Sections 105(a), 362(a), 362(k) of the Bankruptcy Code, Rule 3007(b) of the Rules of Bankruptcy Procedure, the Fair Debt Collection Practices Act, 15 U.S.C. Section 1692 et seq. ("FDCPA"), and the North Carolina Unfair and Deceptive Act and Practices Laws, G.S. Section 75-50 et seq., ("UDAP").

2. This action is also filed to enforce the Order of Confirmation duly entered in this Chapter 13 case and to enforce and to implement other Bankruptcy Code provisions and Rules related thereto.

Jurisdiction and Venue

3. Jurisdiction is conferred on this Court pursuant to the provisions of Section 1334 of Title 28 of the United States Code in that this proceeding arises in and is related to the above-captioned Chapter 13 case under Title 11 and concerns property of the Debtor in that case.

4. This Court has both personal and subject matter jurisdiction to hear this case pursuant to Section 1334 of Title 28 of the United States Code, Section 157(b)(2) of Title 28 of the United States Code, and pursuant to the Order entered by the Judges of the United States District Court for the Western District of North Carolina on July 30, 1984 (the Referral Order), which Order was entered in accordance with the Bankruptcy Amendments and Federal Judgeship Act of 1984.

5. This Court has supplemental jurisdiction to hear all state law claims pursuant to Section 1367 of Title 28 of the United States Code and Section 502(b)(1) of the Bankruptcy Code.

6. This Court also has jurisdiction to hear the Fair Debt Collection Practices Act violations pursuant to Section 1692 of Title 15 of the United States Code; thus, federal subject matter jurisdiction is properly founded upon Section 1331 of Title 28 of the United States Code.

7. This matter is primarily a core proceeding and therefore the Bankruptcy Court has jurisdiction to enter a final order. However, in the event this case is determined to be a non-core

proceeding then and in that event the Plaintiff consents to the entry of a final order by the Bankruptcy Judge.

8. Venue lies in this District pursuant to Section 1391(b) of Title 28 of the United States Code.

Parties

9. The Plaintiff in this case was and is Debtor under Chapter 13 of Title 11 of the United States Code in case number _____, which case is presently pending before this Court. The Plaintiff is hereinafter referred to as the Plaintiff or the Debtor.

10. The Defendant, _____, (hereinafter "Creditor" or "Defendant") is a _____ corporation engaged in the business of _____ with its principal place of business located at _____.

11. The Chapter 13 case of the Plaintiff was commenced by the filing of a voluntary petition with the Clerk of this Court on _____. On or about _____, the Bankruptcy Noticing Center notified Defendant of Plaintiff's bankruptcy case.

12. The §341(a) meeting of creditors was held in Shelby, North Carolina on _____.

13. The Chapter 13 plan of the Plaintiff was subsequently confirmed by order of this Court dated _____.

14. Creditor, Inc. (hereinafter "Creditor") filed a proof of claim reflecting the debtors owe Creditor the sum of \$23,790.13. Attached to the proof of claim were documents purporting to be Arrearages Owed, a Promissory Note, Agreed Rate Reduction Rider and a Deed of Trust for the Proof Of Claim. The account summary itemized the principal owed at \$23,790.13 including arrearage of \$2,997.27.

15. The debtors aver that Creditor is not a secured creditor to their real property.

16. The debtors also aver that Creditor has presented a false and fraudulent proof of claim where the creditor is claiming a mortgage debt for persons other than the debtors. Creditor has knowledge of the correct debtor information since they presented a Proof of Claim for a debt allegedly owed by the debtors. However a cursory review of the files would show that Creditor has identified the names of the debtors alleged to owe the debt as Frank and Mary Lawrence, not the debtors herein. Furthermore, Creditor has identified a Social Security number on the Proof of Claim presented for \$23,790.13 which belongs to someone else, not either of the debtors herein.

17. The Debtor avers that Creditor is attempting by fraud, deceit and abuse of the bankruptcy process to receive disbursements from the property of the debtor's estate in bankruptcy in order to increase its profits.

18. The Debtor believes and therefore alleges that the actions of Creditor in this case constitute an unlawful attempt to collect a debt from the Debtor in violation of the automatic stay and in a manner totally inconsistent with the Chapter 13 Plan, the Bankruptcy Code and the Rules of Bankruptcy Procedure.

19. The Debtor is informed and believes and therefore alleges that Creditor has intentionally filed a false and fraudulent Proof of Claim as a device to perpetuate a fraud upon this Court, the Chapter 13 Trustee, the scheduled creditors in this case, and the Debtor in this proceeding.

20. The Plaintiff has been damaged by the Defendant's actions in that he has been and continues to be forced to expend his time and expenses toward the defense of this contested matter

to protect his rights. The Plaintiff alleges that the actions of Creditor constitute harassment.

**First Claim for Relief
(Violation of the Automatic Stay)**

21. The allegations in paragraphs 1 through 20 of this complaint are realleged and incorporated herein by this reference.

22. The actions of Creditor in filing an improper Proof of Claim in this case, constitute a gross violation of the automatic stay as set forth in 11 U.S.C. Section 362(a)(3).

23. As a result of the above violations of 11 U.S.C. Section 362, Creditor is liable to the Plaintiff for actual damages, punitive damages and legal fees.

**Second Claim for Relief
(North Carolina Unfair and Deceptive Acts and Practices)**

24. The allegations in paragraphs 1 through 23 of this complaint are realleged and incorporated herein by this reference.

25. The Plaintiff is "consumer" as that term is defined by Article 2 of Chapter 75 of the North Carolina General Statutes.

26. The Plaintiff's relationship with Creditor arose out of a "consumer debt" as that term is defined in Article 2 of Chapter 75 of the North Carolina General Statutes.

27. Creditor was and is a "debt collector" as that term is defined by applicable provisions of Article 2 of Chapter 75 of the North Carolina General Statutes.

28. Under the provision of Section 75-52 of the North Carolina General Statutes Creditor was and is prohibited from engaging in any conduct the natural consequences of which is to oppress, harass or abuse any person.

29. The actions and conduct of Creditor were oppressive and abusive in violation of the applicable provisions of Article 2 of Chapter 75 of the North Carolina General Statutes.

30. As a result thereof, Creditor is liable for statutory damages in the sum of no less than \$2,000.00 for violation of N.C.G.S. Section 75-50, et seq. and the payment of legal fees and expenses.

**Third Claim for Relief
(Fair Debt Collection Practices Act)**

31. The allegations in paragraphs 1 through 30 of this complaint are realleged and incorporated herein by this reference.

32. Creditor violated the FDCPA. Defendant's violations include but are not limited to engaging in any conduct the natural consequences of which is to harass, oppress, or abuse any person in connection with the collection of a debt, 15 U.S.C. Section 1692d.

33. As a result of the above violations of the FDCPA, the Defendant is liable to the Plaintiff for actual damages, statutory damages of \$1,000.00, and attorney's fees.

**Fourth Claim for Relief
(Fraud on the Court)**

34. The allegations in paragraphs 1 through 33 of this complaint are realleged and incorporated herein by this reference.

35. The conduct of the Defendant in attempting to file an improper proof of claim constitutes fraud on the Court.

36. The Plaintiff alleges that this Court has authority under Section 105(a) of Title 11 of the United States Code to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title."

37. The Plaintiff alleges that this Court should impose sanctions against the Defendant for attempting to file an improper claim in this case.

WHEREFORE, the Plaintiff having set forth his claims for relief against the Defendant respectfully prays of the Court as follows:

- A. That Defendant be required to file an amended, modified or substitute claim in this case supported by documentation;
- B. That this Court order Creditor to pay actual and punitive damages in a sum to be determined by the Court;
- C. That this Court order Creditor to pay additional actual damages and statutory damages in a sum to be determined by the Court for violation of N.C.G.S. Section 75-50, et seq.;
- D. That this Court order Creditor to pay additional actual damages and statutory damages in a sum to be determined by the Court for violating the FDCPA pursuant to 15 U.S.C. Section 1692k;
- E. That the attorney for the Plaintiff be awarded an additional non-base legal fee of \$ _____ for filing this complaint;
- F. That the Plaintiff have such other and further relief as the Court may deem just and proper.

Dated this the _____ day of _____, 2008.



O. Max Gardner III
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**IN THE UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:)	
)	
	)	CHAPTER 13 CASE NO.
	)	OUR FILE NO.
)	
Debtor.)	
<hr style="border: 0.5px solid black;"/>)	
	)	ADV. PROC. NO.
)	
Plaintiff,)	
)	
vs.)	
)	
)	
Defendants.)	

**COMPLAINT FOR CONTEMPT OF COURT, DAMAGES, DISALLOWANCE OF
CLAIM, AND OTHER RELIEF IN A CORE ADVERSARY PROCEEDING
(Duplicate Claim)**

COMES NOW, plaintiff and files this action for disallowance of claim and contempt of court pursuant to 11 U.S.C. § 105, and to recover damages, sanctions, attorney fees and costs for the defendants' actions in attempting to collect funds from the Chapter 13 estate by filing multiple claims on a single debt and would show the following:

JURISDICTION AND VENUE

1. Jurisdiction is conferred on this Court pursuant to the provisions of § 1334 of Title 28 of the United States Code in that this core proceeding arises in and is related to the above-captioned Chapter 13 case under Title 11 and concerns property of the debtor and the estate. Venue lies in this district pursuant to 28 U.S.C. § 1391(b).
2. This Court has both personal and subject matter jurisdiction to hear this case pursuant to § 1334 of Title 28 of the United States Code, § 157(b)(2) of Title 28 of the United States Code.

PARTIES

3. Plaintiff is the debtor in the above entitled Chapter 13 case number pending before this court. The plaintiff is referred to as the plaintiff or the debtor.

4. The defendants are corporate entities as follows:

Portfolio Recovery Associates, LLC (PRA) is a corporation with a principal office address of 120 Corporate Boulevard, Suite 100, Norfolk, VA 23502 and a notice address at 140 Corporate Boulevard, Norfolk, VA 23502. Portfolio Recovery Associates (PRA) states that it is a leading buyer of charge-off consumer accounts and provides a broad range of accounts receivable management services to lenders, service providers, governments and others. They offer Chapter 7 and Chapter 13 recoveries for secured and unsecured creditors throughout the United States. PRA alleges that it utilizes a proprietary "Bankruptcy Management Program" enabling PRA to electronically monitor and notify its clients with new case filings and case status changes, and will file proofs of claim. PRA states that its clients have 24 hour secure web access to review accounts or to audit portfolios.

Professional Recovery Systems, LLC (PRS) is a corporation with a principal office address of 720 S. Colorado Boulevard, Suite 700 South, Denver, CO 80246. Professional Recovery Systems (PRS) states that it is a veteran in the purchased debt industry offering superior knowledge and expertise in the areas of debt valuation and management.

Cleveland Regional Medical Center, (CRMC) is a fully accredited 241-bed, acute care, not-for-profit medical complex located at 201 E. Grover Street, Shelby, North Carolina 28150. CRMC is part of the Carolinas HealthCare System, the largest healthcare system in the Carolinas, and is registered with the North Carolina Secretary of State as Regional Health Services, LLC with its Manager listed as Cleveland County Health Care System. CRMC employs well-trained medical and support staff who provide comprehensive services through Centers of Excellence specializing in oncology, cardiology, rehabilitation, surgery, women and children's services and critical care. CRMC may be served at Daniel W. Sweat, Registered Agent, 201 East Grover Street, Shelby, NC 28150.

FACTUAL ALLEGATIONS WHICH APPLY TO ALL CAUSES OF ACTION

6. The defendant CRMC has a debt or claim against the plaintiff for medical services that were for household or consumer use.
7. The defendant PRA filed a sworn Proof of Claim #7 for the CRMC claim in the plaintiff's Chapter 13 case.
8. PRA's claim alleges it was the successor and assignor of the claim from CRMC and that it is now the entity entitled to collect the debt from the estate.
9. PRA was listed as a creditor in the plaintiff's bankruptcy since it had attempted to collect the claim from the plaintiff prior to filing the bankruptcy.
10. The defendant PRS filed a sworn Proof of Claim #8 for the CRMC claim in the plaintiff's Chapter 13 case.
11. PRS's claim alleges that it was the successor and assignor of the claim from CRMC and that it is now the entity entitled to collect the debt from the estate.
12. PRS was not listed as a creditor in the plaintiff's bankruptcy.

13. The defendants are sophisticated financial creditors and debt collectors with knowledge of the Bankruptcy Rules and procedure.

14. The defendants have an obligation to comply with all applicable rules and statutes when filing claims and participating in the bankruptcy process.

15. Defendants failed to comply with the applicable Bankruptcy Rules and law and Form B10 instructions.

16. The plaintiff alleges and believes that the defendant CRMC has sold, transferred or assigned the plaintiff's debt to more than one debt buyer or debt collector, thereby subjecting her to repeated payment and collection of the alleged debt by multiple parties alleging to be the owner or assignee of said debt.

17. Duplicate claims filed by multiple parties for the same debt dilute the payments to other unsecured creditors who have properly documented and allowed claims.

18. The demand for payment and attempted collection of this debt by multiple entities outside of the protection of this bankruptcy filing would be a violation of the Fair Debt Collection Practices Act. The plaintiff alleges that this Court may consider the violations of non-bankruptcy consumer protection statutes such as the FDCPA in the determination of the amount of monetary sanctions to impose in this case.

19. The plaintiff believes and alleges that the debt collector defendants in this case have a duty and obligation under the Fair Debt Collection Practices Act to "disqualify an account for collection" before they commence collection of the account. The plaintiff believes and therefore alleges that such a disqualification process would reveal the current holder of the consumer claim or the current collector. The plaintiff alleges that a cursory disqualification process in this case would have revealed the multiple owners of the account and would have triggered internal actions which should have precluded the filing of duplicate claims for the same debt.

20. The Plaintiff also alleges that the debt buyer defendants have access through such systems as AACER and PACER and BANKO to all of the documents filed in this case and in any other bankruptcy case in which they hold a claim or have authority to file a claim. As a result, a cursory review of Schedule F in this case would have revealed the debt and the alleged creditor or debt buyer thereby precluding the filing of duplicate claims for the same debt.

**FIRST CAUSE OF ACTION:
OBJECTION TO THE PROOFS OF CLAIM FILED BY PRA AND PRS**

21. The debtor does not owe any money to PRA and PRS or have any credit relationship with these creditors. The claims do not provide sufficient data regarding any assignment or transfer of the account.

22. The PRA and PRS claims are based upon writing. Their claim forms and attached documents do not satisfy the mandatory requirements of FRBP 3001(c). The Proofs of Claim filed by PRA and PRS were not executed and filed in accordance with Rule 3001(c). The claims lack prima facie validity.

23. Neither claim is supported by any written evidence of an enforceable agreement or a contract that establishes the debt between the debtor and either creditor or between debtor and an alleged predecessor in interest. Their claims do not provide any verification of ownership or information as to how the account was purchased or transferred and how the liabilities were determined. The documents filed do not give fair notice of the conduct, transaction or occurrence that forms the basis of either one of the claims asserted.

24. The PRA and PRS claim forms are incomplete. The attachment to the proof of claim form does not qualify as an "account summary" and is not sufficient to establish the prima facie validity of the proof of claim. The claims are without any evidentiary value and are unenforceable against the debtor and the debtor's property under any agreement or applicable law pursuant to 11 USC § 502(b)(1).

25. The debtor further objects to the amount of the debt. Neither claim includes a written statement of the account. The claims fail to list interest and other charges along with payments made. The claims further fail to include proof of any fees added to the accounts, such as finance charges, attorney fees, interest, and an explanation and breakdown of the elements used in each of the calculations, or a copy of the agreement authorizing the interest, charges and fees that may be included in the claim.

26. The claims should be entirely disallowed as they lack prima facie validity and fail to comply with the mandatory requirements of Rule 3001. Plaintiff asserts the affirmative defense that the claims may be barred by the North Carolina Statute of Limitations.

SECOND CAUSE OF ACTION: CONTEMPT OF COURT, VIOLATION OF BANKRUPTCY CODE AND FEDERAL RULES OF BANKRUPTCY PROCEDURE

27. The defendants have willfully and intentionally failed to comply with the United States Bankruptcy Code, § 501 and others.

28. The defendants have presented and filed fraudulent claims in violation of 18 U.S.C. §§ 152 and 3571.

29. The defendants have a pattern and practice of willfully and intentionally failing to comply with the Rules of Bankruptcy Procedure and the Bankruptcy Code in connection with the filing of Proofs of Claim and the Bankruptcy process.

30. Under 11 U.S.C. § 105, the Court has the inherent ability to enforce the Court's orders, rules, and to prevent an abuse of process.

31. The Court has the authority under 11 U.S.C. § 105 to protect an individual and the bankruptcy estate to the extent that the Court finds that filing of multiple claims on the same debt is a fraud on the Court and/or a fraud on the Chapter 13 estate.

32. The Court should sanction the defendants and award the plaintiff attorney fees and expenses pursuant to 11 U.S.C. § 105(a).

33. The defendants' willful and intentional conduct causes harm to the bankruptcy claims process and the bankruptcy estate.

34. As a result of the foregoing acts, the Court should disallow and void the claims of all parties whether or not the debtor receives a discharge in the underlying case.

WHEREFORE, the plaintiff prays for the following relief for all causes of action:

A. A finding that the defendants are in civil contempt for the willful and intentional failure to comply with the law and rules of the court;

B. Grant sanctions against the defendants in order to prevent future conduct of this kind;

C. Award attorney's fees, expenses and suit money under § 105 of the Bankruptcy Code;

D. Disallow the Proofs of Claim as they lack prima facie validity and fail to comply with the mandatory requirements of Rule 3001 and are barred by the statute of limitations;

E. Strike the defendants' proofs of claim and the claim of any party claiming to own or hold the alleged debt and declare it void whether or not the debtor receives a discharge in the base case;

F. That the plaintiff has such other and further relief as the Court may deem just and proper.

Dated this _____ day of _____, 2009.

O. Max Gardner III
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Attorney for the Debtor/Plaintiff
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(704) 487-0616 / FAX (704) 487-0619
e-mail maxgardner@maxgardner.com

**IN THE UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:)	
)	
John Q. Public,	)	CASE NO.
	)	OUR FILE NO.
Debtor.	)	Chapter 13
_____)	

**FIRST REQUEST TO AMERICAN HOME MORTGAGE SERVICING
FOR PRODUCTION OF DOCUMENTS REGARDING
OBJECTION TO THE PROOF OF CLAIM**

PLEASE TAKE NOTICE THAT, pursuant to Rules 26, 34 and 37 of the Federal Rules of Civil Procedure and Rules 7026, 7034 and 9016 of the Federal Rules of Bankruptcy Procedure, the debtor's attorney, O. Max Gardner III, demands that American Home Mortgage Servicing, Inc. produce for inspection and copying at his office, Gardner & Gardner, PLLC, 403 South Washington Street (28150), P.O. Box 1000, Shelby, North Carolina 28151-1000, on September 30, 2010 at 9:00 a.m., all documents listed on the attached Exhibit A.

Dated this _____ day of _____, 20__.

O. Max Gardner III
Gardner & Gardner PLLC
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NC State Bar #6164
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(704) 487-0616 / FAX (704) 487-0619
e-mail maxgardner@maxgardner.com

EXHIBIT "A"
REQUEST FOR PRODUCTION OF DOCUMENTS
TO AMERICAN HOME MORTGAGE SERVICING, INC.

SECTION I
DEFINITIONS

1. The "Debtor" shall mean John Q. Public in the case of 10-12345 in the United States Bankruptcy Court for the Western District of North Carolina.
2. "Deutsche Bank" shall mean Deutsche Bank National Trust Company as Trustee for the Certificate holders of Soundview Home Loan Trust 2005-OPT3.
3. The "POC" shall mean Deutsche Bank's proof of claim filed on February 5, 2010.
4. The "Real Property" means the Debtor's property located at Somewhere Avenue, Shelby, North Carolina 28150.
5. The "Mortgage" means the mortgage allegedly held by Deutsche Bank in connection with the Real Property.
6. "Fees and Costs" means all the fees and costs listed on the POC, including but not limited to principal, arrearages, interest, service fees, attorneys fees, filing costs and title search fees.
7. "LPS" means LPS Default Solutions, Inc.
8. The "LPS Notes" means any notes maintained by LPS concerning the Debtor.
9. "AHMS" means American Home Mortgage Servicing, Inc.
10. The "Affirmation" means the affirmation of counsel Alan H. Weinreb dated June 28, 2010 (Doc. No. 18)
11. The term "communication" means the transmittal of information (in the form of facts, ideas, inquiries or otherwise).
12. The term "document" is defined to be synonymous in meaning and equal in scope to the usage of this term in Federal Rule of Civil Procedure 34(a), including, without limitation, electronic or computerized data compilations. A draft or non-identical copy is a separate document within the meaning of this term.
13. "Identify" (with respect to persons) means to give, to the extent known, the person's full name, present or last known address, and when referring to a natural

person, additionally, the present or last known place of employment. Once a person has been identified in accordance with this subparagraph, only the name of that person need be listed in response to subsequent discovery requesting the identification of that person.

14. "Identify" (with respect to documents) means to give, to the extent known, the (i) type of document; (ii) general subject matter; (iii) date of the document; and (iv) author(s), addressee(s) and recipient(s)....

15. The term "person" is defined as any natural person or any business, legal or governmental entity or association.

16. The term "concerning" means relating to, referring to, describing, evidencing or constituting.

17. The terms "all" and "each" shall be construed as all and each.

18. The connectives "and" and "or" shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the discovery request all responses that might otherwise be construed to be outside of its scope.

19. The use of the singular form of any word includes the plural and vice versa.

SECTION II **INSTRUCTIONS**

1. In producing the documents called for by this schedule, you are requested to identify the documents produced according to the number or numbers of the requests herein to which they relate.

2. Pursuant to the Federal Rules of Civil Procedure, made applicable by the Federal Rules of Bankruptcy Procedure, documents should be produced as they are kept in the usual course of business, and organized and labeled to correspond with the categories in this request. Accordingly, whenever a document or group of documents is taken out of a file folder, file drawer, file box, or notebook, retrieved from an electronic medium, before the same is produced, please also produce a copy of the label on the file folder, file drawer, file box, or notebook and/or electronic medium from which the document or group of documents was removed.

3. If any document requested herein was formerly in your possession, custody, or control and has been lost or destroyed, or otherwise disposed of, then you are requested to submit in lieu of any such document a written statement (i) describing in detail the nature of the document and its contents, (ii) identifying the person who prepared or authored the document and, if applicable, the person to whom the document was sent and indicated or blind copies, (iii) specifying the date on which the document was prepared or transmitted, and (iv) specifying, if possible, the date on which the document was lost or destroyed and, if destroyed, the conditions of and reasons for such destruction and the persons requesting and performing the destruction.

4. If any document requested herein is withheld on the basis of any claim of privilege or work product immunity, then you are requested to submit in lieu of any such document the information required by Rule 7026, Federal Rules of Bankruptcy Procedure and Rule 26(b)(5), Federal Rules of Civil Procedure.

5. Unless otherwise specified, the documents covered by this request include all documents that have come into existence or have been used since the petition filing date to the date of any response to this request.

6. This request is a continuing one and any document obtained subsequent to production which would have been produced had it been available or its existence been known at the time of production, shall be produced forthwith.

7. If Deutsche Bank has no document responsive to a request, Deutsche Bank should so state.

SECTION III **DOCUMENTS REQUESTED**

Request for Production No. 1: All communications between and among Deutsche Bank, AHMS and Lawrence J. Buckley concerning the Fees and Costs, including, but not limited to, any instructions from Deutsche Bank or AHMS to Mr. Buckley regarding actions to be taken or documents to be reviewed to verify the amounts of the Fees and Costs prior to including them

in the POC.

Request for Production No. 2: All documents evidencing instructions from any and all other sources to Mr. Buckley regarding actions to be taken or documents to be reviewed to verify the amounts of the Fees and Costs.

Request for Production No. 3: All documents that Lawrence J. Buckley personally reviewed prior to signing and filing the POC.

Request for Production No. 4: All documents evidencing Deutsche Bank's policies and procedures governing the preparation of proofs of claim in effect as of February 5, 2010.

Request for Production No. 5: All ledgers, accounting records or other documents that support the amount of the Fees and Costs.

Request for Production No. 6: All reports, screen shots, billing records and other documents that evidence the process by which Deutsche Bank records the amount of outstanding principal, arrearages, interest, service fees, attorneys fees, filing costs and all other fees for mortgages that it holds.

Request for Production No. 7: All reports, screen shots, billing records and other documents that evidence the process by which Deutsche Bank retrieved the amount of the Fees and Costs that were included in the POC.

Request for Production No. 8: All documents that identify the individuals who had responsibilities with respect to recording the amount of the Fees and Costs that were included in the POC, and any communication from or to those individuals concerning the POC occurring on or before February 5, 2010.

Request for Production No. 9: All documents that identify the individuals who had responsibilities with respect to maintaining the records showing the Fees and Costs that were included in the POC, and any communication from or to those individuals concerning the POC occurring on or before February 5, 2010.

Request for Production No. 10: All documents demonstrating Deutsche Bank's interest in

the Real Property as of February 5, 2010.

Request for Production No. 11: All documents demonstrating Sand Canyon Corporation's interest in the Real Property as of October 15, 2009.

Request for Production No. 12: All network agreements, software licensing agreements, technology agreements, or any other agreement in effect between Deutsche Bank and LPS as of February 5, 2010.

Request for Production No. 13: All invoices, payment records, cancelled checks, electronic funds transfer receipts, or other documents evidencing any and all amounts paid to LPS by Deutsche Bank with respect to the POC.

Request for Production No. 14: All documents that support the fees and service costs listed on the LPS invoice that was attached to the POC (the last page).

Request for Production No. 15: All billing records, receipts, bills, cancelled checks, electronic funds transfer receipts, and all other documents that support the \$75 charge for legal fees that was included in the POC.

Request for Production No. 16: All billing records, receipts, bills, cancelled checks, electronic funds transfer receipts, and all other documents that support the \$730 charge for legal fees that was included in the Affirmation.

Request for Production No. 15: All billing records, receipts, bills, cancelled checks, electronic funds transfer receipts, and all other documents that support the \$75 charge for legal fees that was included in the POC.

Request for Production No. 16: All billing records, receipts, bills, cancelled checks, electronic funds transfer receipts, and all other documents that support the \$730 charge for legal fees that was included in the Affirmation.

J – AVOID DEBT TRANSFER

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME:

**CHAPTER 13 NO.
OUR FILE NO.**

ADDRESS:

SSN: --- -- 5707

DEBTOR(S).

DEBTOR

Adv. Proc. No. 06- _____

Plaintiff,

versus

DEBT ELIMINATOR, INC.

Defendant.

**Complaint Seeking to Avoid a Pre Petition Transfer of Property and Seeking Damages
for Violations of the North Carolina Unfair and Deceptive Trade Practices Act
and Breach of Fiduciary Duties**

Introduction

1. This action seeks to avoid pre petition transfers of property from the Plaintiff to the Defendant from which the Plaintiff received less than equivalent value from the Defendant. These transfers were all done within one year of the filing of the bankruptcy petition.

2. This action also seeks damages from the pre –petition actions of the Defendant which constitute numerous violations of the North Carolina Unfair and Deceptive Trade Practices Act.

Jurisdiction and Venue

3. Jurisdiction is conferred on this Court pursuant to the provisions of Section 1334 of Title 28 of the United States Code in that this proceeding arises in and is related to the above-captioned Chapter 13 case under Title 11 and concerns property of the Debtor in that case.

4. This Court has both personal and subject matter jurisdiction to hear this case pursuant to Section 1334 of Title 28 of the United States Code, Section 157(b)(2) of Title 28 of the United States Code, and pursuant to the Order entered by the Judges of the United States District Court for the Western District of North Carolina on July 30, 1984 (the Referral Order), which Order was entered in accordance with the Bankruptcy Amendments and Federal Judgeship Act of 1984.

5. This Court has supplemental jurisdiction to hear all state law claims pursuant to Section 1367 of Title 28 of the United States Code.

6. This matter is primarily a core proceeding and therefore the Bankruptcy Court has jurisdiction to enter a final order. However, in the event this case is determined to be a non-core proceeding then and in that event the Plaintiffs consent to the entry of a final order by the Bankruptcy Judge.

7. Venue lies in this District pursuant to Section 1391(b) of Title 28 of the United States Code.

Parties

8. The Plaintiff in this case was and is a debtor under Chapter 13 of Title 11 of the United States Code in case number _____, which case is presently pending before this court. The Plaintiff is hereinafter referred to as the Plaintiff or the debtor.

9. The Defendant, Debt Eliminator, Inc, is a Delaware corporation allegedly engaged in the business of "debt management".

Factual Allegations

10. The Chapter 13 case of the Plaintiff was commenced by the filing of a voluntary petition with the Clerk of this Court on _____. On _____ the Bankruptcy Noticing Center notified Defendant of Plaintiffs' bankruptcy case.

11. The 341(a) meeting of creditors was held in Shelby, North Carolina on _____.

12. The Chapter 13 plan of the Plaintiff was subsequently confirmed by order of this Court dated _____.

13. On or about _____, the Debtor entered into an agreement with the Defendant. This agreement required the Debtor to remit monthly payments to the Defendant who would use that money to "negotiate" settlements with the Debtor's creditors. The Debtor knew she could not pay her credit card debt in full due to the interest and fees being tacked on each month and was hoping the defendant could help lower the total amounts due and lower the interest rates.

14. The Debtor remitted a total of \$_____ in funds to the Defendant in monthly installments from _____ to _____ believing she was contributing money that would eventually go towards paying off her substantial unsecured debt. She was misled into thinking these payments would be pooled and paid to her creditors.

15. Needless to say, the Defendant's advertised "Debt Settlement Plan" did nothing to reduce her unsecured debt and she was forced to seek bankruptcy protection.

16. These funds were purportedly placed in a Trust account maintained by the Defendant. These funds upon information and belief allegedly remained in the trust account when the debtor filed bankruptcy.

17. The Debtor listed and rejected this contract on Schedule G of her bankruptcy petition.

18. On _____, the attorney for the debtors sent a letter via certified mail demanding that the Defendant turnover the funds held in the Trust Account since the contract had

been rejected. In the absence of a turnover, the letter demanded that the Defendant provide a full accounting of the funds.

19. On _____, the Debtor's attorney received a letter from an attorney for the Defendant. This letter is attached as Exhibit "B" and incorporated herein by reference.

20. This letter states that the first two payments (\$_____) made by the Debtor to the Defendant were paid to the Defendant as an "activation fee".

21. The letter further states that \$_____ of the Debtor's monthly payments was placed in the Debtor's Trust Account.

22. Also, the letter states that "\$_____" was earned by Debt Eliminator as a monthly service fee" and was paid from the trust account to the Defendant.

23. Finally, the letter states that "Debt Eliminator reached a settlement with First Bank, one of Plaintiff's Creditors. The Amount of \$_____ was written from her trust account and used to settle the account, which included a \$15 overnight Delivery Charge. The balance of \$_____ remaining in her trust account was sent to the debtor on _____, after her contract was cancelled. There are no remaining funds to be disbursed."

24. All in all the letter reveals that of the \$_____ sent by the Plaintiff to the Defendant \$_____ of it was paid to the Defendant. This constitutes more than _____% of the total money sent.

25. The Defendant has only refunded the amount of \$_____ to the Debtor.

First Claim for Relief (Avoidance of Fraudulent Transfers)

26. The allegations in paragraphs 1 through 26 of this complaint are realleged and incorporated herein by this reference.

27. 11 U.S.C. Section 548(a)(1)(B)(i) allows the Bankruptcy Trustee to avoid an transfer of a debtor's interest in property that occurred within one year proceeding the filing of the petition where as a result of such transfer the Debtor "received less than a reasonably equivalent value in exchange for such transfer".

28. In this case, the Debtor transferred over \$_____ to the Defendant from _____ to _____.

29. The Debtor filed her bankruptcy petition with this court on _____. Therefore all transfers were made within the one year period prior to the commencement of the case.

30. The Debtor received far less than a reasonable equivalent in value from these transfers in that Defendant did not provide any services in exchange for the money payments. The only service the Defendant allegedly provided was "a settlement" with First Bank, a creditor of the debtor. Despite only providing nominal services to the debtor, the Defendant collected over \$_____ in fees.

31. Pursuant to Section 548(a)(1)(B)(i) these pre-petition transfers were Fraudulent transfers made involuntarily by the Debtor to the Defendant and should be returned to the bankruptcy estate pursuant to Section 541.

Second Claim for Relief (North Carolina Unfair and Deceptive Trade Practices Act)

32. The allegations in paragraphs 1 through 31 of this complaint are realleged and incorporated herein by this reference.

33. The Defendant is a corporation engaging in business in the state of North Carolina.

34. The Defendant's acts against the Debtor were unfair and deceptive and were violations of Chapter 75 Section 1.1 of the North Carolina General Statutes.

35. More particularly, the Defendant's paying itself from Plaintiff's trust account an "Activation Charge" of \$_____ was an unfair and deceptive act.

36. Also, the Defendant's paying itself from the Plaintiff's trust account a service fee of \$_____ for performing less than nominal work on the Plaintiff's behalf was an unfair and deceptive act.

37. Furthermore, the Defendant acted as a debt adjuster as defined by Article 56 Section 14-423 of the North Carolina General Statutes. Section 14-424 specifically states that any person acting as a debt adjuster in the State of North Carolina is guilty of a Class 2 Misdemeanor. Therefore the Defendant's actions were not only deceptive and unfair but also criminal.

38. The Debtor is requesting the court award actual damages in the amount of \$_____ representing the fees charged and collected by the Defendant from the Plaintiff's trust account. Since these actual damages stem from the Defendant's unfair, deceptive, and criminal acts they should be trebled pursuant to Section 75-16 of the North Carolina General Statutes.

39. The Debtor is also asking the Court to award full statutory damages in the amount of \$2000.00 for each violation.

40. Furthermore, the Debtor is seeking punitive damages in order to deter the Defendant from illegally operating in North Carolina and to prevent Defendant from preying on desperate Debtors and their desires to pay something back to their creditors by extracting thousands of dollars in unfair, deceptive and illegal fees. These punitive damages are also sought to deter the defendant from making violations of state criminal and consumer protection statutes part of its business model.

Third Claim for Relief (Breach of Fiduciary Duty and Self Dealing)

41. The allegations in paragraphs 1 through 40 of this complaint are realleged and incorporated herein by this reference.

42. The Defendant indicated in its letter to the attorney of the debtor that a trust account had been established to hold the money remitted by the Debtor.

43. Upon information and belief, the Defendant was the trustee of this trust account.

44. As trustee of this account, the Defendant owed fiduciary duties to the Debtor.

45. The Defendant has breached these fiduciary duties by self dealing with the Trust Account. This self dealing occurred where the Defendant paid itself over \$_____ in fees from the Trust Account. These Fees were not earned by the Defendant.

46. As a result of these breaches, the Plaintiff has suffered actual damages and has

suffered from emotional distress.

WHEREFORE, the Plaintiff having set forth her claims for relief against the Defendant respectfully prays of the Court as follows:

- A. That the Pre Petition transfer of \$_____ be avoided pursuant to 11 U.S.C Section 548;
- B. That this Court order the Defendant to pay additional actual damages and statutory damages in a sum to be determined by the Court for violation of N.C.G.S. Section 75-1.1 et seq and that such actual damages be trebled pursuant to Section 75-16.
- C. That this Court order the Defendant to pay punitive damages in order to deter the Defendant from committing these acts in the future and based on the fact these improper actions were committed while operating as a Debt Adjuster which is a criminal offense in the state of North Carolina.
- D. That this Court order the Defendant to pay additional damages for the emotional distress created by the Defendant's breach of the Fiduciary Duties it owed to the Plaintiff.
- E. That the Plaintiff have and recover against the Defendant all reasonable legal fees and expenses incurred by her attorney;
- F. That the Plaintiff have such other and further relief as the Court may deem just and proper.

Date this the _____ day of _____, 2008.



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**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAMES:

**CHAPTER 13 NO.
OUR FILE NO.**

ADDRESS:

SSN: --- -- 5707

DEBTOR.

DEBTORS

Adv. Proc. No. 06- _____

Plaintiff,

versus

MORTGAGE DEFAULT ASSISTANCE, LLC,

Defendant.

Complaint Seeking to Avoid a Pre-Petition Transfer of Property Pursuant to 11 U.S.C. § 548, to Recover Property of the Estate Pursuant to 11 U.S.C. § 542 and Seeking Damages for Violations of the Automatic Stay Pursuant to 11 U.S.C. § 362, North Carolina Unfair and Deceptive Trade Practices Act (N.C.G.S. § 75-1.1, et. seq.) and North Carolina Law

I. Introduction

1. This action seeks to avoid pre petition transfers of property from the Plaintiff to the Defendant from which the Plaintiff received less than equivalent value from the Defendant. These transfers were all done within one (1) year of the filing of the voluntary chapter 13 bankruptcy petition.

2. This action seeks the turnover of property of the estate pursuant to 11 U.S.C. § 542.

3. This action seeks actual and punitive damages, legal fees, and costs for violations of the automatic stay pursuant to 11 U.S.C. § 362.

4. This action also seeks damages from the pre-petition actions of the Defendant which constitute numerous violations of the North Carolina Unfair and Deceptive Trade Practices Act.

5. This action also seeks damages from pre-petition actions of the Defendant which constitute violations of North Carolina Contract Law and North Carolina Tort Law.

6. This action also seeks damages due to the Defendant's post-petition breach of an agreement between Plaintiff and Defendant whereby the Defendant was to refund money paid by the Plaintiff pre-petition.

II. Jurisdiction and Venue

7. Jurisdiction is conferred on this Court pursuant to the provisions of 28 U.S.C. § 1334 in that this proceeding arises in and is related to the above-captioned Chapter 13 case under Title 11 of the United States Code and concerns property of the Debtor in that case.

8. This Court has both personal and subject matter jurisdiction to hear this case pursuant to 28 U.S.C. § 1334 and 28 U.S.C. § 157(b)(2).

9. This Court has supplemental jurisdiction to hear all state law claims pursuant to 28 U.S.C. § 1367.

10. This matter is primarily a core proceeding and therefore the Bankruptcy Court has jurisdiction to enter a final order. However, in the event this case is determined to be a non-core proceeding then, and in that event the Plaintiff consents to the entry of a final order by the Bankruptcy Judge.

11. Venue lies in this District pursuant to 28 U.S.C. § 1391(b).

III. Parties

12. The Plaintiff, _____, is an unmarried person domiciled in Cleveland County, North Carolina, and is a debtor under Chapter 13 of Title 11 of the United States Code in case number _____, which case is presently pending before this court. The Plaintiff is hereinafter referred to as the Plaintiff or the debtor.

13. The Defendant, Mortgage Default Assistance, LLC, is a for profit limited liability company organized under the laws of the State of Florida, and listing a principal address of 334 East Lake Road, Suite 152, Palm Harbor, Florida 34685. The Defendant lists its registered agent as Spiegel & Utrera, P.A., 1840 SW 2nd Street, 4th Floor, Miami, Florida 33145.

14. Defendant is not licensed to do business in North Carolina.

IV Factual Allegations

15. The Chapter 13 case of the Plaintiff was commenced by the filing of a voluntary petition with the Clerk of this Court on March 4, 2008.

16. The 11 U.S.C. § 341(a) meeting of creditors was held on March 31, 2008 in Shelby, North Carolina.

17. On or about January 13, 2008, the Debtor entered into an agreement with the Defendant. This agreement required the Debtor to remit \$1,400.00 to the Defendant for purported foreclosure assistance. Please see the agreement attached hereto as Exhibit A. The Plaintiff rejected this agreement and the arbitration clause contained therein. Please see the Debtor's Schedule G.

18. The Debtor remitted \$1,000.00 to the Defendant on January 14, 2008, and remitted \$400.00 to the Defendant on January 25, 2008. Please see the receipts attached hereto as Exhibit B.

19. The Defendant took the Plaintiff's money and failed to perform under the terms of the contract, failed to work out a loss mitigation plan, failed to work out payment arrangements with the Plaintiff's mortgage company, failed to forestall or prevent the foreclosure of the Plaintiff's home, and generally failed to perform under the terms of the contract.

20. The Plaintiff received less than a reasonably equivalent value in exchange for the transfer of funds to the Defendant within one year of the filing of their bankruptcy petition.

21. On March 19, 2008, the Plaintiff's attorney faxed and mailed a demand for refund of \$1,400.00 to the Defendant. Please see letter and fax confirmation sheet attached hereto as Exhibit C.

22. In early April 2008, counsel for the Plaintiff was contacted by Bobby Lee, a representative of the Defendant who agreed to refund the \$1,400.00. This agreement was memorialized in the "Release of Claims" attached hereto as Exhibit D. The Release of Claims was signed by Plaintiff and faxed to the Defendant on May 28, 2008. Please see Exhibit E.

23. Neither Plaintiff nor counsel received a refund from the Defendant and on July 31, 2008, counsel for the Plaintiff faxed a second demand for refund of the \$1,400.00. Please see letter and fax confirmation sheet attached hereto as Exhibit F.

24. Despite these demands, the Defendant has failed to abide by their agreement with the Plaintiff and has failed to refund the money.

25. As a result of the Defendant's actions, the Plaintiff has suffered emotional distress and mental anguish and has incurred legal fees in the filing of his chapter 13 bankruptcy and in pursuit of the refund of the funds forwarded to the Defendant.

V. FIRST CLAIM FOR RELIEF (AVOIDANCE OF FRAUDULENT TRANSFERS)

26. The allegations in paragraphs 1 through 25 of this Complaint are realleged and incorporated herein by this reference.

27. 11 U.S.C. § 548(a)(1)(B)(i) allows the Bankruptcy Trustee to avoid a transfer of a debtor's interest in property that occurred within one year preceding the filing of the petition where as a result of such transfer the debtor "received less than a reasonably equivalent value in exchange for such transfer."

28. In this case, the Debtor transferred \$1,400.00 to the Defendant in January 2008.

29. The Debtor filed his bankruptcy petition with this Court on March 4, 2008. Therefore, all transfers were made within a one-year period prior to the commencement of the Debtor's chapter 13 case.

30. The Debtor received far less than a reasonable equivalent in value from these transfers in that Defendant did not provide any services in exchange for the money payments.

31. Pursuant to 11 U.S.C. § 548(a)(1)(B)(i) these pre-petition transfers were fraudulent transfers made involuntarily by the Debtor to the Defendant and should be returned to the bankruptcy estate pursuant to 11 U.S.C. § 541.

VI. SECOND CLAIM FOR RELIEF (TURNOVER OF PROPERTY OF THE ESTATE)

32. The allegations in paragraphs 1 through 31 of this Complaint are realleged and incorporated herein by this reference.

33. Plaintiff's property, which is property of the estate pursuant to 11 U.S.C. §§ 541 and 1306, was seized by the Defendant post-petition and is currently in the possession of the Defendant.

34. Under 11 U.S.C. § 1306 the Debtor is entitled to possession of all property of the estate. Plaintiff has made amicable demand to the Defendant for turnover of the property; nonetheless, the Defendant has refused to refund the money.

35. As a result of the Defendant's actions, the Defendant is liable to the Plaintiff for damages, attorney fees, and costs.

VII. THIRD CLAIM FOR RELIEF (VIOLATION OF THE AUTOMATIC STAY)

36. The allegations in paragraphs 1 through 35 of this Complaint are realleged and incorporated herein by this reference.

37. The actions of the Defendant, set forth hereinabove, constitute willful and egregious violations of the automatic stay pursuant to 11 U.S.C. § 362(a)(3), which prohibits "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate."

38. As a result of the Defendant's violations of the automatic stay, the Defendant is liable to the Plaintiff for actual damages, legal fees, costs, and treble or punitive damages.

VIII. FOURTH CLAIM FOR RELIEF (VIOLATIONS OF N.C.G.S. §§ 75-1.1, ET SEQ AND §§ 14-423, 14-424, 14-425)

39. The allegations in paragraphs 1 through 38 of this Complaint are realleged and incorporated herein by this reference.

40. Debtor has a private right of action against the Defendant pursuant to N.C.G.S. § 75-1.1. Debtor has suffered loss of money as a result of the use or employment by another person of unfair or deceptive method, act, or practice declared unlawful by N.C.G.S. § 14-423 through § 14-425.

41. Defendant has violated N.C.G.S. § 75-1.1, et. seq. and § 14-423 through § 14-425 by engaging in the unfair and deceptive practice of misleading consumers as to the nature of their program and how payments into their program are to be applied and/or distributed, and making material misrepresentations regarding the same.

42. Defendant's acts as described above were done intentionally with the purpose of coercing the Debtor out of their money. This Defendant's actions were fraudulent as that term is defined pursuant to North Carolina law (see N.C.G.S. § 1A-1, Rule 9 and N.C.G.S. § 25-5-114(2)).

43. As a result of the above violations, the Defendant is liable to the Plaintiffs for actual damages, statutory damages, attorney's fees, and costs pursuant to N.C.G.S. § 75-1.1, et. seq., § 75-15.2 and § 75-16.1.

IX. FIFTH CLAIM FOR RELIEF (VIOLATION OF NORTH CAROLINA CONTRACT LAW)

44. The allegations in paragraphs 1 through 43 of this Complaint are realleged and

incorporated herein by this reference.

45. Pursuant to North Carolina law, a constructive fraud claim "requires the creation of a relationship of trust and confidence and that the defendant took advantage of that relationship to plaintiff's detriment." Terry v. Terry, 302 N.C. 77, 273 S.E.2d 674 (1981). Plaintiff herein entered into a contract with the Defendant and Plaintiff obviously placed trust and confidence in the Defendant as evidenced by the payment of \$1,400.00 to Defendant, and thus established a confidential and fiduciary relation.

46. A confidential or fiduciary relation "extends to any possible case in which a fiduciary relation exists in fact, and in which there is confidence reposed on one side, and resulting domination and influence on the other." Abbitt v. Gregory, 201 N.C. 577, 598, 160 S.E. 896, 906 (1931); White v. Consolidated Planning, Inc., 166 N.C.App. 283, 603 S.e.2d 147 (2004). Such a relationship of trust and confidence "exists in all cases where there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence." Abbitt v. Gregory, 201 N.C. 577, 598, 160 S.E. 896, 906 (1931); Compton v. Kirby, 158 N.C.App. 19, 581 S.E.2d 452 (2003).

47. Fraud need only be proved by a preponderance of the evidence and may be established by circumstantial evidence.

48. The North Carolina Court of Appeals has held that "to survive a motion to dismiss, a cause of action for constructive fraud must allege (1) a relationship of trust and confidence, (2) that the defendant took advantage of that position of trust in order to benefit himself, and (3) that plaintiff was, as a result, injured." White v. Consolidated Planning, Inc., 166 N.C.App. 283, 603 S.E.2d 147 (2004); Sterner v. Penn, 159 N.C.App. 626, 631, 583 S.E.2d 670, 674 (2003). In other words, to prove constructive fraud, the Plaintiff must show (1) the existence of a fiduciary duty, and (2) a breach of that duty. Keener Lumber Co. v. Perry, 149 N.C.App. 19, 28, 560 S.E.2d 817, 823 (2002) (citation omitted). See also Greene v. Rogers Realty, 159 N.C.App. 665, 586 S.E.2d 278 (2003).

49. As stated above, a constructive fraud claim requires that the defendant take advantage of the plaintiff to and for his own benefit. "An essential element of constructive fraud is that 'defendants sought to benefit themselves' in the transaction." State ex rel. Long v. Petree Stockton, L.L.P., 129 N.C.App. 432, 445, 499 S.E.2d 790, 798 (1998) (quoting Barger, 346 N.C. at 667, 488 S.E.2d at 224), *cert. dismissed as improvidently granted*, 350 N.C. 57, 510 S.E.2d 374 (1999). See also Walker v. Sloan, 137 N.C.App. 387, 529 S.E.2d 236 (2000). In the instant case, Defendant has failed to perform under the terms of the contract with the Plaintiff, has collected a fee in advance, and has therefore breached the contract to the benefit of the Defendant.

50. Plaintiff has suffered loss as a result of their detrimental reliance on the Defendant's performance under the contract.

51. Defendant's actions with respect to the Debtor, as set forth herein above, rise to the level of fraud, constructive and actual.

52. Defendant intentionally misrepresented the services promised to provide on behalf of Debtor, intentionally collected a fee in advance of providing services, intentionally refused to perform the services promised to Debtor, and intentionally did not honor rescission of the agreement between Debtor and Defendant.

53. The Court of Appeals has held that "damages for breach of trust are designed to restore the trust to the same position it would have been in had no breach occurred." In re Trust Under the Will of Jacobs, 91 N.C.App. 138, 370 S.E.2d 860, *disc. Review denied*, 323 N.C. 476, 373 S.E.2d 863 (1988).

54. Pursuant to N.C.G.S. § 1D-15(a), punitive damages may be awarded "if the claimant proves that the defendant is liable for compensatory damages and that one of the following aggravating factors was present and was related to the injury for which compensatory damages were awarded: (1) Fraud, (2) Malice, (3) Willful or wanton conduct."

55. Pursuant to N.C.G.S. § 1D-5(4) an element of intent must be present to support a constructive fraud claim. See also Babb v. Graham, ____ N.C.App. ____, 660 S.E.2d 626 (2008).

56. Obviously, the element of intent is present in the instant case. Defendant intentionally offered services to the Plaintiff, intentionally collected a fee in advance, intentionally drew up the terms of the contract, intentionally did not provide the services promised, and intentionally did not honor the rescission of the contract entered into with Plaintiff.

57. As a result of their fraud and breach of contract, there is sufficient reason to justify rescission of the agreement between the Debtor and the Defendant and as such Defendant is liable to the Plaintiff for actual damages and attorney fees, and punitive damages pursuant to N.C.G.S. § 1D-15(a).

X. SIXTH CLAIM FOR RELIEF (NORTH CAROLINA TORT LAW)

58. The allegations in paragraphs 1 through 57 of this Complaint are realleged and incorporated herein by this reference.

59. The tort of intentional infliction of mental distress is recognized in North Carolina. Stanback v. Stanback, 297 N.C. 181, 254 S.E.2d 611 (1979). "[L]iability arises under this tort when a defendant's 'conduct exceeds all bounds usually tolerated by decent society' and the conduct 'causes mental distress of a very serious kind.'" *Id.* at 196, 254 S.E.2d at 622, quoting Prosser, § 12, p. 56. The Stanback opinion further states "that defendant's conduct in breaching the contract was 'willful, malicious, calculated, deliberate and purposeful'... [and] that 'she has suffered great mental anguish and anxiety'...'as a result of defendant's conduct in breaching the agreement'...'[and] that defendant acted recklessly and irresponsibly and 'with full knowledge of the consequences which would result....'" *Id.* at 198, 254 S.E.2d at 622-23.

60. Defendant violated North Carolina tort law through the intentional and negligent acts set forth herein above.

61. As a result of the violations of North Carolina tort law, Plaintiffs suffered and continues to suffer personal humiliation, anxiety, embarrassment, mental anguish, and emotional distress.

62. As a result of the above violations of the North Carolina tort law, Defendant is liable to the Plaintiff for actual damages, attorney's fees, and costs.

XI. SEVENTH CLAIM FOR RELIEF (BREACH OF FIDUCIARY DUTY)

63. The allegations in paragraphs 1 through 62 of this Complaint are realleged and incorporated herein by this reference.

64. Upon information and belief, the Defendant was the trustee of a trust account in which funds paid by the Plaintiff's were deposited.

65. As trustee of this account, the Defendant owed fiduciary duties to the Debtor. Wachovia Bank v. Johnston, 269 N.C. 701, 153 S.E.2d 449 (1967); Babb v. Graham, __, N.C.App. ____, 660 S.E.2d 626 (2008).

66. It is a recognized matter of law that a fundamental duty of the trustee throughout the trust relationship is to maintain complete loyalty to the interests of those beneficiaries of the trust. "A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the 'disintegrating erosion' of particular exceptions, . . . Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court." Meinhard v. Salmon, 249 N.Y. 458, 164 N.E. 545, by Cardozo, C.J.

Wachovia Bank v. Johnston, 269 N.C. 701, 153 S.E.2d 449.

The Supreme Court observed that "(t)he trustee, because of his fiduciary relationship, is skating on the thin and slippery ice of presumed fraud, which he must rebut by proof that no fraud was committed and no undue influence or moral duress exerted." Id.

67. "Fiduciary" includes a trustee under any trust. N.C.G.S. § 32-2. Pursuant to N.C.G.S. § 32-71, the trustee is required to "observe the standard of judgment and care under the circumstances then prevailing, which an ordinarily prudent person of discretion and intelligence, who is a fiduciary of the property of others, would observe as such fiduciary."

68. Upon information and belief, the Defendant has breached these fiduciary duties by self dealing with the trust account and deducting fees from this account that were not earned by the Defendant.

69. As a result of these breaches, the Plaintiff has suffered actual damages and has suffered from emotional distress.

WHEREFORE, the Plaintiff having set forth his claims for relief against the Defendant respectfully prays of the Court as follows:

- A. That the pre-petition transfers totaling \$1,400.00 be avoided pursuant to 11 U.S.C. § 548;
- B. That this Court order the Defendant to turn over to the Plaintiff property of the estate that is in the Defendant's possession, and that the Court award sanctions, legal fees, actual damages, and treble or punitive damages to the Plaintiff;
- C. That this Court order the Defendant to pay actual and punitive damages, attorney fees, and costs pursuant to 11 U.S.C. § 362(k) for violations of the automatic stay;
- D. That this Court order the Defendant to pay additional actual damages, statutory damages, attorney fees and costs in a sum to be determined by the Court for violation of N.C.G.S. § 75-1.1, et. seq. and § 14-423 through § 14-425, and that such actual damages be trebled pursuant to N.C.G.S. § 75-1;
- E. That this Court order the Defendant to pay punitive damages in order to deter the Defendant from committing these acts in the future;
- F. That this Court order the Defendant to pay additional damages, attorney fees and costs resulting from the rescission of their agreement with the Debtor due to the Defendant's fraud;

- G. That this Court order the Defendant to pay additional damages for the emotional distress created by the Defendant's violation of Louisiana tort law and by the Defendant's breach of fiduciary duties it owed to the Plaintiff;
- H. That the Plaintiff have and recover against the Defendant all reasonable legal fees and expenses incurred by their attorney;
- I. That the Plaintiff have such other and further relief as the Court may deem just and proper.

Date this the _____ day of _____, 2009.

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**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME: **CHAPTER 13 NO.
OUR FILE NO.**

ADDRESS:

SSN: --- -- 5707

DEBTOR(S).

DEBTOR

Adv. Proc. No. _____

Plaintiff,

versus

DEBT SHIELD, INC

Defendant.

**Complaint Seeking to Avoid a Pre Petition Transfer of Property,
For Damages Arising out of the Restrictions Imposed on Debt Relief
Agents Under Section 526 of the Bankruptcy Code, and
For Damages for Violations of the North Carolina
Unfair and Deceptive Trade Practices Act
and Breach of Fiduciary Duties**

Introduction

1. This action seeks to avoid pre-petition transfers of property from the Plaintiff to the Defendant from which the Plaintiff received less than equivalent value from the Defendant and further did not receive the notices required of Debt Relief Agents. These transfers were all done within one year of the filing of the bankruptcy petition.

2. This action also seeks damages from the pre-petition actions of the Defendant which constitute numerous violations of the North Carolina Unfair and Deceptive Trade Practices Act.

Jurisdiction and Venue

3. Jurisdiction is conferred on this Court pursuant to the provisions of Section 1334 of Title 28 of the United States Code in that this proceeding arises in and is related to the above-captioned Chapter 13 case under Title 11 and concerns property of the Debtor in that case.

4. This Court has both personal and subject matter jurisdiction to hear this case pursuant to Section 1334 of Title 28 of the United States Code, Section 157(b)(2) of Title 28 of the United States Code, and pursuant to the Order entered by the Judges of the United States District Court for the Western District of North Carolina on July 30, 1984 (the Referral Order), which Order was entered in accordance with the Bankruptcy Amendments and Federal Judgeship Act of 1984.

5. This Court has supplemental jurisdiction to hear all state law claims pursuant to Section 1367 of Title 28 of the United States Code.

6. This matter is primarily a core proceeding and therefore the Bankruptcy Court has jurisdiction to enter a final order. However, in the event this case is determined to be a non-core proceeding then and in that event the Plaintiffs consent to the entry of a final order by the Bankruptcy Judge.

7. Venue lies in this District pursuant to Section 1391(b) of Title 28 of the United States Code.

Parties

8. The Plaintiff in this case was and is a debtor under Chapter 13 of Title 11 of the United States Code in case number _____, which case is presently pending before this court. The Plaintiff is hereinafter referred to as the Plaintiff or the debtor.

9. The Defendant, Debt Shield Inc, is a Maryland corporation allegedly engaged in the business of "debt management". The Defendant is also a "debt relief agent" as that term is defined by 11 U.S.C. 101(12A).

Factual Allegations

10. The Chapter 13 case of the Plaintiff was commenced by the filing of a voluntary petition with the Clerk of this Court on _____. On _____ the Bankruptcy Noticing Center notified Defendant of Plaintiffs' bankruptcy case.

11. The 341(a) meeting of creditors was held in Shelby, North Carolina on _____.

12. The Chapter 13 plan of the Plaintiff was subsequently confirmed by order of this Court dated _____.

13. On or about July 1, 2006 the Debtor entered into an agreement with the Defendant. This agreement required the Debtor to remit monthly payments to the Defendant who would use that money to "negotiate" settlements with the Debtor's creditors. The Debtor entered into the agreement based on representations of the Defendant that she would not have to file for bankruptcy relief if she agreed to permit the Defendant to "eliminate her debts" through the Defendant's exclusive debt elimination program. The Debtor knew she could not pay her credit card debts in full due to the interest and fees being tacked on each month and was hoping the defendant could help lower the total amounts due and lower the interest rates.

14. The Plaintiff alleges that in connection with the agreement the Defendant failed to provide the written notices required by Section 342(b)(1) of Title 11 of the United States Code.

15. The Plaintiff alleges that at no time during the initial meeting or within three (3) business days thereafter did the Defendant provide the Plaintiff with a "clear and conspicuous notice" that:

- (a) All information had to be complete, accurate and truthful;
- (b) All assets had to be completely and accurately disclosed;
- (c) All assets had to be valued at the replacement value;
- (d) All current monthly income had to be accurately stated;
- (e) All disposable income had to be accurately stated; and
- (f) All information could be audited.

16. The Plaintiff also alleges that the Defendant failed to provide the Plaintiff with the Statement required by 11 USC 527(b).

17. The Plaintiff alleges that the Defendant failed to "clearly and conspicuously disclose" in all advertisements the notice required by 11 USC 528(a)(4).

18. The Plaintiff also alleges that the Defendant at no time provided the Plaintiff with any of the written notices required by 11 USC 528(b)(2)(A) and (b)(2)(B).

19. The Debtor remitted a total of \$10,380.00 in funds to the Defendant in monthly installments from July 2006 to June of 2008 believing she was contributing money that would eventually go towards paying off her substantial unsecured debt. She was misled into thinking these payments would be pooled and paid to her creditors.

20. Needless to say, the Defendant's advertised Debt Elimination Plan did nothing to reduce her unsecured debt and she was forced to seek bankruptcy protection.

21. These funds were purportedly placed in a Trust account maintained by the Defendant. These funds upon information and belief allegedly remained in the trust account when the debtor filed bankruptcy.

22. The Debtor listed and rejected this contract on Schedule G of her bankruptcy petition.

23. On September 22, 2008, the attorney for the debtors sent a letter via certified mail demanding that the Defendant turnover the funds held in the Trust Account since the contract had been rejected. In the absence of a turnover, the letter demanded that the Defendant provide a full accounting of the funds.

24. On October 7, 2008, the Debtor's attorney received a letter from James D. Ealley, an attorney for the Defendant. This letter is attached as Exhibit "B" and incorporated herein by reference.

25. This letter states that the first two payments (totaling \$1350.00) made by the Debtor to the Defendant were paid to the Defendant as an "activation fee."

26. The letter further states that \$7,680.00 of the Debtor's monthly payments was placed in the Debtor's Trust Account.

27. Also, the letter states that "\$3,649.20 was earned by Debt Shield as a monthly service fee" and was paid from the trust account to the Defendant.

28. Finally, the letter states that "Debt Shield reached a settlement with Capital One, one of Plaintiff's Creditors. The Amount of \$983.00 was written from her trust account and used to settle the account, which included a \$15 overnight Delivery Charge."

29. All in all the letter reveals that of the total funds of more than \$10,000.00 sent by the Plaintiff to the Defendant only \$983.00 has been used to eliminate any of the Plaintiff's credit card debt. This amount constitutes less than 10% of the amount paid by the Plaintiff to the Defendant.

30. The Defendant has refused to refund any of the non-disbursed funds to the Plaintiff.

**First Claim for Relief
(Avoidance of Fraudulent Transfers)**

31. The allegations in paragraphs 1 through 30 of this complaint are realleged and incorporated herein by this reference.

32. 11 U.S.C. Section 548(a)(1)(B)(i) allows the Bankruptcy Trustee to avoid an transfer of a debtor's interest in property that occurred within one year proceeding the filing of the petition where as a result of such transfer the Debtor "received less than a reasonably equivalent value in exchange for such transfer".

33. In this case, the Debtor transferred over \$10,000.00 to the Defendant from July 2006 until June 2008.

34. The Debtor filed her bankruptcy petition with this court on _____. Therefore all transfers were made within the one year period prior to the commencement of the case.

35. The Debtor received far less than a reasonable equivalent in value from these transfers in that Defendant did not provide any services in exchange for the money payments. The only service the Defendant allegedly provided was "a settlement" with Capital One, a creditor of the debtor. Despite only providing nominal services to the debtor, the Defendant collected over \$4,999.20 in fees.

36. Pursuant to Section 548(a)(1)(B)(i) these pre-petition transfers were Fraudulent transfers made involuntarily by the Debtor to the Defendant and should be returned to the bankruptcy estate pursuant to Section 541.

**Second Claim for Relief
(Violation of Section 526 of the Bankruptcy Code)**

37. The allegations in paragraphs 1 through 36 of this complaint are realleged and incorporated herein by this reference.

38. Defendant was at all times relevant to the allegations herein acting as a "Debt Relief Agency" as that term is defined by Section 101(12A) of Title 11 of the United States Code.

39. Plaintiff at all times relevant to the allegations herein was an "assisted person" as that term is defined by Section 101(3) of Title 11.

40. Defendant intentionally and/or negligently failed to comply with the provisions of Section 526 of the Bankruptcy Code.

41. Defendant intentionally and/or negligently disregarded the material requirements of Title 11 of the United States Code and the Federal Rules of Bankruptcy Procedure.

42. Plaintiffs allege that the contract with Defendant should be declared void, that all funds paid by Plaintiff to the Defendant be repaid to Plaintiff, that actual damages be awarded to Plaintiff, that all future conduct by Defendant be enjoined pursuant to Section 526(C)(5)(a), that a civil penalty of at least \$30,000.00 be imposed upon Defendant pursuant to Section 526(C)(5)(b), and that Defendant pay Plaintiff all reasonable costs and legal fees for its violation of Section 526 of the Bankruptcy Code, with said fees computed at the rate of \$375.00 per hour, the current hourly rate for the Plaintiff's attorney.

Third Claim for Relief

(North Carolina Unfair and Deceptive Trade Practices Act)

43. The allegations in paragraphs 1 through 42 of this complaint are realleged and incorporated herein by this reference.

44. The Defendant is a corporation engaging in business in the state of North Carolina.

45. The Defendant's acts against the Debtor were unfair and deceptive and were violations of Chapter 75 Section 1.1 of the North Carolina General Statutes.

46. More particularly, the Defendant's paying itself from Plaintiff's trust account an "Activation Charge" of \$1350.00 was an unfair and deceptive act.

47. Also, the Defendant's paying itself from the Plaintiff's trust account a service fee of \$1,692.00 for performing less than nominal work on the Plaintiff's behalf was an unfair and deceptive act.

48. Furthermore, the Defendant acted as a debt adjuster as defined by Article 56 Section 14-423 of the North Carolina General Statutes. Section 14-424 specifically states that any person acting as a debt adjuster in the State of North Carolina is guilty of a Class 2 Misdemeanor. Therefore the Defendant's actions were not only deceptive and unfair but also criminal.

49. The Debtor is requesting the court award actual damages in the amount of \$4,999.20 representing the fees charged and collected by the Defendant from the Plaintiff's trust account. Since these actual damages stem from the Defendant's unfair, deceptive, and criminal acts they should be trebled pursuant to Section 75-16 of the North Carolina General Statutes.

50. The Debtor is also asking the Court to award full statutory damages in the amount of \$2000.00 for each violation.

51. Furthermore, the Debtor is seeking punitive damages in order to deter the Defendant from illegally operating in North Carolina and to prevent Defendant from preying on desperate Debtors and their desires to pay something back to their creditors by extracting thousands of dollars in unfair, deceptive and illegal fees. These punitive damages are also sought to deter the defendant from making violations of state criminal and consumer protection statutes part of its business model.

Fourth Claim for Relief (Breach of Fiduciary Duty and Self Dealing)

52. The allegations in paragraphs 1 through 51 of this complaint are realleged and incorporated herein by this reference.

53. The Defendant indicated in its letter to the attorney of the debtor that a trust account had been established to hold the money remitted by the Debtor.

54. Upon information and belief, the Defendant was the trustee of this trust account.

55. As trustee of this account, the Defendant owed fiduciary duties to the Debtor.

56. The Defendant has breached these fiduciary duties by self dealing with the Trust Account. This self dealing occurred where the Defendant paid itself \$4,999.20 in fees from the Trust Account. These Fees were not earned by the Defendant.

57. As a result of these breaches, the Plaintiff has suffered actual damages and has suffered from emotional distress.

WHEREFORE, the Plaintiff having set forth her claims for relief against the Defendant respectfully prays of the Court as follows:

- A. That the Pre Petition transfer of \$10,380.00 be avoided pursuant to 11 U.S.C Section 548;
- B. That this Court order the Defendant to pay additional actual damages and statutory damages in a sum to be determined by the Court for violation of N.C.G.S. Section 75-1.1 et seq and that such actual damages be trebled pursuant to Section 75-16.
- C. That this Court order the Defendant to pay punitive damages in order to deter the Defendant from committing these acts in the future and based on the fact these improper actions were committed while operating as a Debt Adjuster which is a criminal offense in the state of North Carolina.
- D. That the contract with Defendant be declared void;
- E. That all future conduct by Defendant be enjoined pursuant to Section 526(C)(5)(a);
- F. That a civil penalty of at least \$30,000.00 be imposed upon Defendant pursuant to Section 526(C)(5)(b);
- G. That the court award actual damages in the amount of \$4,999.20 representing the fees charged and collected by the Defendant from the Plaintiff's trust account and that these damages be trebled.
- H. That the Court award full statutory damages in the amount of \$2000.00 for each violation of the NCUDAP.
- I. That this Court order the Defendant to pay additional damages for the emotional distress created by the Defendant's breach of the Fiduciary Duties it owed to the Plaintiff.
- J. That the Plaintiff have and recover against the Defendant all reasonable legal fees and expenses incurred by her attorney;
- K. That the Plaintiff have such other and further relief as the Court may deem just and proper.

Date this the _____ day of _____.



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**IN THE UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:)	
)	
KATHY A. FREEMAN,	)	CHAPTER 13 CASE NO.
	)	OUR FILE NO. 08-40120
Debtor.)	
_____)	
)	
KATHY A. FREEMAN,	)	ADV. PROC. NO. 08-401
)	
Plaintiff,)	
)	
vs.)	
)	
FAIRHAVEN LAW GROUP, a)	
Professional Law Corporation,)	
)	
Defendant.)	

**COMPLAINT FOR VIOLATION OF THE DEBT RELIEF AGENCY PROVISIONS OF THE
BANKRUPTCY CODE**

Plaintiff, by way of Complaint against the Defendant states as follows:

IDENTIFICATION OF THE PARTIES

1. Plaintiff, Kathy A. Freeman ("Plaintiff"), is the debtor in the above captioned chapter 13 case which was filed in this Court on July 25, 2008 and which case is presently pending before this court.
2. Defendant, Fairhaven Law Group, purports to be a Professional Law Corporation ("Defendant") and is, upon information and belief, a North Carolina corporation with an office/business address of 1234 East Boulevard, Charlotte, North Carolina.

THE CLAIM FOR RELIEF

3. This action seeks damages under 11 U.S.C. Section. 526(c)(2) and other relief for Defendant's failure to comply with the mandatory Debt Relief Agency provisions of the United States Bankruptcy Code.

JURISDICTION

4. Jurisdiction is conferred on this Court pursuant to 28 U.S.C. section 1334 in that this proceeding arises in and is related to the above-captioned Chapter 13 case under Title 11 and concerns property of the Debtor in that case.
5. This Court has both personal and subject matter jurisdiction to hear this case

pursuant to 28 U.S.C. section 1334, 28 U.S.C. sections 157(a), 157(b)(1), 157(b)(2) and standing the Order of Reference entered by the United States District Court for the Western District of North Carolina on July 23, 1984 in accordance with the Bankruptcy Amendments and Federal Judgeship Act of 1984.

6. This matter is a core proceeding pursuant to 28 U.S.C. sections 157(b)(2)(A), (H) and (O) and therefore the Bankruptcy Court has jurisdiction to enter a final order. However, in the unlikely event any aspect of this case is determined to be a non-core proceeding then and in that event the Plaintiff consents to the entry of a final order by the Bankruptcy Judge.

VENUE

7. Venue lies in this District pursuant to 28 U.S.C. section 1409.

FACTUAL ALLEGATIONS

8. The Plaintiff's chapter 13 case was commenced by the filing of a voluntary petition with the Clerk of this Court on February 25, 2008 (the "Filing Date").
9. Prior to the Filing Date, in or about October of 2007 Plaintiff received a commercial solicitation sent by Defendant through the United States Mail addressed to Plaintiff at her home address in which Defendant identified itself as a **Debt Relief Adjustment Agent** and that by retaining the Defendant's services the Plaintiff could avoid filing a petition for relief under the United States Bankruptcy Code.
10. Defendant's solicitation provided examples of monthly debt adjustment programs, and invited Plaintiff to inquire further about retaining Defendant to provide such debt adjustment services.
11. Shortly after receiving Defendant's solicitation, Plaintiff contacted Defendant by telephone to further inquire into Defendant's debt adjustment program. During the course of the telephone contact, Defendant failed to provide Plaintiff with any of the mandatory notices required by the Debt Relief Agency sections of the Bankruptcy Code as amended on October 17, 2005.
12. On or about November 6, 2007 Plaintiff received a follow-up package of documents from Defendant, including a proposed debt adjustment plan and a contract pursuant to which Plaintiff might enroll in Defendant's debt adjustment and debt-elimination program. The program offered these various services as alternatives to filing for relief under Title 11 of the United States Code. The purported contract for debt relief services was the first such document Plaintiff received from Defendant.
13. The proposed debt adjustment plan directed Plaintiff to deposit the sum of \$550.00 every month into her depository bank account to be established by the Defendant. The contract indicated that Defendant would, on Plaintiff's behalf, negotiate reduced lump sum settlements with Plaintiff's secured and unsecured creditors funded by the money in Plaintiff's depository bank account. The contract also represented that in many cases the Defendant would be able to simply eliminate some of the debt.
14. Defendant's fee was also to be paid in monthly installments from the money in Plaintiff's depository bank account. The Plaintiff alleges that none of the written or

verbal information provided by the Defendant indicated or even implied that the full fee to be charged by Defendant would have to be paid prior to any debt negotiation or elimination efforts by Defendant.

15. At the time Plaintiff enrolled in Defendant's debt adjustment and debt-elimination program, Plaintiff was current with payments to her creditors. However, Plaintiff knew that she could not pay her credit card debt in full due to the interest and fees being tacked on each month. And, although Plaintiff could barely afford to save \$550.00 every month without severely scrimping on her necessary and reasonable monthly living expenses, Plaintiff believed the statements and representations in Defendant's literature to the effect that Defendant's debt adjustment and debt-elimination programs would achieve the promised substantial savings as an alternative to filing for bankruptcy protection.
16. Even though Plaintiff was current with payments to her creditors, one of Defendant's agents, servants or employees directed Plaintiff to cease making payments to such creditors and to no longer communicate with them. Such advice extended to and included the first and second mortgage loans on Plaintiff's residential real estate.
17. On or about November 9, 2007, Plaintiff enrolled in Defendant's debt adjustment and debt-elimination programs by signing the contract and returning it by mail to Defendant.
18. Plaintiff also included a check in the amount of \$550.00 with the signed contract, per Defendant's written instructions, to pay the initial installment of Defendant's fee. Defendant negotiated this check on or about November 29, 2007.
19. Plaintiff also signed the pre-printed automatic check withdrawal authorization form included in Defendant's package and returned it to Defendant along with the signed contract. That form authorized the Defendant to electronically withdraw funds from Plaintiff's depository bank account every month to pay Defendant's the \$550.00 installment.
20. Plaintiff was directed by Defendant to notify her secured and unsecured creditors to send all future monthly payment statements to Defendant's address in Charlotte, North Carolina, for Defendant's review and to forward all creditor correspondence to Defendant's separate address in Charlotte, North Carolina for Defendant's review.
21. Defendant, thereafter, began making periodic electronic withdrawals from Plaintiff's depository bank account as payment against Defendant's fees. More specifically, Defendant electronically withdrew \$550.00 from Plaintiff's depository bank account on December 26, 2007 and again electronically withdrew \$550.00 from Plaintiff's depository bank account on January 25, 2008, February 25, 2008, March 25, 2008, April 25, 2008 and May 25, 2008. Thus, Plaintiff paid a total of \$_____to Defendant between November 29, 2007 and May 25, 2008.
22. GE Money Bank was one of the creditors included in the debt adjustment and debt-elimination plans with whom Defendant was to negotiate on Plaintiff's behalf. Despite having paid the total sum of \$_____to Defendant, no such settlement was negotiated with GE Money Bank.
23. Instead, on or about June 22, 2008, GE Money Bank filed a civil action against the Plaintiff in the Superior Court of Cleveland County, North Carolina, under file number

08-CVS-9___ seeking full payment of its claim in excess of \$15,000.00.

24. When Plaintiff was served with GE Money Bank's collection complaint, Plaintiff forwarded a copy of the complaint to Defendant.
25. On or about July 2, 2008 Plaintiff received a federal express package containing a *pro se* answer to GE Money Bank's complaint along with instructions directing Plaintiff to sign the answer, file it with the court and serve a copy on GE Money Bank's counsel.
26. The *pro se* answer contained general denials to the allegations in GE Money Bank's complaint and also contained numerous affirmative defenses.
27. Before preparing the *pro se* answer to GE Money Bank's complaint, no one from Defendant's company spoke to Plaintiff to ascertain whether or not the allegations in that complaint were accurate or if they were subject to denial in good faith.
28. Likewise, before preparing the *pro se* answer to GE Money Bank's complaint, no one from Defendant's company spoke to Plaintiff to ascertain whether any of the affirmative defenses included therein could be asserted in good faith.
29. In addition to the complaint filed by GE Money Bank, several of Plaintiff's other creditors began calling her at home and at work because she had ceased making payments as directed by Defendant. Plaintiff also received two notices of intent to proceed with foreclosures from lawyers representing her first and second mortgage creditors.
30. Plaintiff realized that Defendant was not providing any real services and directed her depository bank in writing not to honor any more electronic fund withdrawals by Defendant.
31. Plaintiff was also left with no choice but to file a chapter 13 bankruptcy case since Defendant's debt adjustment and debt-elimination program did not result in the promised debt reductions and settlements but instead resulted only in one collection action, harassing creditor collection calls and threats of additional legal action including the foreclosure of the mortgages on the Plaintiff's home.
32. On July 26, 2008, the day after Plaintiff's chapter 13 case was filed, Plaintiff's attorney sent a letter via certified mail demanding that, within 10 days, Defendant turnover the sum of \$_____ it had taken from Plaintiff prior to the filing of her chapter 13 petition.
33. Defendant has willfully failed and refused to turnover any part of the said sum to the Plaintiff or to Plaintiff's attorney or to the Chapter 13 Trustee.
34. Plaintiff, whose debts are primarily consumer debts with non-exempt property valued at less than \$150,000, is therefore an "assisted person" as that term is defined in 11 U.S.C. section 101(3). At all times relevant to the allegations herein, Plaintiff was such an "assisted person."
35. Defendant's written communications, website information, literature, directions and debt adjustment and so-called debt-elimination programs constituted goods or services sold or otherwise provided to Plaintiff with the actual or implied purpose of

providing information, advice or counsel with respect to a case or proceeding under title 11 of the United States Code and, therefore, constituted "bankruptcy advice" as that term is defined in 11 U.S.C. section 101(4A).

36. Defendant identified itself as a "debt relief" or a "debt elimination agency" in at least three (3) separate statements contained on the initial mail solicitation received by Plaintiff. Further, Defendant is, in fact, a "debt relief agency" as that term is defined in 11 U.S.C. Section 101(12A) in that Defendant provided bankruptcy advice to Plaintiff, an assisted person.
37. Defendant directly, indirectly, affirmatively and/or by material omission misrepresented to Plaintiff the services Defendant would provide to Plaintiff in violation of 11 U.S.C. section 526(a)(3)(A).
38. Defendant directly, indirectly, affirmatively and/or by material omission misrepresented to Plaintiff the benefits and risks that may result if Plaintiff became a debtor in a case under title 11 of the United States Code in violation of 11 U.S.C. section 526(a)(3)(B).
39. Defendant intentionally or negligently disregarded the material requirements of title 11 of the United States Code applicable to Defendant as a debt relief agency in violation of 11 U.S.C. section 526(c)(2)(C).
40. Defendant failed to provide Plaintiff with the written notice required under 11 U.S.C. section 342(b)(1) in violation of 11 U.S.C. section 527(a)(1).
41. Defendant failed to provide Plaintiff, within three (3) business days after the first date Defendant first offered to provide bankruptcy assistance services to Plaintiff, the additional clear and conspicuous written notices required by, and in violation of, 11 U.S.C. sections 527(a)(2)(A) through (D).
42. Defendant failed to provide Plaintiff the clear and conspicuous separate written notice required by, and in violation of, 11 U.S.C. section 527(b).
43. Defendant failed to provide Plaintiff the clear and conspicuous separate written notice required by, and in violation of, 11 U.S.C. section 527(c).
44. Defendant failed to provide Plaintiff with a complete and fully executed copy of the contract as required by, and in violation of, 11 U.S.C. section 528(a)(2).

WHEREFORE, Plaintiff respectfully requests the Court to enter a judgment as follows:

1. That the contract for services between the Plaintiff and Defendant be declared and adjudged void, pursuant to 11 U.S.C. section 526(c)(1), for failure to comply with the material requirements of sections 526, 527 and/or 528 of the United States Bankruptcy Code and that no provision of such contract may be enforced by the Defendant against the Plaintiff;
2. That Defendant be found liable to Plaintiff, pursuant to 11 U.S.C. section 526(c)(2), in the amount of \$_____ as the amount received by Defendant from Plaintiff in connection with providing bankruptcy assistance.
3. That Plaintiff be awarded any additional actual damages as permitted by 11 U.S.C.

section 526(c)(2) in sum not less than \$25,000.00;

4. That Defendant be ordered to pay Plaintiff's counsel fees and legal expenses as required by 11 U.S.C. section 526(c)(2), with said fee to be computed at the rate of \$375.00 per hour for her attorney and \$125.00 per hour for his legal assistants;
5. That Defendant, having intentionally violated the provisions of 11 U.S.C. section 526, be ordered and enjoined from further violation of such section as permitted by section 11 U.S.C. section 526(c)(5)(A);
6. That an appropriate civil penalty as permitted by 11 U.S.C. section 526(c)(5)(B) be assessed and imposed against Defendant for having engaged in a clear and consistent pattern or practice of violating 11 U.S.C. section 526, said penalty to be in a sum equal to three times the amount of the funds collected by the Defendant plus the amount of the actual damages as determined by this Court;
7. That Plaintiff be awarded and recover from Defendant all costs and expenses connected with this action;
8. That Plaintiff recover interest on the judgment at the rate permitted by law;
9. That Defendant be permanently enjoined from engaging in such unlawful and illegal practices in the State of North Carolina; and
10. Any other such relief as the Court determines just and proper.

This the _____ day of _____, 2008.

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K – TORT OF HARASSMENT

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME:

**CHAPTER 13 NO.
OUR FILE NO.**

ADDRESS:

SSN: --- -- 5707

DEBTOR(S).

**MALE DEBTOR AND WIFE,
FEMALE DEBTOR,**

Adv. Proc. No. _____

Plaintiffs,

versus

GENERAL MOTORS ACCEPTANCE CORPORAITON

Defendants.

**Complaint Seeking Damages in Core Adversary Proceeding
Tort of Harassment**

Introduction

1. This Complaint seeks damages caused by the Defendant's monthly letters requesting proof of insurance on their collateral and also demanding such proof be made within 10 days of the letter or else the Defendant would take the Plaintiffs to Bankruptcy Court presumably to secure relief from the automatic stay. These letters have been sent 6 times despite the fact the Plaintiffs have provided proof of such insurance on three separate occasions and have spoken with agents and employees of the Defendant on numerous occasions. Theses letters are completely inaccurate and the Defendant has constantly been informed of such.

2. It appears that these letters will continue to be sent each month for the remainder of the Debtors' Chapter 13 case (approximately 54 months) unless this Court intervenes. This action is therefore being filed in part to enjoin the Defendant from this practice and to compensate the Plaintiffs for the damages incurred in constantly responding and worrying about these letters, demands and notices. The Plaintiffs are also seeking the recovery of the unnecessary time, expenses and legal fees incurred by their attorney in responding to these "insurance letters."

Jurisdiction and Venue

3. Jurisdiction is conferred on this Court pursuant to the provisions of Section 1334 of Title 28 of the United States Code in that this proceeding arises in and is related to the above-captioned Chapter 13 case under Title 11 and concerns property of the Debtors in that case.

4. This Court has both personal and subject matter jurisdiction to hear this case pursuant to Section 1334 of Title 28 of the United States Code, Section 157(b)(2) of Title 28 of the United States Code, and pursuant to the Order entered by the Judges of the United States

District Court for the Western District of North Carolina on July 30, 1984 (the Referral Order), which Order was entered in accordance with the Bankruptcy Amendments and Federal Judgeship Act of 1984.

5. This Court has supplemental jurisdiction to hear all state law claims pursuant to Section 1367 of Title 28 of the United States Code.

6. This matter is primarily a core proceeding and therefore the Bankruptcy Court has jurisdiction to enter a final order. However, in the event this case is determined to be a non-core proceeding then and in that event the Plaintiff consents to the entry of a final order by the Bankruptcy Judge.

7. Venue lies in this District pursuant to Section 1391(b) of Title 28 of the United States Code.

Parties

8. The Plaintiffs in this case were and are debtors under Chapter 13 of Title 11 of the United States Code in case number _____, which case is presently pending before this Court. The Plaintiffs are hereinafter referred to as the Plaintiffs and/or the debtors.

9. The Defendant, General Motors Acceptance Corporation (GMAC), is a Delaware corporation engaged in the business of originating and servicing motor vehicle loans with its principal place of business located at 300 Renaissance Center, MC: 482-C14-C66, Detroit, MI 48265-3000. Furthermore, the Defendant is a creditor in the Plaintiffs' Chapter 13 payment. GMAC has filed two proofs of claim in this case, thereby consenting to the jurisdiction of this Court to resolve all matters and controversies between the parties.

10. The Chapter 13 case of the Plaintiffs was commenced by the filing of a voluntary petition with the Clerk of this Court on _____. On _____ the Bankruptcy Noticing Center notified Defendant of Plaintiffs' bankruptcy case.

11. The 341(a) meeting of creditors was held in Shelby, North Carolina on _____.

12. The Chapter 13 plan of the Plaintiff was subsequently confirmed by order of this Court dated _____. The Plan, as confirmed, provides for the payment of the claims of GMAC and rejects all arbitration and other executory contracts related to the legal relationship between the Plaintiffs and GMAC. GMAC did not file an objection to the confirmation of the Plan and has failed to file a timely motion to reconsider confirmation.

13. On or about November 5, 2005, the Defendant sent the attorney for the Plaintiffs a letter requesting the Plaintiffs to send proof of insurance on the vehicle that is being paid in this pending Chapter 13 case and is secured by a duly recognized lien in favor of the Defendant. Specifically, the letter stated: "Please be advised that according to our records, insurance coverage has lapsed or we are unable to verify adequate insurance coverage on the NO2 BUICCENTER (VIN redacted)... owned by the above-referenced Debtor(s). If we are not provided the necessary information within 10 days of the date of this letter, we may seek relief in the Bankruptcy Court."

14. On or about November 11, 2005, the Plaintiff's attorney mailed such proof as requested in the November 5, 2005 letter from the Defendant. This proof included a copy of the name of the insurance carrier, the policy number and the nature and amount of coverage. This proof also confirmed that GMAC was named as a loss-payee on the policy of insurance. This notice was sent to the address that was used on the Defendant's letterhead. The letter contained no other contact addresses. The letter was not returned to the Plaintiffs' attorney by the United States Postal System and therefore was deemed received.

15. On or about January 5, 2006, the Defendant sent a second letter to the attorney for the Plaintiffs again demanding that the Plaintiffs provide proof of insurance on the same motor vehicle. This letter was the same form letter sent the previous time and included the identical return address and text.

16. On or about January 24, 2006, the Plaintiff's attorney again mailed such proof of insurance as requested in the January 5, 2006 letter. The letter was not returned to the Plaintiffs' attorney by the United States Postal System and was therefore deemed received.

17. On or about March 6th, 2006, the Defendant sent a third letter to the attorney for the Plaintiffs again demanding that Plaintiffs provide proof of insurance on the same motor vehicle. This was letter was the same form letter sent the previous two times and included the same return address and text.

18. In response to this third letter, a staff member of the attorney employed by the debtors contacted the Defendant directly by phone notifying them of proof of insurance and that it was the third time the debtors had provided GMAC with such information. An agent of the Defendant named Rachelle stated "that the easiest way for them to update their system would be to fax the insurance information". The staff member suggested that the easiest way for GMAC to confirm the coverage would be to check its file for proof of current coverage from the insurance company. GMAC did not deny that it received periodic status reports from the insurance carrier for the debtors or that such notice was required by the applicable North Carolina Insurance Laws.

19. On or about April 3, 2006, the Defendant sent a fourth letter to the attorney for the Plaintiffs again demanding that the Plaintiffs provide proof of insurance of the same motor vehicle. This letter was the same form letter sent the previous three times and included the same return address and text.

20. On or about May 2, 2006, the Defendant sent a fifth letter to the attorney for the Plaintiffs again demanding that the Plaintiffs provide proof of insurance on the same motor vehicle. This letter was the same form letter sent the previous four times and included the same return address and text.

21. On or about June 5, 2006, the Defendant sent a sixth letter to the attorney for the Plaintiffs again demanding that the Plaintiffs provide proof of insurance of the same motor vehicle. This letter was the same form letter sent the previous five times and included the same return address and text.

First Claim for Relief (Tort of Harassment)

22. The allegations of paragraphs 1-21 above are realleged and incorporated herein by reference.

23. In the case of *Douglas and Darcia Sipe v. Conseco Finance Servicing Company*, Case Number 99-40166, Order entered July 18th, 2001, Judge Marvin R. Wooten held "that the facts in this case constitute the commission of the tort of harassment against debtors who are complying with their Chapter 13 plans". In that case, Conseco was sending confusing monthly statements each month regarding their mobile home payments. It was not clear if they were demands for payment or simply some type of account information. The Court concluded that the confusing statements caused "undue and unnecessary time and expenses on the attorneys who represent debtors in bankruptcy cases, causing them to incur expenses and expend valuable time and effort for which absolutely no fee is provided for under our Local Bankruptcy Rules or our standard written fee agreement". He ordered the creditor to pay damages for the harassment caused by these letters. A copy of this order is attached to this Complaint as Exhibit "A" and is fully incorporated herein by reference.

24. Like the Debtors that were before Judge Wooten in the Conseco case, GMAC's inability to properly control the GMAC business records regarding the Plaintiffs' insurance has resulted in the Debtors' attorney and the Plaintiffs expending time, money and expenses in order to constantly respond to these frivolous form letters that GMAC sends more or less on a monthly basis. It seems clear from the pattern of conduct that GMAC is exercising no prior due diligence to confirm whether or not the internal business records of GMAC include proof of or cancellation of such insurance but rather that GMAC is simply issuing periodic and computerized default notice form letters to the attorney for the debtors. Also, the Plaintiffs have been current on their Chapter 13 plan payments and have maintained physical damage and liability insurance on the GMAC vehicle at all times since they filed for Chapter 13 relief. The Plaintiffs simply do not understand why GMAC is alleging to the contrary each month. The Plaintiffs are also worried every time they receive one of these letters that GMAC will file a motion with the Bankruptcy Court, as they allege they may do in each letter, which will cause the Plaintiffs to spend even more time and money and face the risk of the loss of the use of their motor vehicle.

25. Furthermore, this monthly harassment has interfered with the attorney-client relationship between the Plaintiffs and their attorney of record in the base bankruptcy case. Despite his numerous efforts of providing the Defendant with proof of insurance, from these constant letters from GMAC, it appears as if the attorney for the Plaintiffs has failed to timely respond to these demand letters. It also makes it appear as if the attorney for the Plaintiffs is not fulfilling his duty to his clients' case, when in reality he is in fact performing such duties with all due speed and diligence.

Second Claim for Relief (Request for Injunction and Declaratory Judgment)

26. The allegations of paragraphs 1-25 above are realleged and fully incorporated herein by reference.

27. The Plaintiffs have attached to this complaint a copy of the statement they have provided to the defendant as proof of insurance. Based on this information, the debtors respectfully seek a judgment from this Court declaring that they have adequate insurance on the motor vehicle encumbered by the first lien of GMAC. This requested relief is sought as a way to relieve the Debtors of any worry about losing their car if the Defendant continues to send monthly letters stating they don't have adequate insurance.

28. The Plaintiffs allege that under North Carolina Law their physical damage insurance carrier is required to provide notice of cancellation or non-renewal of such insurance to GMAC and that said insurance cannot be terminated as to GMAC without such notice. If and when GMAC receives such a notice, it should be allowed to contact the Plaintiffs for proof of such coverage. The Plaintiffs allege that none of the contacts and actions of GMAC as alleged herein related to or arose out of the issuance of such notices by the Plaintiffs insurance carrier.

29. Along with the request for a Declaratory Judgment, the Plaintiffs respectfully move this Court to issue an injunction against the Defendant from sending these inaccurate letters each month or at any time without proof of cancellation or non-renewal of such coverage.

WHEREFORE, the Plaintiffs having set forth their claims for relief against the Defendants respectfully pray of the Court as follows:

- A. That the Plaintiffs have and recover against the Defendant a sum to be determined by the Court in the form of actual damages;
- B. That the Plaintiffs have and recover against the Defendant a sum a sum to be determined by the Court in the form of punitive damages;
- C. That the Court issue a declaratory judgment stating that the Plaintiffs have

adequate insurance on their motor vehicle;

- D. That the Court enjoin the Defendant from sending these inaccurate letters each month or at any time without proof of termination or non-renewal of such coverage from the Plaintiffs' insurance carrier;
- E. That the Defendant be required to pay the attorney fees and expenses for bringing this action; and
- F. That the Plaintiffs have such other and further relief as the Court may deem just and proper.

Date this the _____ day of June 2006.



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L – PAYOFF STATUTE

N.C.G.S. § 45-36.7. Payoff statement: request and content.

(a) An entitled person, or an agent authorized by an entitled person to request a payoff statement, may give to the secured creditor a notification requesting a payoff statement for a specified payoff date not more than 30 days after the notification is given. The notification must contain all of the following:

- (1) The entitled person's name.
 - (2) If given by a person other than an entitled person, the name of the person giving the notification and a statement that the person is an authorized agent of the entitled person.
 - (3) A direction whether the statement is to be sent to the entitled person or that person's authorized agent.
 - (4) The address to which the creditor must send the statement.
 - (5) Sufficient information to enable the creditor to identify the secured obligation and the real property encumbered by the security interest.
- (b) If a notification under subsection (a) of this section directs the secured creditor to send the payoff statement to a person identified as an authorized agent of the entitled person, the secured creditor must send the statement to the agent, unless the secured creditor knows that the entitled person has not authorized the request.

(c) A person who gives to a secured creditor a notification requesting a payoff statement thereby represents that the person is an entitled person or the authorized agent of an entitled person. A secured creditor may rely on that representation in providing a payoff statement unless the secured creditor knows that the requesting person is neither an entitled person nor the authorized agent of an entitled person. A secured creditor has no duty to make inquiry as to whether, or to verify that, the person requesting a payoff statement is an entitled person or the authorized agent of an entitled person.

(d) Within 10 days after the effective date of a notification that complies with subsection (a) of this section, the secured creditor shall issue a payoff statement and send it as directed pursuant to subdivision (a)(3) of this section in the manner prescribed in G.S. 45-36.5 for giving a notification. A secured creditor that sends a payoff statement to the entitled person or the authorized agent may not claim that the notification did not satisfy subsection (a) of this section. If the person to whom the notification is given once held an interest in the secured obligation but has since assigned that interest, the person need not send a payoff statement but shall give (i) a notification of the assignment to the person to whom the payoff statement otherwise would have been sent, providing the name and address of the assignee, or (ii) a notification to the person to whom the payoff statement otherwise would have been sent, stating that the recipient claims no interest in the security instrument or the secured obligation, that the secured obligation was assigned, but that the identity and address of the assignee is not known.

(e) A payoff statement must contain:

- (1) The date on which it was prepared and the payoff amount as of that date, including the amount by type of each fee, charge, or other sum included within the payoff amount;
- (2) The information reasonably necessary to calculate the payoff amount as of the requested payoff date, including the per diem interest amount; and
- (3) The payment cutoff time, if any, the address or place where payment must be made, and any limitation as to the authorized method of payment.

(f) A payoff statement may contain the amount of any fees authorized under this section not included in the payoff amount. A secured creditor may require the payment in full of any fees authorized under this section before issuing a payoff statement.

(g) A secured creditor may not qualify a payoff amount or state that it is subject to change before the payoff date unless the payoff statement provides information sufficient to permit the entitled person or the person's authorized agent to request an updated payoff amount at no charge and to obtain that updated payoff amount during the secured creditor's normal business hours on the payoff date or the immediately preceding business day.

(h) A secured creditor must provide upon request one payoff statement without charge during any six-month period. A secured creditor may charge a fee of twenty-five dollars (\$25.00) for each additional payoff statement requested during that six-month period. However, a secured creditor may not charge a fee for providing an updated payoff amount under subsection (f) of this section or a corrected payoff statement under G.S. 45-36.8(a).

(i) Unless the security instrument provides otherwise, a secured creditor is not required to send a payoff statement by means other than first-class mail. If the creditor agrees to send a statement by another means, it may charge a reasonable fee for complying with the requested manner of delivery.

(j) Except as otherwise provided in G.S. 45-36.12, if a secured creditor to which a notification has been given pursuant to subsection (a) of this section does not send a timely payoff statement that substantially complies with subsection (d) of this section, the creditor is liable to the entitled person for any actual damages caused by the failure, but not punitive damages. A creditor that does not pay the damages provided in this subsection within 30 days after receipt of a notification demanding payment shall also be liable for reasonable attorneys' fees and costs.

(k) This section does not apply unless the notification requesting a payoff statement is given on or after October 1, 2005. (2005-123, s. 1.)

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**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME:

**CHAPTER 13 NO.
OUR FILE NO.**

ADDRESS:

SSN: --- -- 5707

DEBTOR(S).

**MALE DEBTOR. and wife,
FEMALE DEBTOR**

Adversary Proc. No. 06- _____

Plaintiffs,

versus

CITIFINANCIAL MORTGAGE COMPANY, INC.

Defendant.

**Complaint Seeking Damages in Core Adversary Proceeding
For Violation of the North Carolina Payoff Statute**

Introduction

1. This is an action for actual and punitive damages filed by the debtors pursuant to Sections 45-36.4 and 45-36.7 of the North Carolina General Statutes.

2. This action is also filed to enforce the Order of Confirmation duly entered in this Chapter 13 case and to enforce and to implement other Bankruptcy Code provisions and Rules related thereto.

Jurisdiction and Venue

3. Jurisdiction is conferred on this Court pursuant to the provisions of Section 1334 of Title 28 of the United States Code in that this proceeding arises in and is related to the above-captioned Chapter 13 case under Title 11 and concerns property of the Debtors in that case.

4. This Court has both personal and subject matter jurisdiction to hear this case pursuant to Section 1334 of Title 28 of the United States Code, Section 157(b)(2) of Title 28 of the United States Code, and pursuant to the Order entered by the Judges of the United States District Court for the Western District of North Carolina on July 30, 1984 (the Referral Order), which Order was entered in accordance with the Bankruptcy Amendments and Federal Judgeship Act of 1984.

5. This Court has supplemental jurisdiction to hear all state law claims pursuant to

Section 1367 of Title 28 of the United States Code.

6. This Court also has jurisdiction to hear the Fair Debt Collection Practices Act violations pursuant to Section 1692 of Title 15 of the United States Code; thus, federal subject matter jurisdiction is properly founded upon Section 1331 of Title 28 of the United States Code.

7. This matter is primarily a core proceeding and therefore the Bankruptcy Court has jurisdiction to enter a final order. However, in the event this case is determined to be a non-core proceeding then and in that event the Plaintiff consents to the entry of a final order by the Bankruptcy Judge.

8. Venue lies in this District pursuant to Section 1391(b) of Title 28 of the United States Code.

Parties

9. The Plaintiffs in this case were and are debtors under Chapter 13 of Title 11 of the United States Code in case number _____ which case is presently pending before this court. The Plaintiffs are hereinafter referred to as the Plaintiffs or the debtors.

10. The Defendant, CitiFinancial Mortgage Company, Inc. (hereinafter "CitiFinancial") is a New York Corporation with a principal office address of Bowling Green Station, P O Box 5156, New York, NY 10274. CitiFinancial is the holder of the Equity Line Deed of Trust on the debtors' real property located at 908 Earl Road, Shelby, NC.

Factual Allegations

11. The Chapter 13 case of the Plaintiffs was commenced by the filing of a voluntary petition with the Clerk of this Court on _____. On _____ the Bankruptcy Noticing Center notified Defendant of Plaintiffs' bankruptcy case.

12. The 341(a) meeting of creditors was held in Shelby, North Carolina on _____.

13. The Chapter 13 plan of the Plaintiff was subsequently confirmed by order of this Court dated _____.

14. The Chapter 13 plan as confirmed included a debt to CitiFinancial in the amount of \$76,000.00, which was scheduled as a claim secured by a first deed of trust on the rental real estate of the Plaintiffs at _____ (the "rental property").

15. The plan provided for the cure of pre-petition arrears to CitiFinancial in the amount of \$3945.00 through October of 2005, with the Plaintiffs to resume direct payments in November of 2005.

16. In the schedules filed with the Chapter 13 petition, the debtors reserved their rights to any potential claims for relief for damages against CitiFinancial and all officers, agents, employees, attorneys, successors, and assigns arising out of the servicing of the debtors' mortgage loan during and after their prior Chapter 13 case, including but not limited to unlawful fees, costs and charges and violations of the discharge injunction and other applicable state and federal statutes.

17. In the schedules filed with the Chapter 13 petition, the debtors also stated that they contest and dispute the alleged debt owed to CitiFinancial and the factual and legal basis for the alleged default, the factual and legal basis for the filing of a foreclosure proceeding following the debtors' prior Chapter 13 discharge, and CitiFinancial's right to proceed with the said foreclosure.

18. CitiFinancial received notice of the bankruptcy filing and of the Order of Confirmation entered in this case, as evidenced by a Notice of Appearance by Cameron Wesley on behalf of CitiFinancial on January 23, 2006. CitiFinancial did not file any objection to the terms of the Plan in this case or to the reservation of claims language against CitiFinancial in the said Schedules. The debtors are informed and believe and therefore allege that CitiFinancial actually reviewed the Plan and Schedules filed in this case since their records indicate a fee was charged against the loan for such actions.

19. The claim of CitiFinancial for the first deed of trust is identified on the records of the Trustee as claim number 0003 in the amount of \$76,000.00 and the claim for the pre-petition arrears is identified as claim number 0007 in the amount of \$5210.00; however, upon information and belief, CitiFinancial has failed to file a Proof of Claim for the arrears.

20. The debtors were forced to file the within chapter 13 case due to the threat of foreclosure from CitiFinancial on _____. On _____ the Bankruptcy Noticing Center notified Defendant of Plaintiffs' bankruptcy case.

21. On or about March 14, 2006 the debtors' attorney received a notice of default from CitiFinancial alleging that the debtors were in default in the amount of \$1903.60 from February 1, 2006. In response thereto, the attorney for the debtors sent a payoff request to CitiFinancial on March 24, 2006.

22. CitiFinancial did not respond to the payoff request.

23. On or about May 31, 2006, the debtors' attorney received a notice of default from CitiFinancial alleging that the debtors were in default in the amount of \$3168.10 from March 1, 2006. In response thereto, the attorney for the debtors sent a payoff request to CitiFinancial on June 7, 2006.

24. CitiFinancial did not respond to the payoff request.

25. The Plaintiffs have been and continue to be damaged by the Defendants' actions in that they have been and continue to be forced to expend their time and expenses toward the defense of this contested matter and have feared losing their residential rental property. The debtors allege that their disabled son resides in the rental property and has also feared losing his home.

**Claim for Relief
(Failure to Respond to Payoff Request)**

26. The allegations in paragraphs 1 through 25 of this complaint are realleged and incorporated herein by this reference.

27. The actions alleged herein are acts in violation of Sections 45-36.4 and 45-36.7 of the North Carolina General Statutes as CitiFinancial failed to respond to at least two requests for a payoff.

28. As a result of the above violation, CitiFinancial is liable to the Plaintiffs for actual damages, punitive damages and legal fees.

WHEREFORE, the Plaintiffs having set forth their claims for relief against the Defendant respectfully pray of the Court as follows:

- A. That the Plaintiffs have and recover against the Defendant a sum to be determined by the Court in the form of actual damages;

- B. That the Plaintiffs have and recover against the Defendant a sum to be determined by the Court in the form of statutory damages;
- C. That the Plaintiffs have and recover against the Defendant a sum to be determined by the Court in the form of punitive damages;
- D. That the Plaintiffs have and recover against the Defendant all reasonable legal fees and expenses incurred by their attorney;
- E. That the Plaintiffs have such other and further relief as the Court may deem just and proper.

Date this the _____ day of July 2006.



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**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME:

**CHAPTER 13 NO.
OUR FILE NO.**

ADDRESS:

SSN: --- -- 5707

DEBTOR(S).

**MALE DEBTOR. and wife,
FEMALE DEBTOR**

Adversary Proc. No. 06- _____

Plaintiffs,

versus

CITIFINANCIAL MORTGAGE COMPANY, INC.

Defendant.

**Complaint Seeking Damages in Core Adversary Proceeding
For Violation of the North Carolina Payoff Statute and Other State and Federal Laws,
and
Stay and Discharge Violations**

Introduction

1. This is an action for actual and punitive damages filed by the debtors pursuant to Sections 105, 362, 501, 502, 503 and 506 of the Bankruptcy Code, the Fair Debt Collection Practices Act, 15 U.S.C. Section 1692 et seq. ("FDCPA"), and the North Carolina Unfair and Deceptive Act and Practices Laws, G.S. Section 75-50 et seq., ("Acts" and "UDAP"), and for actual and punitive damages pursuant to Sections 2605(e)(1)(A) and 2605(e)(1)(B)(2) of Title 12 of the United States Code and Sections 3500.21(e)(1) and 3500.21(e)(3) of Regulation X; and for violation of Sections 45-36.4 and 45-36.7 of the North Carolina General Statutes. Defendant's conduct also involves a violation of the automatic stay in their prior Chapter 13 case; violation of the discharge injunction of the prior Chapter 13 case; and falsely representing that a debt discharged in the debtors' prior Chapter 13 Case is still owed, the sole purpose of which is to coerce the payment of a discharged debt. Plaintiffs seek monetary, declaratory and injunctive relief based on violations of 11 U.S.C. § 524.

2. This action is also filed to enforce the Order of Confirmation duly entered in this Chapter 13 case and to enforce and to implement other Bankruptcy Code provisions and Rules related thereto.

Jurisdiction and Venue

3. Jurisdiction is conferred on this Court pursuant to the provisions of Section 1334 of Title 28 of the United States Code in that this proceeding arises in and is related to the above-captioned Chapter 13 case under Title 11 and concerns property of the Debtors in that case.

4. This Court has both personal and subject matter jurisdiction to hear this case pursuant to Section 1334 of Title 28 of the United States Code, Section 157(b)(2) of Title 28 of the United States Code, and pursuant to the Order entered by the Judges of the United States District Court for the Western District of North Carolina on July 30, 1984 (the Referral Order), which Order was entered in accordance with the Bankruptcy Amendments and Federal Judgeship Act of 1984.

5. This Court has supplemental jurisdiction to hear all state law claims pursuant to Section 1367 of Title 28 of the United States Code.

6. This Court also has jurisdiction to hear the Fair Debt Collection Practices Act violations pursuant to Section 1692 of Title 15 of the United States Code; thus, federal subject matter jurisdiction is properly founded upon Section 1331 of Title 28 of the United States Code.

7. This matter is primarily a core proceeding and therefore the Bankruptcy Court has jurisdiction to enter a final order. However, in the event this case is determined to be a non-core proceeding then and in that event the Plaintiff consents to the entry of a final order by the Bankruptcy Judge.

8. Venue lies in this District pursuant to Section 1391(b) of Title 28 of the United States Code.

Parties

9. The Plaintiffs in this case were and are debtors under Chapter 13 of Title 11 of the United States Code in case number _____ which case is presently pending before this court. The Plaintiffs are hereinafter referred to as the Plaintiffs or the debtors.

10. The Defendant, CitiFinancial Mortgage Company, Inc. (hereinafter "CitiFinancial") is a New York Corporation with a principal office address of Bowling Green Station, P O Box 5156, New York, NY 10274. CitiFinancial is the holder of the Equity Line Deed of Trust on the debtors' real property located at 908 Earl Road, Shelby, NC.

Factual Allegations

11. The Chapter 13 case of the Plaintiffs was commenced by the filing of a voluntary petition with the Clerk of this Court on _____. On _____ the Bankruptcy Noticing Center notified Defendant of Plaintiffs' bankruptcy case.

12. The 341(a) meeting of creditors was held in Shelby, North Carolina on _____.

13. The Chapter 13 plan of the Plaintiff was subsequently confirmed by order of this Court dated _____.

14. The Chapter 13 plan as confirmed included a debt to CitiFinancial in the amount of \$76,000.00, which was scheduled as a claim secured by a first deed of trust on the rental real estate of the Plaintiffs at _____ (the "rental property").

15. The plan provided for the cure of pre-petition arrears to CitiFinancial in the amount of \$3945.00 through October of 2005, with the Plaintiffs to resume direct payments in November

of 2005.

16. In the schedules filed with the Chapter 13 petition, the debtors reserved their rights to any potential claims for relief for damages against CitiFinancial and all officers, agents, employees, attorneys, successors, and assigns arising out of the servicing of the debtors' mortgage loan during and after their prior Chapter 13 case, including but not limited to unlawful fees, costs and charges and violations of the discharge injunction and other applicable state and federal statutes.

17. In the schedules filed with the Chapter 13 petition, the debtors also stated that they contest and dispute the alleged debt owed to CitiFinancial and the factual and legal basis for the alleged default, the factual and legal basis for the filing of a foreclosure proceeding following the debtors' prior Chapter 13 discharge, and CitiFinancial's right to proceed with the said foreclosure.

18. CitiFinancial received notice of the bankruptcy filing and of the Order of Confirmation entered in this case, as evidenced by a Notice of Appearance by Cameron Wesley on behalf of CitiFinancial on January 23, 2006. CitiFinancial did not file any objection to the terms of the Plan in this case or to the reservation of claims language against CitiFinancial in the said Schedules. The debtors are informed and believe and therefore allege that CitiFinancial actually reviewed the Plan and Schedules filed in this case since their records indicate a fee was charged against the loan for such actions.

19. The claim of CitiFinancial for the first deed of trust is identified on the records of the Trustee as claim number 0003 in the amount of \$76,000.00 and the claim for the pre-petition arrears is identified as claim number 0007 in the amount of \$5210.00; however, upon information and belief, CitiFinancial has failed to file a Proof of Claim for the arrears.

VIOLATION OF AUTOMATIC STAY IN PRIOR CHAPTER 13 CASE

20. On or about June 14, 1996 the Plaintiffs executed an Equity Line of Credit Deed of Trust to Avco Mortgage and Acceptance Corporation in the amount of \$48,871.00. The Deed of Trust states, "this Deed of Trust shall not secure more at any one time than \$48,871.00 nor shall it secure advances made more than 5 years after the date of the Deed of Trust." The Deed of Trust was subsequently sold, transferred or assigned to CitiFinancial. The said Deed of Trust is recorded at Book _____ and Page _____ in the Office of the Register of Deeds of _____ County.

21. The debtors filed a voluntary petition for Chapter 13 protection on _____, bearing case number _____ ("first Chapter 13 case").

22. The debtors' first Chapter 13 Case included a debt to CitiFinancial in the estimated amount of \$67,970.70 for the first deed of trust on the rental property, and a debt for arrears in the amount of \$23,872.22.

23. CitiFinancial failed to file a Proof of Claim in the first Chapter 13 case for the arrears and received no disbursements from the Office of the Trustee on this claim.

24. On February 20, 2004 CitiFinancial filed a Motion for Relief from Stay, by and through their attorney Robin Lymberis, alleging that the debtors were in arrears post petition from July 2002 to February 2004 in the amount of \$632.00 per month. The said motion acknowledged that the debtors' plan provided for the cure of arrears to CitiFinancial.

25. The Motion for Relief from Stay was resolved by Consent Order dated June 10, 2004, which provided for the cure of arrears from July 2003 to May 2004 in the amount of \$7552.00 including a \$600.00 attorney fee for CitiFinancial.

26. According to the Consent Order the debtors paid a lump sum payment of \$1264.00 and paid the remaining \$5688.00 in arrears and \$600.00 legal fee through their first chapter 13 case.

27. The Claim for arrears in favor of CitiFinancial in the amount of \$5688.00 is identified on the records of the Trustee as claim number 0041 and the claim for legal fees of \$600.00 is identified as claim number 0040.

28. As of March 31, 2005, the Office of the Trustee disbursed the sum of \$6097.00 on claim number 0041 and \$600.00 on claim number 0040 to CitiFinancial at 1111 Northpoint Dr., Bldg 4, Ste 100, Coppell, Texas, 75019.

29. On or about May 19, 2005 and prior to the discharge of their first Chapter 13 case, the debtors received a statement from CitiFinancial indicating that they were past due in the amount of \$5981.66, and that they were being charged \$750.00 as a "repo expense advance." The statement indicated that their current balance was \$76,625.20, which was \$8654.50 more than the estimated balance when they filed the first Chapter 13 case, and \$27,754.20 more than when they executed the Deed of Trust on June 14, 1996.

30. The debtors deny that they were in default and allege that this action constituted a violation of the automatic stay in their first Chapter 13 case; that the imposition of \$750.00 was an improper application of unauthorized and unapproved corporate advances; and furthermore was the beginning of a series of violations against the debtors that has continued through to the present date.

31. The debtors received a discharge of the first Chapter 13 case on June 10, 2005.

32. The debtors allege that this discharge extended to and included the claims of CitiFinancial, including all claims for arrears.

VIOLATION OF DISCHARGE INJUNCTION IN PRIOR CHAPTER 13 CASE

33. On or about July 15, 2005 the attorney for the debtors sent a "Qualified Written Request" to Robin Lymberis on behalf of CitiFinancial, requesting information on behalf of the debtors about their loan, due to the apparent application of interest and improper fees and the alleged default.

34. CitiFinancial failed to acknowledge or respond to the Qualified Written Request in violation of Sections 2605(e)(1)(A) and 2605(e)(1)(B)(2) of Title 12 of the United States Code and Sections 3500.21(e)(1) and 3500.21(e)(3) of Regulation X.

35. On or about July 18, 2005 the debtors received a notice pursuant to NCGS 45-21.16 (c)(5a) from CitiFinancial which stated that the payoff was \$77,186.89 and that the debtors were being charged \$782.00 for "attorney fees and cost."

36. On or about July 18, 2005 the debtors also received a letter from the offices of David B. Craig, Substitute Trustee, advising the debtors that the foreclosure of their property was scheduled for August 23, 2005. The said letter was signed by an individual, presumably as authorized signatory, for April M. Gunter "Foreclosure Processor." The debtors are informed and believe and therefore allege that the said letter may have been false to the extent that the said April M. Gunter was not an employee of Mr. Craig and furthermore did not review or verify any original data in connection with the preparation of said letter.

37. The debtors also received a Notice of Hearing Prior to Foreclosure of Deed of Trust and a Notice of Foreclosure Sale from David B. Craig.

38. On or about August 1, 2005 an agent by the name of "Justin" from CitiFinancial contacted the debtors and advised them that they needed to "get out of the house." The debtors allege that "Justin" advised the debtors to look for a realtor to sell the home for them.

39. On approximately August 8 of 2005, the debtors sought to obtain a new mortgage refinance from Hillbrook Mortgage in Shelby, NC.

40. Teri Ellison ("Ellison") of Hillbrook Mortgage contacted the office of the attorney for the debtors requesting how the payoff to CitiFinancial could be \$78,909.58, when the debtors only financed \$48,871.00 to begin with and had not obtained any loan advances. Ellison stated that a representative of CitiFinancial by the name of "Justin" (1-888-219-1433 extension 71471) had advised her that it was a revolving line of credit "like an interest only account" and that no payments were applied to principal. Ellison also advised the office of the attorney for the debtors that Justin said CitiFinancial had a "lien on the property but no deed of trust" and further that even though arrears of \$5688.00 were paid through the plan, interest continued to accumulate resulting in the \$30,000.00 difference in the payoff and the original amount of the loan.

41. The debtors allege that the foregoing actions of CitiFinancial (1) to attempt to foreclose on the debtors' property with regard to a discharged debt; (2) to impose additional unauthorized and unapproved corporate advances directly related to a debt included in their first bankruptcy case; (3) to misrepresent the nature and extent of the debt to a third party; (4) to improperly treat the debt as a daily interest loan instead of a scheduled payment obligation; (5) to fail to provide a response to the debtors' Qualified Written Request; (6) to seek collection of an unlawful debt in violation of the Fair Debt Collection Practices Act; and (7) to seek collection of an unlawful debt in violation of the North Carolina Unfair and Deceptive Acts and Practices Statute are all matters in willful violation of the Discharge Injunction.

VIOLATION OF AUTOMATIC STAY IN CURRENT CHAPTER 13 CASE

42. The debtors were forced to file the within chapter 13 case due to the threat of foreclosure from CitiFinancial on _____. On _____ the Bankruptcy Noticing Center notified Defendant of Plaintiffs' bankruptcy case.

43. In approximately November of 2005, the female debtor contacted her attorney and advised that CitiFinancial was refusing her payments. She advised that she had contacted CitiFinancial directly about sending her payments via Western Union and was advised by "Justin" that CitiFinancial would not accept any payments from her since the home was in foreclosure. The female debtor reported that she told Justin that she had a letter from CitiFinancial stating that the foreclosure had been stopped due to the new bankruptcy filing.

44. On or about January 10, 2006, CitiFinancial hired a real estate agent with a name closely approximating "Terri McGowan" to sell the debtors' real property and to place a lock box on the door.

45. The lock box was not removed after the real estate agent was given notice of the bankruptcy and notice of a possible stay violation, so the debtors removed it themselves.

46. On or about March 14, 2006 the debtors' attorney received a notice of default from CitiFinancial alleging that the debtors were in default in the amount of \$1903.60 from February 1, 2006. In response thereto, the attorney for the debtors sent a payoff request to CitiFinancial on March 24, 2006.

47. CitiFinancial did not respond to the payoff request.

48. Following the March 14, 2006 default letter, the debtors contacted CitiFinancial and were advised by an agent by the name of "Nicole" that beginning in February, 2006, their payment had been increased to \$951.80. The debtors advised Nicole that they did not get notice

of the payment increase. Nicole did not find any information on her computer as to why the payment increased but advised the debtors that she would investigate the matter. Nicole advised the female debtor to call back on April 4, 2006. The female debtor offered to make a payment of \$632.19 but was refused. Nicole advised the debtor that her payment needed to be \$951.80.

49. The female debtor called CitiFinancial back on April 4, 2006 as instructed and was advised by an agent by the name of "Tina" that the investigation would take another 7 to 10 days to complete the search of why the debtors' payment had been increased. The female debtor offered to make a payment of \$632.19, but was refused. Tina advised that the payment needed to be \$951.80.

50. On or about April 17, 2006, the debtors' attorney received a notice of default from CitiFinancial alleging that the debtors were in default in the amount of \$2855.40 from February 1, 2006 (a difference of \$951.80, which the debtors allege is more than their monthly payment).

51. On or about May 2, 2006 the debtors' attorney mailed the debtors' payment of \$1264.50 to the Law Office of Shapiro & Ingle, LLP, which payment had been refused by CitiFinancial.

52. On or about May 3, 2006, the debtors' attorney received a notice of default from CitiFinancial alleging that the debtors were in default in the amount of \$3807.20 from February 1, 2006 (a difference of \$951.80, which the debtors allege is more than their monthly payment).

53. On or about May 31, 2006, the debtors' attorney received a notice of default from CitiFinancial alleging that the debtors were in default in the amount of \$3168.10 from March 1, 2006. In response thereto, the attorney for the debtors sent a payoff request to CitiFinancial on June 7, 2006.

54. CitiFinancial did not respond to the payoff request.

55. The Plaintiffs have been and continue to be damaged by the Defendants' actions in that they have been and continue to be forced to expend their time and expenses toward the defense of this contested matter and have feared losing their residential rental property. The debtors allege that their disabled son resides in the rental property and has also feared losing his home.

First Claim for Relief (Violation of the Automatic Stay—First Chapter 13 Case)

56. The allegations in paragraphs 1 through 55 of this complaint are realleged and incorporated herein by this reference.

57. The actions of CitiFinancial in imposing improper, unauthorized and unapproved fees and charges to their mortgage loan account, constitute a gross violation of the automatic stay of the debtors' first Chapter 13 Case as set forth in 11 U.S.C. Section 362(a)(3).

58. The imposition of the said unapproved fees constitutes unlawful and illegal bankruptcy fees in violation of the automatic stay and inconsistent with the decision of this court in *In re Stark*, 242 B.R. 866 (W.D.N.C. 1999).

59. The actions of CitiFinancial by charging post-petition legal fees and expenses as alleged herein without any prior notice or Court approval constitute willful, intentional, gross and flagrant violations of the provisions of Sections 105 and 506 of Title 11 of the United States Code and Rule 2016 of the Federal Rules of Bankruptcy Procedure which provides, in pertinent part, that: "An entity seeking interim or final compensation for services, or reimbursement of

necessary expenses, from the estate shall file an application setting forth a detailed statement of (1) the services rendered, time expended and expenses incurred, and (2) the amounts requested."

60. As a result of the above violations of 11 U.S.C. Section 362, CitiFinancial is liable to the Plaintiffs for actual damages, punitive damages and legal fees.

**Second Claim for Relief
(Violation of the Discharge Injunction—First Chapter 13 Case)**

61. The allegations in paragraphs 1 through 60 of this complaint are realleged and incorporated herein by this reference.

62. The actions of Defendant in this case, in seeking to collect payment on a discharged debt by falsely and deceptively attempting to coerce the debtors are in violation of the discharge injunction entered in Plaintiffs' first Chapter 13 case pursuant to 11 U.S.C. § 524, and constitute contempt of bankruptcy court orders.

63. The Plaintiffs allege that the actions of the Defendant in seeking to collect on a debt after the debtor's lawful discharge, constitute a gross violation of the discharge injunction as set forth in 11 U.S.C. Section 524.

64. The conduct of the Defendant in this case has substantially frustrated the discharge order entered by this Court and has caused the debtors unwarranted and unnecessary time, effort and expense in seeking to enforce rights guaranteed by the Bankruptcy Code.

65. In order to carry out the provision of the Code and to maintain its integrity this Court must impose actual damages, punitive damages and legal fees against the Defendant pursuant to the provisions of Section 105 of the Code.

66. In order to protect debtors who have completed their Chapter 13 plans and secured a full discharge thereunder this Court must impose sanctions against the Defendant for their misconduct in this case.

67. As a result of the Defendant's violation of 11 U.S.C. Section 524, the Defendant is liable to the Plaintiffs for actual damages, punitive damages and legal fees under Section 105 of Title 11 of the United States Code.

**Third Claim for Relief
(Violation of RESPA)**

68. The allegations in paragraphs 1 through 67 of this complaint are realleged and incorporated herein by this reference.

69. The Defendant is the servicer of a "federally related mortgage loan" as that term is defined in Section 2602(1) of Title 12 of the United States Code.

70. The "qualified written request" was not acknowledged within 20 days of receipt as required by Section 2605(e)(1)(A) of Title 12 of the United States Code and Section 3500.21(e)(1) of Reg. X.

71. The Defendant did not, within 60 days of receipt of the "qualified written request," provide the information requested and inform the Plaintiffs of its actions as required by Section 2605(e)(1)(B)(2) of Title 12 of the United States Code and Section 3500.21(e)(3) of Reg. X.

72. The Defendant failed to comply with Section 2605 of Title 12 of the United States Code.

73. Pursuant to Section 2605(f) of Title 12 of the United States Code and Section 3500.21(f) of Reg. X, the Plaintiffs may recover of the Defendant actual damages, costs and reasonable attorney fees for each failure of the Defendant to comply with any part of Section 2605 of Title 12 of the United States Code.

**Fourth Claim for Relief
(Violation of the Automatic Stay)**

74. The allegations in paragraphs 1 through 73 of this complaint are realleged and incorporated herein by this reference.

75. The actions of CitiFinancial in refusing her post-petition plan payments, representing to the debtors that their home is in foreclosure following the filing of their Chapter 13 case, and hiring a real estate agent to sell the property and place a lock box on the door, constitute a gross violation of the automatic stay as set forth in 11 U.S.C. Section 362(a)(3).

76. As a result of the above violations of 11 U.S.C. Section 362, CitiFinancial is liable to the Plaintiffs for actual damages, punitive damages and legal fees.

**Fifth Claim for Relief
(North Carolina Unfair and Deceptive Acts and Practices)**

77. The allegations in paragraphs 1 through 76 of this complaint are realleged and incorporated herein by this reference.

78. The Plaintiffs are "consumers" as that term is defined by Article 2 of Chapter 75 of the North Carolina General Statutes.

79. The Plaintiffs' relationship with CitiFinancial arose out of a "consumer debt" as that term is defined in Article 2 of Chapter 75 of the North Carolina General Statutes.

80. CitiFinancial was and is a "debt collector" as that term is defined by applicable provisions of Article 2 of Chapter 75 of the North Carolina General Statutes.

81. Under the provision of Section 75-52 of the North Carolina General Statutes CitiFinancial was and is prohibited from engaging in any conduct the natural consequences of which is to oppress, harass or abuse any person.

82. The actions and conduct of CitiFinancial were oppressive and abusive in violation of the applicable provisions of Article 2 of Chapter 75 of the North Carolina General Statutes.

83. As a result thereof, CitiFinancial is liable for statutory damages in the sum of no less than \$2,000.00 for violation of N.C.G.S. Section 75-50, et seq. and the payment of legal fees and expenses.

**Sixth Claim for Relief
(Fair Debt Collection Practices Act)**

84. The allegations in paragraphs 1 through 83 of this complaint are realleged and incorporated herein by this reference.

85. CitiFinancial violated the FDCPA. Defendant's violations include but are not limited to engaging in any conduct the natural consequences of which is to harass, oppress, or abuse any person in connection with the collection of a debt, 15 U.S.C. Section 1692d. Furthermore, CitiFinancial failed to include any of the verification and dispute rights notices in the foreclosure proceeding filed by the Substitute Trustee on behalf of CitiFinancial.

86. As a result of the above violations of the FDCPA, the Defendant is liable to the Plaintiffs for actual damages, statutory damages of \$1,000.00, and attorney's fees.

**Seventh Claim for Relief
(Failure to Respond to Payoff Request)**

87. The allegations in paragraphs 1 through 86 of this complaint are realleged and incorporated herein by this reference.

88. The actions alleged herein are acts in violation of Sections 45-36.4 and 45-36.7 of the North Carolina General Statutes as CitiFinancial failed to respond to at least two requests for a payoff.

89. As a result of the above violation, CitiFinancial is liable to the Plaintiffs for actual damages, punitive damages and legal fees.

WHEREFORE, the Plaintiffs having set forth their claims for relief against the Defendant respectfully pray of the Court as follows:

- A. That the Plaintiffs have and recover against the Defendant a sum to be determined by the Court in the form of actual damages;
- B. That the Plaintiffs have and recover against the Defendant a sum to be determined by the Court in the form of statutory damages;
- C. That the Plaintiffs have and recover against the Defendant a sum to be determined by the Court in the form of punitive damages;
- D. That the Plaintiffs have and recover against the Defendant all reasonable legal fees and expenses incurred by their attorney;
- E. That this Court order CitiFinancial to pay additional actual damages and statutory damages in a sum to be determined by the Court for violation of N.C.G.S. Section 75-50, et seq.;
- F. That this Court order CitiFinancial to pay additional actual damages and statutory damages in a sum to be determined by the Court for violating the FDCPA pursuant to 15 U.S.C. Section 1692k;
- G. That the Plaintiffs have such other and further relief as the Court may deem just and proper.

Date this the _____ day of July 2006.



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M –TRUSTEE IN STATE FORECLOSURE

) IN THE GENERAL COURT OF JUSTICE
) SUPERIOR DIVISION

) 07 CVS _____

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COMPLAINT

The Plaintiffs, SHEILA B. LAWS and RONNIE E. LAWS, suing on behalf of themselves and all others similarly situated, complain as follows against the Defendants:

NATURE OF ACTION

1. This action is brought by the Plaintiffs, as members of a class of persons similarly situated, for breach of contract, breach of fiduciary duty, breach of the duty of good faith, an accounting and disgorgement of fees paid to Defendant PRIORITY TRUSTEE SERVICES OF N.C., L.L.C. (“PTS”) and fees paid to Defendant MORRIS, SCHNEIDER & PRIOR, L.L.C. (“Morris Schneider”).

2. PTS acts as a trustee or substitute trustee under deeds of trust in North Carolina, and institutes foreclosure actions following an alleged default under the deeds of trust.

3. Morris Schneider is a member and manager of PTS. Morris Schneider represents PTS in all foreclosure proceedings in which PTS serves as a substitute trustee. Morris Schneider also simultaneously represents lenders in foreclosure actions in which PTS is named as trustee or

substitute trustee. PTS conceals from the borrowers, to whom it owes a fiduciary duty, the relationship between PTS and Morris Schneider.

4. PTS, in its capacity as trustee or substitute trustee, is a fiduciary charged with representing the interests of both lender and borrower under a deed of trust. A trustee or substitute trustee under a deed of trust owes to the borrower a fiduciary duty of fidelity, impartiality, good faith and diligence. A trustee or substitute trustee under a deed of trust owes to the borrower a duty to receive and disburse the proceeds of sale in strict accordance with law. A trustee or substitute trustee under a deed of trust may not represent either the lender or the borrower as an advocate at any stage of a foreclosure proceeding.

5. PTS breached its fiduciary duties to Sheila B. Laws and Ronnie E. Laws by continuing to serve as substitute trustee while Morris Schneider represented both the substitute trustee and the lender in connection with the deed of trust executed by Sheila B. Laws and Ronnie E. Laws.

6. Plaintiffs, and other similarly situated persons, are entitled to recover any fees paid to PTS and Morris Schneider, jointly and severally, in any case in which PTS has breached its fiduciary duty to the borrower as outlined above.

THE PARTIES AND RELATED ENTITIES

7. Sheila B. Laws is a citizen and resident of Gaston County, North Carolina.

8. Ronnie E. Laws is a citizen and resident of Gaston County, North Carolina.

9. Sheila B. Laws and Ronnie E. Laws filed a petition for relief under Chapter 13, of Title 11 of the United States Code (the “Bankruptcy Code”) on May 3, 2005, in the United States Bankruptcy Court for the Western District of North Carolina (the “Bankruptcy Case”). The Bankruptcy Case was assigned case number 05-31841.

10. Defendant PTS is a limited liability corporation organized and existing under the laws of the State of North Carolina, with its principal place of business in Raleigh, North Carolina.

11. Defendant Morris, Schneider & Prior, L.L.C. (“MORRIS SCHNEIDER”) is a limited liability corporation organized and existing under the laws of the State of Georgia. All of the managers of Morris Schneider are residents of the state of Georgia.

12. The following persons are managers of PTS: Morris Schneider, Mark A. Baker, Kenneth D. Cavins, Donna O. Jack, Matressa R. Morris, Crystal Robinson, Matt C. Meinig, Wendy B. Cole, Otis Byron Meredith, III, Angel R. Gordon, Becky L. Milligan, Joel A. Freedman, Michele L. Burgos.

13. In addition to serving as a manager of PTS, Mark A. Baker, who is admitted to practice law in North Carolina and Georgia, is a partner in the law firm of Morris Schneider.

14. In addition to serving as a manager of PTS, Otis Byron Meredith, III, who is admitted to practice law in Georgia, previously was a partner in the law firm of Morris Schneider.

15. In addition to serving as a manager of PTS, Angel R. Gordon, who is admitted to practice law in North Carolina and Georgia, is an associate lawyer employed by Morris Schneider.

16. In addition to serving as a manager of PTS, Joel A. Freedman, who is admitted to practice law in Georgia, is a partner in the law firm of Morris Schneider.

FACTUAL ALLEGATIONS

17. On or about April 23, 2002, Sheila B. Laws obtained a mortgage loan (“Mortgage Loan A”) from Equity One, Inc. dba Equity One Mortgage Services, a Pennsylvania corporation

(“Equity One”) in the original amount of \$52,000, which loan was secured by a deed of trust executed by Ronnie E. Laws and Sheila B. Laws to First American Title Insurance Co., as trustee, for the benefit of Equity One and recorded in book 3446, Page 386, Gaston County Registry, North Carolina (the “Equity One Deed of Trust”).

18. Equity One, Inc. dba Equity One Mortgage Services thereafter purported to assign the Equity One Deed of Trust and the obligation secured thereby to a trust named Equity One ABS Inc. Mortgage/Pass Through Certified Series #2002-5 (the “Trust”). Throughout this Complaint, the term “Equity One” shall be used to refer to the holder of the obligations secured by the Equity One Deed of Trust.

19. Following an alleged default by Sheila B. Laws on the obligations secured by the Equity One Deed of Trust, Equity One appointed PTS as substitute trustee under the Equity One Deed of Trust by an instrument recorded in the Office of the Register of deeds of Gaston County, North Carolina.

20. On or about March 10, 2005, PTS, as substitute trustee, by and through its purported attorneys, Morris Schneider, filed a Petition and Notice of Hearing in this Court scheduling a hearing pursuant to N.C.G.S. § 45-21.16, et seq, with respect to the foreclosure of the Equity One Deed of Trust. The Petition and Notice of Hearing was signed by attorney Brian S. Tatum on behalf of Morris Schneider, as attorney for PTS.

21. At all times during the foreclosure of the Equity One Deed of Trust, Morris Schneider acted as counsel for PTS.

22. On April 12, 2005, the Clerk of Superior Court, Gaston County, North Carolina conducted a hearing on the Petition and Notice of Hearing. An attorney from Morris Schneider attended the hearing, and at the conclusion of the hearing, the Clerk entered an order that

authorized PTS, as substitute trustee, to proceed to foreclose under the terms of the Equity One Deed of Trust and in accordance with North Carolina law.

23. Morris Schneider, through Brian E. Tatum appeared as counsel at the April 12, 2005, hearing and purported to represent PTS, as substitute trustee.

24. PTS, as substitute trustee, posted a Notice of Foreclosure Sale on April 12, 2005, and thereafter caused the Notice of Foreclosure Sale to be published on April 22, 2005 and April 29, 2005.

25. The sale of the property subject to the Equity One Deed of Trust was scheduled for May 3, 2005, at 1:30 pm.

26. Prior to sale of the property subject to the Equity One Deed of Trust, Sheila B. Laws and Ronnie E. Laws filed their Bankruptcy Case on May 3, 2005.

27. The law firm of Miller & Clark, PC, a California law firm, filed proofs of claim on behalf of Equity One in the Bankruptcy Case. Miller & Clark, PC also filed notice that it was engaged for the limited purpose of filing a proof of claim and that it was not the authorized agent to receive notices for Equity One.

28. On October 10, 2006, Morris Schneider, by and through Angel Gordon, filed a notice of appearance of counsel for Equity One in the Bankruptcy Case. Morris Schneider represented Equity One throughout the bankruptcy case at the same time that it represented PTS as substitute trustee and at the same time that its lead bankruptcy counsel served as a manager of PTS.

29. Morris Schneider represented Equity One in both the foreclosure proceedings, and the subsequent bankruptcy proceedings.

30. Morris Schneider filed various motions and were adverse to Sheila B. Laws and Ronnie E. Laws in the Bankruptcy Case.

31. On or about October 10, 2006, Angel Gordon on behalf of Morris Schneider filed a motion for relief from stay pursuant to 11 U.S.C. § 362 on behalf of Equity One. In that motion, Morris Schneider sought relief from the automatic stay in order to complete the foreclosure of the Equity One Deed of Trust.

32. Upon information and belief, Morris Schneider was unable to locate a copy of the Equity One Deed of Trust and therefore attached to the motion for relief from stay filed on October 10, 2006 a copy of a deed of trust for other property owned by Sheila B. Laws and Ronnie E. Laws. Morris Schneider corrected that mistake when Angel Gordon filed an Amended Motion for Relief from Stay on or about October 11, 2006.

33. In the motion for relief from stay, Morris Schneider represented to the Bankruptcy Court that Sheila B. Laws and Ronnie E. Laws owed a principal balance of \$51,005.34, plus an arrearage of \$3,765.93, plus attorneys' fees and costs.

34. Sheila B. Laws and Ronnie E. Laws initially opposed the motion for relief from stay.

35. After negotiations in which Angel Gordon participated on behalf of Equity One, Sheila B. Laws and Ronnie E. Laws reached an agreement with Equity One and on December 8, 2006, the Bankruptcy Court entered a Consent Order memorializing that agreement.

36. The Consent Order provided that Sheila B. Laws and Ronnie E. Laws would pay to Equity One its costs and attorneys' fees in the amount of \$600.00. Therefore, the amount that Equity One claimed to be owed as of December, 2006, inclusive of attorneys' s fees, was \$55,371.27.

37. The consent order further provided that the automatic stay was continued on the condition that Sheila B. Laws and Ronnie E. Laws make certain payments to Equity One.

38. On or about April 17, 2007, PTS resumed the foreclosure proceedings against Sheila B. Laws and Ronnie E. Laws due to their failure to make payments when due under the Consent Order.

39. Morris Schneider continued to represent PTS, the substitute trustee, in the foreclosure proceedings.

40. On May 22, 2007, Equity One was the last and highest bidder for the property securing the Equity One Deed of Trust at the foreclosure sale, bidding the amount of \$62,613.87. The bid amount exceeded the amount that was claimed to be due, just five months earlier, by \$7,242.60.

41. Upon information and belief, the amount bid at the foreclosure sale was sufficient to pay in full all amounts owed to Equity One.

42. On or about June 23, 2007, PTS filed a Final Report and Account of Foreclosure Sale (the "Final Report"). PTS certified in the Final Report that \$61,669.11 was paid to Equity One on account of the Secured Obligation under the Equity One Deed of Trust and that there were no surplus sales proceeds.

43. Upon information and belief, PTA approved the payment of an attorney's fee to Morris Schneider and Morris Schneider was paid fees from the proceeds of the foreclosure sale.

44. Alternatively, upon information and belief, Equity One paid Morris Schneider fees in connection with the foreclosure sale.

45. Under North Carolina law, it is unlawful to exact, charge, or receive any attorney's fee for the foreclosure of any mortgage under power of sale, unless the foreclosure is

conducted by a licensed attorney-at-law of North Carolina and the full amount charged as an attorney's fee is actually paid to and received and retained by a licensed North Carolina attorney-at-law, without being shared with anyone else.

46. The payment of any attorney's fee to Morris Schneider for the foreclosure of a North Carolina deed of trust violates North Carolina law.

47. Upon information and belief, PTS approved the payment of a trustee's fee to PTS and PTS was paid a trustee's fee from the proceeds of the foreclosure sale. Alternatively, upon information and belief, Equity One or Morris Schneider paid PTS fees in connection with the foreclosure sale.

GENERAL ALLEGATIONS

48. Upon information and belief, Morris Schneider, through its partners, associates and employees dominates the policies and business practices of PTS with regard to PTS' actions as substitute trustee. Morris Schneider, through its partners, associates and employees uses its control of PTS to commit wrong, to perpetrate the violation of a statutory or other positive legal duty, and dishonest and unjust acts as detailed in this Complaint in contravention of the legal rights of the Plaintiffs.

49. PTS operates from the offices of Morris Schneider in Atlanta, GA. The address and phone number that is given out by PTS is the same address and phone number used by Morris Schneider in Atlanta Ga.

50. Upon information and belief, PTS has no officers or employees other than employees of Morris Schneider. Upon information and belief, Morris Schneider uses PTS as an instrument to obtain fees and charges from borrowers to which Morris Schneider would not otherwise be entitled because Morris Schneider is prohibited by law from serving as substitute

trustee in connection with foreclosures of deeds of trust. Upon information and belief, PTS has failed to follow corporate formalities and has no existence independent of Morris Schneider.

51. Upon information and belief, Morris Schneider utilizes PTS as a façade for the dealings of Morris Schneider. Upon information and belief, PTS does not maintain offices or assets independent of Morris Schneider. Upon information and belief, PTS and Morris Schneider intermingle funds. The correspondence used by PTS lists a phone number and facsimile number that belong to Morris Schneider. PTS' correspondence to borrowers directs all communications to Morris Schneider through use of Morris Schneider's website and phone number. PTS does not disclose to the borrowers for whose deeds of trust it acts as trustee or substitute trustee that those borrowers are calling their lender's lawyers. Every employee of PTS uses an email address supplied by Morris Schneider. The only way for a borrower to contact PTS is to contact Morris Schneider. Morris Schneider provides a website listing of all pending foreclosure actions. Morris Schneider attorneys often sign PTS documents as attorneys for Morris Schneider. Morris Schneider attorneys sometimes sign PTS documents as employees of PST. All contact telephone numbers and facsimile numbers provided by PTS are for Morris Schneider.

52. A lawyer who serves as a trustee must be neutral as between the interests of the lender and the interests of the borrower and may not, therefore, represent either party individually while initiating a foreclosure proceeding. Morris Schneider and PTS have breached their duty of neutrality by the acts and conduct alleged herein.

53. An attorney who serves as trustee may represent neither the lender nor the borrower in a "role of advocacy" in the foreclosure proceeding. So long as the attorney remains trustee, the attorney owes a fiduciary duty to both the borrower and lender.

54. Morris Schneider and PTS have breached their fiduciary duty by assuming the role of an advocate.

55. The filing of a motion to set aside the automatic bankruptcy stay places the attorney in an adversarial position. Consequently, Morris Schneider may not properly file such a motion while serving as trustee in the foreclosure. Morris Schneider and PTS have breached their fiduciary duty by filing motions for relief from stay, entering an appearance and taking other action in connection with the mortgage loans for which they serve as trustee or substitute trustee.

56. A lawyer serving as trustee may not simultaneously participate in the negotiation of a loan modification or workout agreement as attorney for the lender. Morris Schneider and PTS have breached their duties to the borrowers under the deeds of trust for which they server as trustee or substitute trustee by participating in negotiations on behalf of the lenders under those deeds of trust.

CLASS ALLEGATIONS

57. This action is brought as a class action under the provisions of N.C. Rule of Civil Procedure 23 on behalf of all persons similarly situated as members of the proposed plaintiff class.

58. The class is defined as all individuals who were alleged to have defaulted on a loan secured by a deed of trust, under which deed of trust PTS was the original trustee or was substituted as trustee and for which Morris Schneider provided legal services to the lender and PTS.

59. Upon information and belief, the class is so numerous that joinder of all members is impractical. The number of class members and their addresses are readily obtainable from PTS's and Morris Schneider's records.

60. PTS and Morris Schneider have engaged in a pattern and practice of simultaneously serving as substitute trustee and counsel to lenders so as to maximize the fees and revenues that can be generated from their foreclosure business.

61. PTS and Morris Schneider have used policies and procedures to systemically charge borrowers for trustee's fees and attorney's fees to which they are not entitled due to their breach of fiduciary duties owed to the borrowers under the deeds of trust.

62. Upon information and belief, PTS has breached their fiduciary duty to hundreds of borrowers under deeds of trust.

63. There are questions of law and fact common to the class, which predominate over questions affecting only individual class members. Among others, the principal questions are:

- (a) Whether PTS engages in the acts and practices complained of,
- (b) Whether Morris Schneider engages in the acts and practices complained of,
- (c) Whether PTS is an alter-ego of Morris Schneider,
- (d) Whether PTS breached its fiduciary duty to the members of the class,
- (e) Whether Morris Schneider breached its fiduciary duty to the members of the class,
- (f) Whether PTS breached the terms of the deed of trust for which it served as trustee,

(g) Whether PTS breached the duty of good faith and fair dealing, and

(h) Whether the payment of an attorney fee to Morris Schneider violates North Carolina law.

64. The Plaintiffs are able to and will fairly and adequately protect the interest of the class. The Plaintiffs are similarly situated with, and have suffered similar injuries as, the members of the class they seek to represent. The Plaintiffs have retained counsel experienced in handling class action suits involving bankruptcy issues, claims for breach of fiduciary duty and consumer law. Neither of the named Plaintiffs nor their counsel have any interest that might cause them to not vigorously pursue this action.

65. The Plaintiffs' are typical of the claims of the class, which all arise from the same operative facts and are based on the same legal theories.

66. Sheila B. Laws and Ronnie E. Laws have retained counsel who are competent and experienced in complex class actions who intend to prosecute this matter vigorously.

67. A class action is a superior method for the fair and efficient adjudication of this controversy. Upon information and belief, a substantial, but as yet undetermined number of debtors have been subject to a breach of fiduciary duty owed to them by PTS and/or Morris Schneider and have no knowledge that their rights have been violated by unethical practices. The interest of the class members in individually controlling the prosecution of separate claims against PTS and/or Morris Schneider is small because the maximum amount of damages in an individual action and the class members' financial condition prevent them from retaining counsel on an individual basis. Management of this class claim is likely to present significantly fewer difficulties than those presented in many class claims, e.g. for securities fraud.

FIRST CLAIM FOR RELIEF
(Declaratory and Injunctive Relief)
(incorporating all previous allegations)

68. Sheila B. Laws and Ronnie E. Laws and each member of the class incorporate by reference and re-allege each and every allegation set forth above, as if fully set forth herein.

69. Sheila B. Laws and Ronnie E. Laws and the plaintiff class are entitled to an equitable decree enjoining PTS and Morris Schneider from (i) engaging in the illegal practice of both serving as substitute trustee and representing the lender as an advocate with respect to contested foreclosures of deeds of trust in North Carolina (ii) requiring PTS and Morris Schneider to disgorge all monies either collected or charged to any borrower in connection with the foreclosure of any deed of trust in which PTS served as substitute trustee and Morris Schneider in any way represented the lender and (iii) requiring Morris Schneider to disgorge any attorney fee received in violation of North Carolina law.

70. The amount to be disgorged by PTS and Morris Schneider can easily be determined from a review of the data contained in the records of PTS and Morris Schneider.

SECOND CLAIM FOR RELIEF
(Breach of Contract)
(incorporating all previous allegations)

71. Sheila B. Laws and Ronnie E. Laws and each member of the class incorporate by reference and re-allege each and every allegation set forth above, as if fully set forth herein.

72. Sheila B. Laws and Ronnie E. Laws and each member of the class entered into deeds of trust for which PTS was either named as trustee or named as substitute trustee with the understanding and agreement that the substitute trustee would comply with the terms and conditions of the deeds of trust and exercise the rights of the trustee in accordance with North Carolina law.

73. PTS breached its obligations under the deed of trust by, inter alia, simultaneously serving as substitute trustee while its members served as counsel for the lender in connection with any contested foreclosure for which it acted as trustee.

74. PTS breached its obligations under the deed of trust by, inter alia, approving the payment of any attorney fee to Morris Schneider.

75. PTS breached its obligations under the deed of trust by, inter alia, failing to disclose that Morris Schneider was one of its members and managers and that its employees are all employees of Morris Schneider.

76. Based upon the foregoing, Sheila B. Laws and Ronnie E. Laws and the other class members are entitled to a judgment that PTS and Morris Schneider, as its alter ego, has breached the terms of the deeds of trust.

77. As a result of PTS and Morris Schneider's breach, Sheila B. Laws and Ronnie E. Laws and other members of the class have been damaged in an amount equal to any and all attorneys' fees or trustee fees paid to PTS or Morris Schneider. Sheila B. Laws and Ronnie E. Laws and the other members of the class are therefore entitled to recover such amounts that were improperly paid.

THIRD CLAIM FOR RELIEF
(Breach of Fiduciary Duty)
(incorporating all previous allegations)

78. Sheila B. Laws and Ronnie E. Laws and each member of the class incorporate by reference and re-allege each and every allegation set forth above, as if fully set forth herein.

79. As an alter-ego of Morris Schneider, PTS breached its fiduciary duty to Plaintiffs by continuing to act as trustee or substitute trustee under deeds of trust securing the Plaintiffs' obligations, while Morris Schneider represented Equity One in actions adverse to Plaintiffs, including actions to lift the automatic stay in bankruptcy proceedings.

80. PTS obtained fees and costs for its services as trustee/ substitute trustee either in the form of a trustee's fee or in the form of attorney's fees for representing the trustee/ substitute trustee.

81. PTS breached its fiduciary duty by, inter alia, approving the payment of any attorney fee to Morris Schneider.

82. PTS breached its fiduciary duty by, inter alia, failing to disclose that Morris Schneider was one of its members and managers and that its employees are all employees of Morris Schneider.

83. Such fees and costs should be disgorged from PTS for its breach of fiduciary duty to Plaintiffs.

FOURTH CLAIM FOR RELIEF
(Aiding and Abetting Breach of Fiduciary Duty)
(incorporating all previous allegations)

84. Sheila B. Laws and Ronnie E. Laws and each member of the class incorporate by reference and re-allege each and every allegation set forth above, as if fully set forth herein.

85. By knowingly assisting PTS in its breach of the fiduciary duties owed to Plaintiffs, Morris Schneider is liable to Plaintiffs for aiding and abetting a breach of fiduciary duty.

86. Morris Schneider profited from aiding and abetting PTS in its breach of fiduciary duty to plaintiffs by receiving attorney's fees in connection with the foreclosure and/or bankruptcy proceedings.

87. Such fees and costs should be disgorged from Morris Schneider for aiding and abetting PTS in its breach of fiduciary duty to Plaintiffs.

FIFTH CLAIM FOR RELIEF
(Breach of Duty of Good Faith and Fair Dealing)
(incorporating all previous allegations)

88. Sheila B. Laws and Ronnie E. Laws and each member of the class incorporate by reference and re-allege each and every allegation set forth above, as if fully set forth herein.

89. PTS has a duty of good faith and fair dealing that is implied in each of the deeds of trust for which it serves as trustee or substitute trustee, including the duty of fidelity, impartiality, good faith and diligence. A trustee or substitute trustee under a deed of trust owes to the borrower a duty to receive and disburse the proceeds of sale in strict accordance with law. A trustee or substitute trustee under a deed of trust may not represent either the lender or the borrower as an advocate at any stage of a foreclosure proceeding.

90. PTS breached its duty of good faith and fair dealing by, inter alia, simultaneously serving as substitute trustee while its members served as counsel for the lender in connection with the foreclosure for which it acted as trustee.

91. PTS breached its duty of good faith under the deed of trust by, inter alia, approving the payment of any attorney fee to Morris Schneider.

92. PTS breached its duty of good faith under the deed of trust by, inter alia, failing to disclose that Morris Schneider was one of its members and managers and that its employees are all employees of Morris Schneider.

93. Based upon the foregoing, Sheila B. Laws and Ronnie E. Laws and the other class members are entitled to a judgment that PTS and Morris Schneider, as its alter ego, has breached the duty of good faith and fair dealing implied in the deeds of trust.

94. As a result of PTS and Morris Schneider's breach, Sheila B. Laws and Ronnie E. Laws and other members of the class have been damaged in an amount equal to any and all attorneys' fees or trustee fees paid to PTS or Morris Schneider.

SIXTH CLAIM FOR RELIEF
(Imposition of Constructive Trust)
(incorporating all previous allegations)

95. Sheila B. Laws and Ronnie E. Laws and each member of the class incorporate by reference and re-allege each and every allegation set forth above, as if fully set forth herein.

96. PTS owed a fiduciary duty to Sheila B. Laws and Ronnie E. Laws and members of the class.

97. For the reasons set forth above, PTS breached its fiduciary duty.

98. PTS and its alter ego, Morris Schneider, obtained trustee fees and attorney fees by breach of fiduciary duty and they continue to hold those fees.

99. Equity requires that the fees obtained by Morris Schneider and PTS be paid to Sheila B. Laws and Ronnie E. Laws and the members of the class to prevent unjust enrichment.

100. Sheila B. Laws and Ronnie E. Laws and members of the class hereby request that the Court impose a constructive trust upon all fees received by either of them in connection with the foreclosure of any deed of trust for which they breached their fiduciary duty.

SEVENTH CLAIM FOR RELIEF
(Fraudulent Practices against Morris Schneider Only)
(incorporating all previous allegations)

101. Sheila B. Laws and Ronnie E. Laws and each member of the class incorporate by reference and re-allege each and every allegation set forth above, as if fully set forth herein.

102. Morris Schneider, through its alter ego PTS, has engaged in a scheme to charge and obtain fees (both attorney fees and trustee fees) by serving both as counsel to the lender and as substitute trustee in contested foreclosures. Morris Schneider, through its alter ego PTS, has engaged in a scheme to charge and obtain fees (both attorney fees and trustee fees) by concealing the relationship between Morris Schneider and PTS.

103. Morris Schneider's actions complained of herein, both its own actions and its actions through its alter ego PTS, were not open, fair and honest. Sheila B. Laws and Ronnie E. Laws and members of the class have paid fees and charges to Morris Schneider, through its alter ego PTS, to which Morris Schneider was not entitled and have otherwise been damaged by the actions of Morris Schneider directly and indirectly through its alter ego PTS.

104. Sheila B. Laws and Ronnie E. Laws and members of the class are entitled to recover double the amount of fees and charges paid to Morris Schneider directly or indirectly through its alter ego PTS and double the amount of damages caused by the actions of Morris Schneider and its alter ego PTS.

EIGHTH CLAIM FOR RELIEF
(Unfair Trade Practices Act; Chapter 75)
(incorporating all previous allegations)

105. Sheila B. Laws and Ronnie E. Laws and each member of the class incorporate by reference and re-allege each and every allegation set forth above, as if fully set forth herein.

106. Morris Schneider and PTS were, at all times relevant to this Complaint, engaged in commerce in the state of North Carolina.

107. Morris Schneider and PTS actions detailed herein constitute a violation of North Carolina General Statute § 75-1.1 as an unfair and deceptive method of competition or trade practice, and their misconduct has caused actual damage to Sheila B. Laws and Ronnie E. Laws and each member of the class.

108. The actions of Morris Schneider and PTS offend established public policy and are immoral, unethical, oppressive, unscrupulous, and substantially injurious to consumers. Morris Schneider and PTS have engaged in conduct manifesting an inequitable assertion of power or position.

109. As a result of the unfair and/or deceptive methods and practices of Morris Schneider and PTS, Sheila B. Laws and Ronnie E. Laws and each member of the class have been damaged in an amount to be proven at trial and are entitled to relief and treble damages for injuries caused by defendants' unfair and deceptive conduct.

110. The professional services exemption of Chapter 75, N.C.G.S. § 75-1.1(b) applies only when a lawyer or law firm acts within the traditional attorney-client relationship. That exception does not apply to this case because Morris Schneider was not engaged in the traditional practice of law, but was engaged in the entrepreneurial aspects of legal practice. Morris Schneider's actions were geared towards their own interests, not the interests of its clients, the lenders to whom Sheila B. Laws and Ronnie Laws and the members of the class owed money.

111. Morris Schneider and PTS willfully engaged in unfair and deceptive conduct and Sheila B. Laws and Ronnie E. Laws and the members of the class are entitled, under North Carolina General Statute § 75-16.1, to recover from the defendants their costs and reasonable attorneys' fees.

PRAYER FOR RELIEF

WHEREFORE, plaintiff respectfully requests that this Court enter judgment in favor of Plaintiffs and the class and against PTS and Morris Schneider, jointly and severally, as follows:

- (a) Declaring that the defendants breached their fiduciary duty to plaintiffs and the class by engaging in the illegal practice of both serving as substitute trustee and representing the lender as an advocate with respect to contested foreclosures of deeds of trust in North Carolina.
- (b) Requiring PTS and Morris Schneider to disgorge all monies either collected or charged to any borrower in connection with the foreclosure of any deed of trust in which PTS served as substitute trustee and Morris Schneider in any way represented the lender.

- (c) Requiring Morris Schneider to disgorge any attorney fee received in violation of North Carolina law.
- (d) Declaring that PTS is an alter-ego of Morris Schneider, and as such, has breached the fiduciary duty owed to Plaintiffs;
- (e) Declaring that Morris Schneider knowingly assisted PTS in breaching the fiduciary duty it owed to Plaintiffs.
- (f) Ordering PTS and Morris Schneider to disgorge all profits derived from cases in which PTS breached its fiduciary duty.
- (g) Imposing a constructive trust upon all fees received by either Morris Schneider or PTS in connection with the foreclosure of any deed of trust for which they breached their fiduciary duty.
- (h) Awarding to plaintiffs and the class double the amount of fees paid to Morris Schneider and PTS as damages.
- (i) Awarding to plaintiffs and the class treble damages on account of the unfair trade practices engaged in by Morris Schneider and PTS.
- (j) For such other and further relief as the Court deems just and proper.

Dated: Charlotte, North Carolina
_____, 2008.

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**N – LIEN RELEASE AND
CANCELATION OF DEED OF
TRUST**

N.C.G.S. § 45-36.9. Secured creditor to submit satisfaction for recording; liability for failure.

(a) A secured creditor shall submit for recording a satisfaction of a security instrument within 30 days after the creditor receives full payment or performance of the secured obligation. If a security instrument secures a line of credit or future advances, the secured obligation is fully performed only if, in addition to full payment, the secured creditor has received a notification requesting the creditor to terminate the line of credit or containing a statement sufficient to terminate the effectiveness of the provision for future advances in the security instrument.

(b) Except as otherwise provided in G.S. 45-36.12, a secured creditor that is required to submit a satisfaction of a security instrument for recording and does not do so by the end of the period specified in subsection (a) of this section is liable to the landowner for any actual damages caused by the failure, but not punitive damages.

(c) Except as otherwise provided in subsection (d) of this section and in G.S. 45-36.12, a secured creditor that is required to submit a satisfaction of a security instrument for recording and does not do so by the end of the period specified in subsection (a) of this section is also liable to the landowner for one thousand dollars (\$1,000) and any reasonable attorneys' fees and court costs incurred if, after the expiration of the period specified in subsection (a) of this section, all of the following occur:

(1) The landowner gives the secured creditor a notification, by any method authorized by G.S. 45-36.5 that provides proof of receipt, demanding that the secured creditor submit a satisfaction for recording.

(2) The secured creditor does not submit a satisfaction for recording within 30 days after the secured creditor's receipt of the notification.

(3) The security instrument is not satisfied of record by any of the methods provided in G.S. 45-37(a) within 30 days after the secured creditor's receipt of the notification.

The right to receive the additional one thousand dollars (\$1,000) is personal to the landowner who gives the secured creditor notification under this subsection and may not be assigned.

(d) Subsection (c) of this section does not apply if the secured creditor received full payment or performance of the secured obligation before October 1, 2005.

(e) This section does not apply if the security instrument is satisfied of record by any of the methods provided in G.S. 45-37(a) within 30 days after the secured creditor receives full payment or performance of the secured obligation. (2005-123, s. 1.)

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME: PUBLIC, JOHN Q. CHAPTER 13 CASE NO. 01-49999
PUBLIC, MARY E. OUR FILE NO. 11999

ADDRESS: 100 MAIN STREET
ANYWHERE, NC 28999

SSN: --- -- 1234 & --- --5678

DEBTORS.

JOHN Q. PUBLIC and wife,
MARY E. PUBLIC,

Adv. Proc. No. 05- 4002

Plaintiffs,

versus

AMERICREDIT FINANCIAL SERVICES, INC.

Defendant.

Complaint For Failure to Release Lien on Title to Motor Vehicle

Introduction

1. This is an action for actual and punitive damages filed by the debtors for the failure of Defendant to release its lien on the title to a motor vehicle in compliance with applicable North Carolina law and for the adverse impact such State law violations have had on the applicable provisions of Title 11 of the United States Code.

2. This action is also filed to enforce the Order of Confirmation duly entered in this Chapter 13 case, the Order of Discharge duly entered in this case, and to enforce and to implement other Bankruptcy Code provisions and Rules related thereto, and to prevent an abuse of process and to preclude the frustration of the orderly discharge of the claims in this case.

Jurisdiction

3. Jurisdiction is conferred on this Court pursuant to the provisions of Section 1334 of Title 28 of the United States Code in that this proceeding arises in and is related to the above-captioned Chapter 13 case under Title 11 and concerns property of the debtors in that case.

4. This Court has supplemental jurisdiction to hear all state law claims pursuant to Section 1367 of Title 28 of the United States Code.

5. Venue lies in this District pursuant to Section 1391(b) of Title 28 of the United States Code.

6. This matter is a non-core proceeding and the Plaintiffs consent to the entry of a final order in this proceeding by the Bankruptcy Judge.

Parties

7. The Plaintiffs in this case were and are debtors under Chapter 13.

8. The Defendant, AmeriCredit Financial Services, Inc. ("AmeriCredit"), is upon information and belief a business entity organized and existing under the laws of the State of Delaware and has a principal office/mailling address of 801 Cherry St., Ste 3900, Fort Worth, TX 76102.

Factual Allegations

9. Before the commencement of the Chapter 13 case, the Plaintiffs pledged security in a 1995 Mercury Mystique to AmeriCredit as and for a lien on the vehicle and AmeriCredit had its security interest duly perfected by having its lien noted on the title to the vehicle issued by the North Carolina Division of the Motor Vehicles. The account was assigned the number 403037765 by AmeriCredit. This claim was treated under the confirmed plan as a bifurcated claim.

10. The Chapter 13 case of the Plaintiffs herein was commenced by the filing of a voluntary petition with the Clerk of this Court on _____.

11. The 341(a) meeting of creditors in this case was held in Shelby, North Carolina on _____.

12. The Chapter 13 plan of the Plaintiffs and debtors herein was subsequently confirmed by order of this Court filed and entered on _____. The confirmation order provided in pertinent part that all "lienholders" could "retain their liens pending payoff or discharge."

13. AmeriCredit received notice of the 341(a) meeting from documents mailed by the Trustee's office and AmeriCredit also received a "filed" copy of the Order of Confirmation.

14. AmeriCredit filed a sworn proof of claim in this case with the Chapter 13 Trustee in the amount of \$6,163.50 (secured) and \$5,150.53 (unsecured). The sworn proof of claim was identified on the records of the Trustee as claim numbers 0003 and 2003.

15. All of the monthly payments from the Trustee on AmeriCredit's secured claim, totaling \$7,606.09, and AmeriCredit's unsecured claim totaling \$1,633.05 were mailed to AmeriCredit at 12125 Herbert Wayne Court, Suite 100, Huntersville, NC 28078. All of these checks were in fact received, endorsed, deposited and otherwise duly processed by AmeriCredit.

16. During the pendency of this case the Trustee's office never received any notice whatsoever of the assignment of the subject claim by AmeriCredit to any other party or entity and that no notice of any such assignment of this claim was ever filed with the Clerk of this Court as required by Rule 3001 of the Federal Rules of Bankruptcy Procedure. As such, the debtors allege that AmeriCredit is still the lienholder.

17. During the pendency of the debtors' Chapter 13 case numerous documents were served on the Defendant and received by the Defendant including but not limited to the first meeting notice, the Trustee's motion to allow secured and unsecured claims, the Trustee's motion for the entry of a Final Order of Discharge, and the Discharge Order itself.

In addition, AmeriCredit filed a Motion for Relief from Stay in this case which was resolved by a consent order.

18. The Plaintiffs made all of the required Chapter 13 plan payments and duly completed their Chapter 13 plan. As a result, a final Discharge Order was duly entered by this Court on or about July 8, 2004. The Discharge Order provided in pertinent part that the Plaintiffs and debtors herein were "discharged from all debts provided for by the plan." The Plaintiffs aver that this discharge extended to and included the balance of the debt to AmeriCredit.

Factual Allegations (Post-Discharge)

19. On or about September 2, 2004, the debtors' attorney caused a demand for the release of the lien on the title to be sent to AmeriCredit at the Huntersville address. The defendant received the title demand, as evidenced by Postal Form 3811 dated September 3, 2004. Said title demand and Postal Form 3811 are attached hereto as Exhibits A and B respectively and are incorporated herein by this reference.

20. On or about October 12, 2004 the debtors' attorney caused a second demand for the release of the lien on the title to be sent to AmeriCredit at the Huntersville Address. Said title demand is attached hereto as Exhibit C and incorporated herein by this reference.

21. On or about November 22, 2004 the debtors' attorney caused a third demand for the release of the lien on the title to be sent to AmeriCredit at the Huntersville Address. Said title demand is attached hereto as Exhibit D and incorporated herein by this reference.

22. To date, neither the debtors nor their attorney have received the title to the subject vehicle with the lien released.

23. As a result of the conduct of AmeriCredit the debtor filed a motion to reopen this case with this Court, to pursue "discharge violations and other relief against creditors in this proceeding."

24. Under Section 350(b) of the Code "a case may be reopened in the Court in which such case was closed to administer assets, to accord relief to the debtors, or for other cause." This case was reopened for all of the reasons provided for in the said Code section.

25. Prior and subsequent to the reopening of this case the debtors have engaged in meetings with their attorney and members of his staff about this matter.

26. The violations of the non-bankruptcy laws as alleged herein further justify and enhance the necessity for the award of substantial and significant punitive damages in this case.

First Claim for Relief

27. The allegations in paragraphs 1 through 26 of this complaint are realleged and incorporated herein by this reference.

28. The actions of AmeriCredit after receiving notice of the order of discharge entered on July 8, 2004 constitute a gross violation of the discharge injunction as set forth in 11 U.S.C. Section 524.

29. As a result of the above violation of 11 U.S.C. Section 524, the Defendant is

liable to the Plaintiffs for actual damages, punitive damages and legal fees under Section 105 of Title 11 of the United States Code.

Second Claim for Relief

30. The allegations in paragraphs 1 through 29 of this complaint are realleged and incorporated herein by this reference.

31. As a result of the failure of AmeriCredit to release its lien on the title to the subject motor vehicle the debtors have found it necessary to devote countless and unnecessary hours to their efforts to secure such title and that all of this time was unwarranted and unnecessary.

32. The Plaintiffs have worried about this situation and have feared that the Defendant had some improper motive for holding the said title.

33. The actions of the Defendant in this case constitute a clear violation of the provisions of North Carolina General Statute Section 20-58.4 and of Sections 25A-22(b) of the North Carolina Retail Installment Sales Act.

34. Section 20-58.4 of the North Carolina General Statutes provides in pertinent part as follows:

"Release of security interest. Upon the satisfaction or other discharge of a security interest in a vehicle for which the certificate of title is in the possession of the secured party, *the secured party shall within 10 days after demand and, in any event, within 30 days, execute a release of his security interest*, in the space provided therefore on the certificate or as the Division prescribes, and mail or deliver the certificate and release to the next secured party named therein, or if none, to the owner or other person authorized to receive the certificate for the owner."*[emphasis added]*

35. The Defendant did not comply with this statute after the entry of the Discharge Order in this case.

36. The actions of the Defendant in this case have been unlawful in nature and as a result the Plaintiffs are entitled to recover both actual and punitive damages as well as legal fees and expenses as provided for by Sections 25A-44(4) of the North Carolina Retail Installment Sales Act.

Third Claim for Relief

37. The allegations in paragraphs 1 through 36 of this complaint are realleged and incorporated herein by this reference.

38. The Plaintiffs are "consumers" as that term is defined by Article 2 of Chapter 75 of the North Carolina General Statutes.

39. The Plaintiffs' relationship with the Defendant arose out of a "consumer debt" as that term is defined in Article 2 of Chapter 75 of the North Carolina General Statutes.

40. The Defendant was and is a "debt collector" as that term is defined by applicable provisions of Article 2 of Chapter 75 of the North Carolina General Statutes.

41. Under the provision of Section 75-52 of the North Carolina General Statutes the Defendant was and is prohibited from engaging in any conduct the natural consequences

of which is to oppress, harass or abuse any person.

42. The actions and conduct of the Defendant were oppressive and abusive in violation of the applicable provisions of Article 2 of Chapter 75 of the North Carolina General Statutes.

43. As a result thereof, the Defendant is liable for statutory damages in the sum of no less than \$2,000.00 for violation of N.C.G.S. Section 75-50, et seq. and the payment of legal fees and expenses.

Fourth Claim for Relief

44. The allegations in paragraphs 1 through 43 of this complaint are realleged and incorporated herein by this reference.

45. The actions and conduct of the Defendant in this case constitute unfair and deceptive acts and practices in violation of the provisions of Section 75-1.1 of the North Carolina General Statutes. Specifically, the unfair acts and practices of AmeriCredit arose out of its failure to comply with the mandatory provisions of Chapter 20 of the North Carolina General Statutes.

46. As a result of the unfair acts and deceptive practices of AmeriCredit, the Plaintiffs are entitled to the recovery of actual and treble damages under the provision of Section 75-16 of the North Carolina General Statutes.

47. As a result of the unfair acts and deceptive practices of the Defendant, the Plaintiffs are entitled to the recovery of reasonable legal fees under the provisions of Section 75-16.1 of the North Carolina General Statutes.

Fifth Claim for Relief

48. The allegations in paragraphs 1 through 47 of this complaint are realleged and incorporated herein by this reference.

49. The conduct of the Defendant in this case has substantially frustrated the discharge order entered in this case and has caused the debtors unwarranted and unnecessary time, effort and expense in seeking to enforce rights guaranteed by the Bankruptcy Code.

50. In order to carry out the provisions of the Code and to maintain its integrity this Court must impose actual damages, punitive damages and legal fees against the Defendant pursuant to the provisions of Section 105 of the Code.

51. In order to protect debtors who have completed their Chapter 13 plans and secured a full discharge thereunder this Court must impose sanctions against the Defendant for its misconduct in this case.

Sixth Claim for Relief

52. The allegations in paragraphs 1 through 51 of this complaint are realleged and incorporated herein by this reference.

53. The Confirmation Order in this case permitted AmeriCredit to retain the title to the vehicle "pending discharge" of its debt in this case.

54. The Confirmation Order imposed an affirmative duty on AmeriCredit to release its lien on the title to the vehicle and to deliver the said title to the Plaintiffs upon entry of the Discharge Order.

55. The failure of AmeriCredit to provide an accurate release of its lien on the said title and to deliver the title to the Plaintiffs in a timely manner post-discharge was and is in violation of the Confirmation Order in this case.

56. As a result, the Plaintiffs are entitled to the recovery of actual damages, punitive damages and legal fees.

Seventh Claim for Relief

57. The allegations in paragraphs 1 through 56 of this complaint are realleged and incorporated herein by this reference.

58. The title to the vehicle in this case was and is property of the debtors' Estate in Bankruptcy.

59. The reopening of this case under Section 350(b) of the Bankruptcy Code grants to this Court jurisdiction to administer assets of this case including but not limited to the title to the said vehicle.

60. As of the date of the reopening of this case AmeriCredit was under a direct and affirmative duty to turnover the said title to the vehicle to the Plaintiffs with its lien duly canceled and released.

61. The failure of the Defendant to turnover the said title violated Section 542 of the Bankruptcy Code.

62. As a result thereof, the Plaintiffs are entitled to the recovery of actual damages, punitive damages and legal fees.

Eighth Claim for Relief

63. The allegations in paragraphs 1 through 62 of this complaint are realleged and incorporated herein by this reference.

64. The title to the vehicle in this case was and is property of the debtors' Estate in Bankruptcy.

65. The reopening of this case under Section 350(b) of the Bankruptcy Code grants to this Court jurisdiction to administer assets of this case including but not limited to the title to the said vehicle.

66. As of the date of the reopening of this case the Defendant was under a direct and affirmative duty to turnover the said title to the vehicle to the Plaintiffs with its lien duly canceled and released.

67. The failure of the Defendant to immediately turnover the said title to the Plaintiffs constituted an unlawful act to exercise control over property of the Estate in violation of Section 362(a)(3) of the Bankruptcy Code.

68. As a result, the Plaintiffs are entitled to the recovery of actual damages, punitive damages and legal fees.

WHEREFORE, the Plaintiffs having set forth their claims for relief against the Defendant respectfully prays of the Court as follows:

- A. That the Plaintiffs have and recover against the Defendant a sum to be determined by the Court in the form of actual damages;
- B. That the Plaintiffs have and recover against the Defendant to be determined by the Court in the form of punitive damages;
- C. That the Plaintiffs have and recover against the Defendant all reasonable legal fees and expenses incurred by their attorney;
- D. That this Court enter a standing order requiring all applicable secured creditors to comply with the provisions of N.C.G.S. Section 20-58.4 within 13 days of the service of the discharge order in all Chapter 13 cases or to be subject to civil sanctions for contempt of court;
- E. That the Defendant be required to pay to the Plaintiffs as an additional damage award in this case all funds received from the Chapter 13 Trustee during the pendency of the plan in this case;
- F. That the Plaintiffs have and recover against the Defendant the sum of \$2,000.00 for its violation of N.C.G.S. Section 75-50, et seq.; and
- G. That the Plaintiffs have such other and further relief as the Court may deem just and proper.

Date this the _____ day of January 2005.

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**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

**NAME: McSWAIN, DAVID RAY
 McSWAIN, KAREN BALLARD**

**CHAPTER 13 CASE NO. 02-40588
OUR FILE NO. 10380**

**ADDRESS: 1179 TINY TRAIL
 LINCOLNTON, NC 28092**

SSN: --- -- 0276 & --- -- 1585

DEBTORS

**DAVID RAY McSWAIN and wife
KAREN BALARD McSWAIN**

ADVERSARY PROC. NO. 07-_____

PLAINTIFFS

versus

BENEFICIAL NORTH CAROLINA, INC.

DEFENDANT

**COMPLAINT SEEKING DAMAGES IN NON-CORE ADVERSARY PROCEEDING
FOR FAILURE TO CANCEL DEED OF TRUST**

Introduction

1. This is an action for actual and punitive damages filed by the debtors for the failure of Defendant to cancel the second deed of trust on the debtors' residence located at 1179 Tiny Trail, Lincolnton, North Carolina 28092 in compliance with applicable North Carolina law and for the adverse impact such State law violations have had on the applicable provisions of Title 11 of the United States Code.

2. This action is also filed to enforce the Order of Confirmation duly entered in this Chapter 13 case, the Order for Default Judgment duly entered in this case and the Order of Discharge duly entered in this case, and to enforce and to implement other Bankruptcy Code provisions and Rules related thereto, and to prevent an abuse of process and to preclude the frustration of the orderly discharge of the claims in this case.

Jurisdiction

3. Jurisdiction is conferred on this Court pursuant to the provisions of Section 1334

of Title 28 of the United States Code in that this proceeding arises in and is related to the above-captioned Chapter 13 case under Title 11 and concerns real property of the debtors in that case.

4. This Court has supplemental jurisdiction to hear all state law claims pursuant to Section 1367 of Title 28 of the United States Code.

5. Venue lies in this District pursuant to Section 1391(b) of Title 28 of the United States Code.

6. This matter is a non-core proceeding and the Plaintiffs consent to the entry of a final order in this proceeding by the Bankruptcy Judge.

Parties

7. The Plaintiffs in this case were and are debtors under Chapter 13.

8. The Defendant, Beneficial North Carolina, Inc., ("Beneficial"), is organized and existing under the laws of the State of Delaware and has a principal office address of 300 Beneficial Center, Peapack, NJ 07977-0000 and a registered agent mailing address care of CT Corporation System at 225 Hillsborough Street, Raleigh, NC 27603. Beneficial was the servicer for the debtors' second mortgage loan.

Factual Allegations

9. The Chapter 13 case of the Plaintiffs herein was commenced by the filing of a voluntary petition with the Clerk of this Court on June 26, 2002.

10. The §341(a) meeting of creditors in this case was held in Shelby, North Carolina on August 16, 2002.

11. The Chapter 13 plan of the Plaintiffs and debtors herein was subsequently confirmed by order of this Court on September 9, 2002.

12. The Defendant filed no objection to confirmation of the plan in this case.

13. In the schedules filed with the petition in this case and on the master mailing matrix filed with the Clerk of this Court, a debt in the amount of \$36,930.00 was listed in favor of Beneficial for the second deed of trust on the residential real estate of the debtors. The debtors believed and therefore alleged in their petition and schedules that there was no equity in their residential real estate to which the second mortgage could secure at the time that the loan was made and, therefore, provided for the claim to be paid as an unsecured claim under the terms of the confirmed plan.

14. Beneficial filed a sworn secured proof of claim in this case with the Chapter 13 Trustee in the amount of \$20,607.10. The sworn proof of claim was identified on the records of the Trustee as claim number 0001.

15. On or about December 4, 2002, the debtors filed an adversary proceeding in the United States Bankruptcy Court asking the Court to determine the validity, priority and extent of the lien of Beneficial. The Court granted the debtors' request by way of an order of Default Judgment entered on March 27, 2003. The Order granting default judgment provides in part that "upon entry of the discharge order in this case, the Defendant is hereby ordered to cancel and mark paid its second deed of trust and must provide debtors with proof."

16. All of the monthly payments from the Trustee on Beneficial's claim, totaling \$4,121.42 were mailed to Beneficial North Carolina, Inc. at 961 Weigel Drive, Elmhurst, IL 60126. All of these checks were in fact received, endorsed, deposited and otherwise duly processed by Beneficial.

17. During the pendency of this case the Trustee's office never received any notice whatsoever of the assignment of the subject claim by Beneficial to any other party or entity and that no notice of any such assignment of this claim was ever filed with the Clerk of this Court as required by Rule 3001 of the Federal Rules of Bankruptcy Procedure. As such, the debtors allege that Beneficial still holds the second deed of trust on their real property.

18. During the pendency of the debtors' Chapter 13 case numerous documents were served on the Defendant and received by the Defendant including but not limited to the notice of first meeting of creditors, the Trustee's motion to allow secured and unsecured claims, the Trustee's motion for the entry of a Final Order of Discharge, and the Discharge Order itself.

19. The Plaintiffs made all of the required Chapter 13 plan payments and duly completed their Chapter 13 plan. As a result, a final Discharge Order was duly entered by this Court on or about February 7, 2006. The Discharge Order provided in pertinent part that the Plaintiffs and debtors herein were "discharged from all debts if the debt is provided for by the Chapter 13 plan or is disallowed by the Court." The Plaintiffs aver that this discharge extended to and included the balance of the debt to Beneficial.

Factual Allegations (Post-Discharge)

20. On or about March 17, 2006, the debtors' attorney caused a demand for the cancellation of the second deed of trust be sent to Beneficial North Carolina, Inc., care of its registered agent CT Corporation System at 225 Hillsborough Street, Raleigh, North Carolina 27603. A second demand for the cancellation of the second deed of trust was sent to Beneficial North Carolina, Inc. at the same address above on or about April 26, 2006.

21. To date, neither the debtors nor their attorney have received the cancelled and marked as paid second deed of trust on the debtors' residence or any response to the two demands that the second deed of trust be cancelled.

22. On or about August 8, 2006 the debtors' attorney e-mailed an attorney that typically represents Beneficial in these matters, and he said that he would "get the request to the right person." However, neither the Plaintiffs nor the attorney for the Plaintiffs never received any further contact.

23. As a result of Beneficial's failure to comply with the Court order and failure to cancel the second deed of trust, the debtors filed a motion to reopen this case with this Court, to pursue "discharge violations and other relief against creditors in this proceeding."

24. Under Section 350(b) of the Code "a case may be reopened in the Court in which such case was closed to administer assets, to accord relief to the debtors, or for other cause." This case was reopened for all of the reasons provided for in the said Code section.

25. Prior and subsequent to the reopening of this case the debtors have engaged in meetings with their attorney and members of his staff about this matter.

26. The violations of the non-bankruptcy laws as alleged herein further justify and

enhance the necessity for the award of substantial and significant punitive damages in this case.

First Claim for Relief

27. The allegations in paragraphs 1 through 26 of this complaint are realleged and incorporated herein by this reference.

28. The actions of Beneficial after receiving notice of the order of discharge entered on February 7, 2006 constitute a gross violation of the discharge injunction as set forth in 11 U.S.C. Section 524.

29. As a result of the above violation of 11 U.S.C. Section 524, the Defendant is liable to the Plaintiffs for actual damages, punitive damages and legal fees under Section 105 of Title 11 of the United States Code.

Second Claim for Relief

30. The allegations in paragraphs 1 through 29 of this complaint are realleged and incorporated herein by this reference.

31. As a result of the failure of Beneficial to cancel its second deed of trust on the debtors' residence, the debtors have found it necessary to devote countless and unnecessary hours to their efforts to secure cancelled and marked as paid such deed of trust and that all of this time was unwarranted and unnecessary.

32. The Plaintiffs have worried about this situation and have feared that the Defendant had some improper motive for holding the said deed of trust.

33. The actions of the Defendant in this case constitute a clear violation of the provisions of North Carolina General Statute Section 45-36.3 and Section 45-37.

34. Section 45-36.3 of the North Carolina General Statutes provides in pertinent part as follows:

"Notification by mortgagee of satisfaction of provisions of deed of trust or mortgage, or other instrument.

(a) *After the satisfaction of the provisions of any deed of trust or mortgage, or other instrument intended to secure with real property the payment of money or the performance of any other obligation and registered as required by law, the holder of the evidence of the indebtedness, if it is a single instrument, or a duly authorized agent or attorney of such holder shall within 60 days:*

(1) *Discharge and release of record such documents and forward the cancelled documents to the grantor, trustor or mortgagor; or*

(2) *Alternatively, the holder of the evidence of the indebtedness or a duly authorized agent or attorney of such holder, at the request of the grantor, trustor or mortgagor, shall forward said instrument and the deed of trust or mortgage instrument, with payment and satisfaction acknowledged in accordance with the requirements of G.S. 45-37, to the grantor, trustor or mortgagor."* [emphasis added].

35. The Defendant did not comply with this statute after the entry of the Discharge Order in this case.

36. The actions of the Defendant in this case have been unlawful in nature and as a result the Plaintiffs are entitled to recover both actual and punitive damages as well as legal fees and expenses as provided for by Sections 45-36.3(c) of the North Carolina General Statute.

Third Claim for Relief

37. The allegations in paragraphs 1 through 36 of this complaint are realleged and incorporated herein by this reference.

38. The Plaintiffs are "consumers" as that term is defined by Article 2 of Chapter 75 of the North Carolina General Statutes.

39. The Plaintiffs' relationship with the Defendant arose out of a "consumer debt" as that term is defined in Article 2 of Chapter 75 of the North Carolina General Statutes.

40. The Defendant was and is a "debt collector" as that term is defined by applicable provisions of Article 2 of Chapter 75 of the North Carolina General Statutes.

41. Under the provision of Section 75-52 of the North Carolina General Statutes the Defendant was and is prohibited from engaging in any conduct the natural consequences of which is to oppress, harass or abuse any person.

42. The actions and conduct of the Defendant were oppressive and abusive in violation of the applicable provisions of Article 2 of Chapter 75 of the North Carolina General Statutes.

43. As a result thereof, the Defendant is liable for statutory damages in the sum of no less than \$2,000.00 for violation of N.C.G.S. Section 75-50, et seq. and the payment of legal fees and expenses.

Fourth Claim for Relief

44. The allegations in paragraphs 1 through 43 of this complaint are realleged and incorporated herein by this reference.

45. The actions and conduct of the Defendant in this case constitute unfair and deceptive acts and practices in violation of the provisions of Section 75-1.1 of the North Carolina General Statutes. Specifically, the unfair acts and practices of Beneficial arose out of its failure to comply with the mandatory provisions of Chapter 45 of the North Carolina General Statutes.

46. As a result of the unfair acts and deceptive practices of Beneficial, the Plaintiffs are entitled to the recovery of actual and treble damages under the provision of Section 75-16 of the North Carolina General Statutes.

47. As a result of the unfair acts and deceptive practices of the Defendant, the Plaintiffs are entitled to the recovery of reasonable legal fees under the provisions of Section 75-16.1 of the North Carolina General Statutes.

Fifth Claim for Relief

48. The allegations in paragraphs 1 through 47 of this complaint are realleged and incorporated herein by this reference.

49. The conduct of the Defendant in this case has substantially frustrated the

discharge order entered in this case and has caused the debtors unwarranted and unnecessary time, effort and expense in seeking to enforce rights guaranteed by the Bankruptcy Code.

50. In order to carry out the provisions of the Code and to maintain its integrity this Court must impose actual damages, punitive damages and legal fees against the Defendant pursuant to the provisions of Section 105 of the Code.

51. In order to protect debtors who have completed their Chapter 13 plan and secured a full discharge thereunder this Court must impose sanctions against the Defendant for its misconduct in this case.

Sixth Claim for Relief

52. The allegations in paragraphs 1 through 51 of this complaint are realleged and incorporated herein by this reference.

53. The Confirmation Order in this case permitted Beneficial to retain its deed of trust on the debtors' real property "pending discharge" of its debt in this case.

54. The Confirmation Order imposed an affirmative duty on Beneficial to cancel its deed of trust on the debtors' residence and to deliver proof to the Plaintiffs upon entry of the Discharge Order.

55. The failure of Beneficial to cancel its deed of trust on the debtors' real property and to deliver proof to the Plaintiffs in a timely manner post-discharge was and is in violation of the Confirmation Order in this case.

56. As a result, the Plaintiffs are entitled to the recovery of actual damages, punitive damages and legal fees.

Seventh Claim for Relief

57. The allegations in paragraphs 1 through 56 of this complaint are realleged and incorporated herein by this reference.

58. The Order for Default Judgment entered in this case permitted Beneficial to retain the second deed of trust on the debtors' residence "pending entry of the discharge" in this case.

59. The Order for Default Judgment imposed an affirmative duty on Beneficial to cancel and mark as paid all loan documents related to its second deed of trust on the debtors' residence and to deliver the said documents to the Plaintiffs upon entry of the Discharge Order.

60. The failure of Beneficial to cancel its second deed of trust and to deliver the cancelled and marked as paid deed of trust to the Plaintiffs in a timely manner post-discharge was and is in violation of the Order for Default Judgment entered in this case.

61. As a result, the Plaintiffs are entitled to the recovery of actual damages, punitive damages and legal fees.

Eighth Claim for Relief

62. The allegations in paragraphs 1 through 61 of this complaint are realleged and incorporated herein by this reference.

63. The second deed of trust on the subject real property in this case was and is property of the debtors' Estate in Bankruptcy.

64. The reopening of this case under Section 350(b) of the Bankruptcy Code grants to this Court jurisdiction to administer assets of this case including but not limited to the second deed of trust on the said real property.

65. As of the date of the reopening of this case, Beneficial was under a direct and affirmative duty to turnover its deed of trust on the debtors' residence to the Plaintiffs with its lien duly canceled and marked as paid.

66. The failure of the Defendant to turnover the said deed of trust violated Section 542 of the Bankruptcy Code.

67. As a result thereof, the Plaintiffs are entitled to the recovery of actual damages, punitive damages and legal fees.

Ninth Claim for Relief

68. The allegations in paragraphs 1 through 67 of this complaint are realleged and incorporated herein by this reference.

69. The second deed of trust in this case was and is property of the debtors' Estate in Bankruptcy.

70. The reopening of this case under Section 350(b) of the Bankruptcy Code grants to this Court jurisdiction to administer assets of this case including but not limited to the second deed of trust on the said real property.

71. As of the date of the reopening of this case, the Defendant was under a direct and affirmative duty to turnover its deed of trust on the debtors' residence to the Plaintiffs with its lien duly canceled and marked as paid.

72. The failure of the Defendant to immediately turnover the said title to the Plaintiffs constituted an unlawful act to exercise control over property of the Estate in violation of Section 362(a)(3) of the Bankruptcy Code.

73. As a result, the Plaintiffs are entitled to the recovery of actual damages, punitive damages and legal fees.

WHEREFORE, the Plaintiffs having set forth their claims for relief against the Defendant respectfully pray of the Court as follows:

- A. That the Plaintiffs have and recover against the Defendant a sum to be determined by the Court in the form of actual damages;
- B. That the Plaintiffs have and recover against the Defendant a sum to be determined by the Court in the form of punitive damages;
- C. That the Plaintiffs have and recover against the Defendant all reasonable legal

fees and expenses incurred by their attorney;

- D. That the Defendant be required to cancel its deed of trust on the debtors' real property or to be subject to civil sanctions for contempt of court;
- E. That the Defendant be required to pay to the Plaintiffs as an additional damage award in this case all funds received from the Chapter 13 Trustee during the pendency of the plan in this case;
- F. That the Plaintiffs have and recover against the Defendant the sum of \$2,000.00 for its violation of N.C.G.S. Section 75-50, et seq.; and
- G. That the Plaintiffs have such other and further relief as the Court may deem just and proper.

Dated this the _____ day of May 2007.



O. Max Gardner III
Law Offices of O. Max Gardner III
Attorney for the Debtor(s)
NC State Bar #6164
P.O. Box 1000
Shelby, NC 28151-1000
(704) 487-0616
FAX (888) 870-1647
e-mail: maxgardner@maxgardner.com

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

**NAME: PUBLIC, JOHN Q. CHAPTER 13 CASE NO. 01-49999
PUBLIC, MARY E. OUR FILE NO. 11999**

**ADDRESS: 100 MAIN STREET
ANYWHERE, NC 28999**

SSN: --- -- 1234 & --- --5678

DEBTORS.

**JOHN Q. PUBLIC and wife,
MARY E. PUBLIC,**

Adv. Proc. No. 05- 4002

Plaintiffs,

versus

AMERICREDIT FINANCIAL SERVICES, INC.

Defendant.

**FIRST REQUEST FOR ADMISSIONS OF FACT
FROM THE PLAINTIFFS TO THE DEFENDANT
(Lien release case)**

COME NOW the above-named Plaintiffs, by and through their attorney of record, and herewith serve upon the above named defendant in this case the following request for admissions of fact. This request is being made pursuant to the provisions of Rules 7001 and 7036 of the Rules of Bankruptcy Procedure, Rule 36 of the Federal Rules of Civil Procedure, and Rules 7016-1, 7026-1 and 7030-1 of the Local Bankruptcy Rules for the United States Bankruptcy Court for the Western District of North Carolina, and the Bankruptcy Practice Guide for the United States Bankruptcy Court for the Western District of North Carolina.

The defendant is requested by way of a proper officer to admit for the purpose of this action only the following facts. Please note that under the provisions of the applicable court rules each and every matter set forth below will be deemed admitted unless, within thirty (30) days after service of this request, the defendant serves upon the plaintiffs a written answer or objection addressed to the matter, signed by the defendant or their attorney.

REQUEST FOR ADMISSIONS

1. The Chapter 13 case of the Plaintiffs was commenced by the filing of a voluntary petition with the Clerk of this Court on _____.

RESPONSE:

2. The Chapter 13 plan as confirmed included a debt to Americredit secured by a 1995 Mercury Mystique.

RESPONSE:

3. Americredit filed a proof of claim in the amount of \$_____.

RESPONSE:

4. The Trustee disbursed the total sum of \$_____ to Americredit during the pendency of the Plaintiffs' Chapter 13 case.

RESPONSE:

5. The Plaintiffs' Chapter 13 case was completed and an Order of Discharge was entered by the Bankruptcy Court on _____.

RESPONSE

6. Americredit received a copy of the Trustee's motion for approval of his final report and for entry of the Order of Discharge.

RESPONSE:

7. Americredit received a copy of the Order of Discharge entered in this case on _____.

RESPONSE:

8. Americredit has business records that indicate O. Max Gardner III represented the Plaintiffs in their bankruptcy case.

RESPONSE:

9. Americredit has business records that include the mailing address and telephone number for O. Max Gardner III.

RESPONSE:

10. Americredit has never been contacted by any attorney other than O. Max Gardner III with respect to any matter or thing related to the representation of the Plaintiffs.

RESPONSE:

11. The proof of claim filed by Americredit was paid in full by the Chapter 13 Trustee.

RESPONSE:

12. Americredit filed no objection to the Trustee's motion for the entry of final discharge order or to the approval of his final accounting.

RESPONSE:

13. Americredit did not release the lien on the title to the subject vehicle within 30 days of the date of the entry of the Debtors' Order of Discharge.

RESPONSE:

14. Americredit had notice that such lien should have been released within 30 days of the entry of the Order of Discharge.

RESPONSE:

15. Americredit maintains an address at _____.

RESPONSE:

16. Americredit has never filed a notice of change of address with the Trustee or the Court.

RESPONSE:

17. The Defendant received a letter from the Plaintiffs' attorney dated _____ requesting the turnover of the title to the subject vehicle with the lien released.

RESPONSE:

18. The letter dated January 17, 2005 identified in the caption the Plaintiffs' address as 304 W. Deer Road, Timmons ville, SC 29161.

RESPONSE:

19. The Defendant did not release the lien on the title to the subject vehicle and deliver it to the Plaintiffs or to the Plaintiffs' attorney following its receipt of the letter dated _____.

RESPONSE:

20. The Defendant received a second letter from the Plaintiffs' attorney dated _____ requesting the turnover of the title to the subject vehicle with the lien released.

RESPONSE:

21. The letter dated _____ identified in the caption the Plaintiffs' address as 812 Cherokee Road, Florence, SC 29501.

RESPONSE:

22. The Defendant did not release the lien on the title to the subject vehicle and deliver it to the Plaintiffs or to the Plaintiffs' attorney following its receipt of the letter dated _____.

RESPONSE:

Dated this the _____ day of _____, 20____.

O. Max Gardner III
Attorney for the Plaintiffs
State Bar No: 6164
PO Box 1000
Shelby NC 28151-1000
704 487-0616
maxgardner@maxgardner.com

CERTIFICATE OF SERVICE

O. MAX GARDNER III, attorney for the Plaintiffs hereby certifies to the Court as follows:

1. I am not a party to the foregoing proceeding;
2. I am not less than 18 years of age;
3. I have this day served a copy of the foregoing **REQUEST FOR ADMISSIONS**

OF FACT on all parties in interest by placing the same in an envelope, first-class mail, postage prepaid, (or by certified mail, return receipt, postage prepaid, as indicated below), addressed to each person at his dwelling house or usual place of abode or to the place where he regularly conducts his business or profession as follows:

John Q. Public
Mary E. Public
100 Main Street
Anywhere, NC 28999

And via the Court's Electronic Case Filing System to:

Atty for Creditor

Steven G. Tate, Trustee
P.O. Box 1778
Statesville, NC 28687-1778

John Bramlett, Bankruptcy Admin.
402 W. Trade St., Room 200
Charlotte, NC 28202-1664

4. To the best of my knowledge, information and belief, the parties in interest are not infants or incompetent persons;
5. Service as outlined herein was made within the United States of America.

Dated this the ____ day of _____ 20____.

O. Max Gardner III
Law Offices of O. Max Gardner III, P.C.
Attorney for the Plaintiffs
N.C. State Bar No. 6164
P.O. Box 1000
Shelby, NC 28151-1000
(704) 487-0616 / FAX (704) 487-0619
maxgardner@maxgardner.com

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

**NAME: PUBLIC, JOHN Q. CHAPTER 13 CASE NO. 01-49999
PUBLIC, MARY E. OUR FILE NO. 11999**

**ADDRESS: 100 MAIN STREET
ANYWHERE, NC 28999**

SSN: --- -- 1234 & --- --5678

DEBTORS.

**JOHN Q. PUBLIC and wife,
MARY E. PUBLIC,**

Adv. Proc. No. 05- 4001

Plaintiffs,

versus

HOMEQ SERVICING CORPORATION

Defendant.

**FIRST INTERROGATORIES AND REQUEST FOR PRODUCTION
OF DOCUMENTS FROM THE PLAINTIFFS TO THE DEFENDANTS
(Lien Release Case)**

COME NOW the above-named debtors and Plaintiffs herein, by and through their attorney of record, and herewith serve upon the DEFENDANT(S) in this case the following written interrogatories pursuant to the provisions of Rule 7033 of the Rules of Bankruptcy Procedure and Rule 33 of the Federal Rules of Civil Procedure and the following request for the production and inspection of documents pursuant to Rule 7034 of the Rules of Bankruptcy Procedure and Rule 34 of the Federal Rules of Civil Procedure as provided for and set forth in the foregoing rules. Answers to these Interrogatories and Request for Production of Documents must be furnished within forty-five (45) days of the service of the Summons and Complaint or within thirty (30) days of the service of these Interrogatories, whichever is later.

DEFINITIONS AND INSTRUCTIONS

A. If there is insufficient space after each interrogatory for you to provide a full and complete answer, then you should state your full and complete answer on a separate page, identify the page, and attach the page to your response as a properly identified and marked exhibit thereto.

B. The term "Document" means all writings of any kind, including the originals and all other non-identical copies, whether different from the originals by reason of any notation made on such copies or otherwise, including but not limited to correspondence, memoranda, notes, diaries, desk or other calendars, statistics, letters, telegrams, minutes, business records, personal records, accountants' statements, account statements, contracts, reports, credit reports, studies, checks, statements, receipts, invoices, bills, return checks, summaries, pamphlets, books, inter-office and intra-office communications, notations of any sort of conversations or meetings, telephone call meetings or other communications, written agreements, bulletins, printed matter, computer printouts, teletypes, telefaxes, invoices, worksheets, all drafts, alterations, modifications, changes and amendments of any kind with respect to any of the foregoing, graphic or oral records or representations of any kind (including, without limitation, tapes, cassettes, discs, recordings, electronic mail records, computer memory records such as hard disk drives and master back-up tapes, diskettes, or other devices such as zip drive records).

C. The term "act" as used herein includes acts of every kind and description.

D. The term "identify" or "describe" when used in reference to a "document" means to state:

- a. The type of document (e.g., letter, memorandum, report, electronic mail records, notes, etc.);
- b. The date of the document;
- c. The name of the parties or parties who originated the document, their past or present position with the defendants, their general duties and responsibilities, their current physical location with the company, and their e-mail, telephone number and telephone extension;
- d. The name and address of the current custodian of the document;
- e. The name and current address of each signatory thereon;
- f. The reason, in detail, for the preparation of the document;
- g. The subject or subjects covered by the document;
- h. The names, business addresses and titles of the persons to whom the document writing was directed; and
- i. The name and address and title of each person who originated, read or received the document.

E. The term "identify" as used herein in connection with a "person" or "persons" means to state the names, titles, the present employer of such "person" or "persons," the relationship of such person or persons to any of the defendants, and such person's current business address and business telephone number.

F. The term "identify" as used herein with respect to or in connection with an "act" means to:

- a. Furnish the date and place of the act;
- b. Identify the person acting, the person for whom the act was performed, and the person against whom the act was directed; and
- c. Describe in detail the act.

G. The terms "describe" or "state" as used herein mean:

- a. Describe or state fully by reference to underlying facts rather than by ultimate facts or conclusions of law;
- b. Particularize as to the:

- i. Time;
- ii. Date;
- iii. Manner; and
- iv. Place.

H. The term "oral communication" as used herein means and includes any face-to-face conversation, meeting, conference, telephone conversation, cell-phone conversation, computer conversation with voice mail, or any one for more of these or related devices.

I. The term "person" or "persons" as used herein means and includes all natural persons, public and private corporations, associates, wholly owned affiliates or subsidiary corporations or any other form of a business association, and any other type of entity and the agents, employees, officers, deputies and representatives thereof.

J. The terms "you" or "your" as used herein shall refer to any one or all of the named defendants and any related or affiliated companies associated in any way therewith.

K. All requests shall be deemed to include any documents made by, held by, or maintained in the files of any predecessor, successor, employee, agent or assignee of either one or all of the defendants.

L. The term "the transaction" or "the transactions" or "account" or "accounts" when used herein without qualification means the transactions and accounts between or among the debtors and the named defendants and all related activities and agents or assigns of either party.

M. If the space provided below each interrogatory is not sufficient for your answer, then use additional sheets, numbered consecutively after each such interrogatory, and inserted in the proper order of all copies filed and served. For example, in the case of Interrogatory number 1, any additional sheets for your answers would be numbered as 1-A, 1-B, 1-C, etc.

N. Each of the following requests for production of documents and interrogatories is intended to be a continuing request to produce and answer. As a result, the Plaintiffs hereby demand that, in the event that at any later date you obtain any additional facts, or form any conclusions, opinions or contentions different from those set forth in your responses herein, then you shall amend your answers to such responses and document production promptly and sufficiently in advance of any trial date, to fully set forth such differences and to produce and documents in connection therewith.

INTERROGATORIES AND REQUEST FOR PRODUCTION OF DOCUMENTS

1. Did the Defendant receive a request for turnover of the title to the subject vehicle from the attorney for the Plaintiffs dated _____? If so, identify the date the letter was received.

ANSWER:

2. Did the Defendant receive a request for turnover of the title to the subject vehicle from the attorney for the Plaintiffs dated _____? If so, identify the date the letter was received.

ANSWER:

3. Who reviewed the above referenced letters? Please identify by name and title all employees and agents of Defendant who reviewed the above referenced letters.

ANSWER:

4. Did any employees or agents of the Defendant attempt to respond to or contact the attorney for the Plaintiffs directly regarding the above referenced letters or any other matter prior to the filing of the within complaint? If so, identify who and when and give a detailed account of any such attempts.

ANSWER:

5. If no such attempt to respond to or contact the attorney for the Plaintiffs directly regarding the above referenced letters or any other matter prior to the filing of the within Complaint, please explain why such an attempt was not made.

ANSWER:

6. What action did the Defendant take to note the debtors were being represented by an attorney prior to the time the Complaint was filed?

ANSWER:

7. If no such action was taken to note the debtors were being represented by an attorney prior to the time the Complaint was filed, please explain why such action was not taken.

ANSWER:

8. If the Defendant in fact sent a letter directly to the debtors in approximately _____ instructing them on the procedure for obtaining a duplicate title, along with a check for duplicate title fees, why did the Defendant not provide a carbon copy of the said letter to the attorney for the Plaintiffs?

ANSWER:

9. Why did the Defendant not send any such letter to the attorney for the debtors instead of attempting to contact the debtors directly?

ANSWER:

10. Produce a copy of the letter allegedly mailed or attempted to be mailed to the debtors in approximately _____ advising them of the procedure for obtaining a duplicate title along with a copy of all enclosures.

ANSWER:

11. Please provide the source for your assumption or information that the debtors' address in _____ was 727 Lake Hurst Drive, Shelby, NC.

ANSWER:

12. Did Defendant check the Bankruptcy Court or Trustee websites for the debtors' current address?

ANSWER:

13. If Defendant did not check the Bankruptcy Court or Trustee websites for a current address for the debtors, why not?

ANSWER:

14. Please identify by name, bankruptcy case number, and bankruptcy district, any and all cases where the Defendant has been found to have violated the automatic stay or the discharge injunction or where the Defendant has settled a stay violation or a discharge violation case by way of the payment of any United States currency to any debtors or any attorney for the debtors within five (5) years of the date of the filing of the within Complaint.

ANSWER:

15. Describe Defendant's process for releasing liens on titles discharged in bankruptcy cases.

ANSWER:

16. Produce a copy of all documents and records in Defendant's possession regarding this matter.

ANSWER:

17. State each and every contention that you will present at the hearing in this matter as to why Defendant committed no federal or state law violations in retaining the title to the debtors' vehicle.

ANSWER:

18. Identify with particularity each and every exhibit that you will seek to introduce into evidence at the hearing in this matter.

ANSWER:

19. State the name, title or position, address and telephone number of each and every witness that you plan to call to testify at the hearing in this case and state the substance of the testimony expected from each such witness.

ANSWER:

Dated this the _____ day of _____ 20_____.

O. Max Gardner III
Law Offices of O. Max Gardner III, PC
Attorney for Plaintiffs

403 South Washington Street
PO Box 1000
Shelby NC 28151-1000
704.487.0616
maxgardner@maxgardner.com

CERTIFICATE OF SERVICE

O. MAX GARDNER III, attorney for the Plaintiffs, hereby certifies to the Court as follows:

1. I am not a party for the foregoing proceeding;
2. I am not less than 18 years of age;
3. I have this day served a copy of the foregoing **FIRST INTERROGATORIES AND FIRST REQUEST FOR PRODUCTION OF DOCUMENTS** on all parties in interest by placing the same in an envelope, first-class mail, postage prepaid, and addressed to each person at his dwelling house or usual place of abode or to the place where he or she regularly conducts his business or profession as follows:

John Q. Public
Mary E. Public
100 Main Street
Anywhere, NC 28999

And via the Court's Electronic Case Filing System to:

Atty for Creditor

Steven G. Tate, Trustee
P.O. Box 1778
Statesville, NC 28687-1778

John Bramlett, Bankruptcy Admin.
402 W. Trade St., Room 200
Charlotte, NC 28202-1664

4. To the best of my knowledge, information and belief, the parties in interest are not infants or incompetent persons;
5. Service as outlined herein was made within the United States of America.

Dated this the ____ day of _____ 20____.

O. Max Gardner III
Law Offices of O. Max Gardner III, P.C.
Attorney for the Plaintiffs
N.C. State Bar No. 6164
P.O. Box 1000
Shelby, NC 28151-1000
(704) 487-0616 / FAX (704) 487-0619
maxgardner@maxgardner.com

NORTH CAROLINA
CLEVELAND COUNTY

RELEASE AND SETTLEMENT
AGREEMENT

This SETTLEMENT AGREEMENT AND RELEASE (the "Agreement") is made and executed as of the ____ day of _____, 2007, by and between John Q. Public and Mary E. Public ("Public") (with their heirs, agents, administrators, executors, trustees and assigns) and _____ ("Defendants") (and their heirs, agents and assigns); is intended to extinguish all liabilities, causes of action, or damages either past or present, known or unknown, if any, which the Publics may be entitled to pursue against the Defendants.

RECITALS:

The Publics filed a bankruptcy case in the Western District of North Carolina, identified as Case Number _____ ("Bankruptcy Case"). Subsequent to the debtors' filing of their bankruptcy case, the debtors filed Adversary Proceeding No. _____ in the Western District of North Carolina an action for actual and punitive damages filed by the debtors for the failure of Defendant to release its lien on the title to a motor vehicle in compliance with applicable North Carolina law.

The mutual desire of the parties is to resolve these matters to avoid litigation.

The Defendants agree to tender to the Publics the sum of \$_____ in damages and to the Publics' attorney the sum of \$_____ in legal fees, in satisfaction of all claims the Publics, and/or anyone deriving rights from the Publics, may have against the Defendants; and the Publics have agreed not to pursue litigation or further claims against Defendants. Any fees and expenses to which the attorney is entitled under the terms of his written fee agreement with the debtor(s) shall be deemed the sole and separate property of the attorney and to that extent the attorney shall have a lien on the said proceeds.

Defendants agree to release the lien on the title to the subject vehicle either by providing the Plaintiffs with a Title with the lien released or by providing the Plaintiffs a lien release form.

NOW, THEREFORE, in consideration of the above recitals and the value set out above and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, and intending to be legally bound, Defendants and the Publics covenant and agree as follows:

1. The Publics hereby release and forever discharge Defendants of and from all claims, causes of actions, suits, debts, agreements, damages, judgments, executions, and demands whatsoever ("Claims"), in law or in equity, which the Publics may have or ever had or have now, known or unknown, which arise from, are based upon, or are related to any action committed related to the Publics' Bankruptcy Case by Defendants.

2. The Publics hereby covenant that, they will now and forevermore forbear and refrain from the institution or prosecution of any Claims, court proceedings or causes of action whatsoever arising at any time prior to the effective date of this Agreement against Defendants. This covenant may be pleaded as an absolute defense to any court pleading or action brought against Defendants by the Publics as of the date of this Agreement.

3. The Defendant agrees that it will provide all three of the Consumer Credit Reporting Agencies with notice (by an Automated Dispute Verification form or otherwise) that the amount owed by Public on the subject account is "0". The Defendant also agrees that in the event they are ever contacted about this account in the future they shall only report that the account has been discharged and that the balance owed is "0". The Defendant shall refrain from ever reporting anything on this account other than a "0" balance and any such reporting shall be deemed a breach of this contract and of any applicable bankruptcy or other state or federal statutes.

4. This Agreement releases any and all Claims based on any action or inaction of Defendants which occurred on or prior to the date of this Agreement.

5. This Agreement shall be construed under and in accordance with the laws of the State of North Carolina.

6. This settlement is made for the express purpose of avoiding the expense of litigation and to resolve the dispute among the parties and is not, nor shall it be construed as, an admission of liability on the part of Defendants.

7. The Publics acknowledge that they have (i) read this Agreement in its entirety and fully understand its tenor and effect, (ii) have discussed this Agreement with counsel, (iii) agree that this Agreement constitutes the entire agreement between the parties, and (iv) by their signatures represent that there have been no other promises or inducements made to them in connection with the execution of this Agreement other than the consideration set forth above.

IN WITNESS WHEREOF, John Q. Public and Mary E. Public have hereby executed this RELEASE AND SETTLEMENT AGREEMENT effective on the day and year written above.

Date

John Q. Public

Date

Mary E. Public

I HEREBY APPROVE THE TERMS AND CONDITIONS OF THE FOREGOING
RELEASE AND SETTLEMENT AGREEMENT.

O. Max Gardner, III
Counsel for Plaintiffs

I HEREBY APPROVE THE TERMS AND CONDITIONS OF THE FOREGOING
RELEASE AND SETTLEMENT AGREEMENT.

Dewey Cheatham
Counsel for Defendants

O – DISCHARGED DEBTS

Effective 10/01/2008

Bankruptcy Court Miscellaneous Fee Schedule (28 U.S.C. § 1930)

The fees included in the Bankruptcy Court Miscellaneous Fee Schedule are to be charged for services provided by the bankruptcy courts.

- The United States should not be charged fees under this schedule, with the exception of those specifically prescribed in Items 1, 3 and 5 when the information requested is available through remote electronic access.
- Federal agencies or programs that are funded from judiciary appropriations (agencies, organizations, and individuals providing services authorized by the Criminal Justice Act, 18 U.S.C. § 3006A, and bankruptcy administrators) should not be charged any fees under this schedule.

(1) For reproducing any document, \$.50 per page. This fee applies to services rendered on behalf of the United States if the document requested is available through electronic access.

(2) For certification of any document, \$9.
For exemplification of any document, \$18.

(3) For reproduction of an audio recording of a court proceeding, \$26. This fee applies to services rendered on behalf of the United States if the recording is available electronically.

(4) For filing an amendment to the debtor's schedules, lists of creditors, or mailing list, \$26, except:

- The bankruptcy judge may, for good cause, waive the charge in any case.
- This fee must not be charged if -
 - the amendment is to change the address of a creditor or an attorney for a creditor listed on the schedules; or
 - the amendment is to add the name and address of an attorney for a creditor listed on the schedules.

(5) For conducting a search of the bankruptcy court records, \$26 per name or item searched. This fee applies to services rendered on behalf of the United States if the information requested is available through electronic access.

(6) For filing a complaint, \$250, except:

- If the trustee or debtor-in-possession files the complaint, the fee should be paid by the estate, if there is an estate.
- This fee must not be charged if -
- the debtor is the plaintiff; or
- a child support creditor or representative files the complaint and submits the form required by § 304(g) of the Bankruptcy Reform Act of 1994.

(7) For filing any document that is not related to a pending case or proceeding, \$39.

(8) Administrative fee for filing a case under Title 11 or when a motion to divide a joint case under Title 11 is filed, \$39.

(9) For payment to trustees pursuant to 11 U.S.C. § 330(b)(2), a \$15 fee applies in the following circumstances:

- For filing a petition under Chapter 7.
- For filing a motion to reopen a Chapter 7 case.
- For filing a motion to divide a joint Chapter 7 case.
- For filing a motion to convert a case to a Chapter 7 case.
- For filing a notice of conversion to a Chapter 7 case.

(10) In addition to any fees imposed under Item 9, above, the following fees must be collected:

- For filing a motion to convert a Chapter 12 case to a Chapter 7 case or a notice of conversion pursuant to 11 U.S.C. § 1208(a), \$45.
- For filing a motion to convert a Chapter 13 case to a Chapter 7 case or a notice of conversion pursuant to 11 U.S.C. § 1307(a), \$10.

The fee amounts in this item are derived from the fees prescribed in 28 U.S.C. § 1930(a).

If the trustee files the motion to convert, the fee is payable only from the estate that exists prior to conversion.

If the filing fee for the chapter to which the case is requested to be converted is less than the fee paid at the commencement of the case, no refund may be provided.

(11) For filing a motion to reopen, the following fees apply:

- For filing a motion to reopen a Chapter 7 case, \$245.
- For filing a motion to reopen a Chapter 9 case, \$1000.
- For filing a motion to reopen a Chapter 11 case, \$1000.
- For filing a motion to reopen a Chapter 12 case, \$200.
- For filing a motion to reopen a Chapter 13 case, \$235.
- For filing a motion to reopen a Chapter 15 case, \$1000.

The fee amounts in this item are derived from the fees prescribed in 28 U.S.C. § 1930(a).

The reopening fee must be charged when a case has been closed without a discharge being entered.

The court may waive this fee under appropriate circumstances or may defer payment of the fee from trustees pending discovery of additional assets. If payment is deferred, the fee should be waived if no additional assets are discovered.

The reopening fee must not be charged in the following situations:

- to permit a party to file a complaint to obtain a determination under Rule 4007(b); or
- when a debtor files a motion to reopen a case based upon an alleged violation of the terms of the discharge under 11 U.S.C. § 524.

(12) For retrieval of a record from a Federal Records Center, National Archives, or other storage location removed from the place of business of the court, \$45.

(13) For a check paid into the court which is returned for lack of funds, \$45.

(14) For filing an appeal or cross appeal from a final judgment, \$250.

This fee is collected in addition to the statutory fee of \$5 that is collected under 28 U.S.C. § 1930(c) when a notice of appeal is filed.

Parties filing a joint notice of appeal should pay only one fee.

If a trustee or debtor in possession is the appellant, the fee must be payable only from the estate and to the extent there is any estate realized.

Upon notice from the court of appeals that a direct appeal or direct cross-appeal has been authorized, an additional fee of \$200 must be collected.

(15) For filing a case under Chapter 15 of the Bankruptcy Code, \$1000.

This fee is derived from and equal to the fee prescribed in 28 U.S.C. § 1930(a)(4) for filing a case commenced under Chapter 11 of Title 11.

(16) The court may charge and collect fees commensurate with the cost of providing copies of the local rules of court. The court may also distribute copies of the local rules without charge.

(17) The clerk shall assess a charge for the handling of registry funds deposited with the court, to be assessed from interest earnings and in accordance with the detailed fee schedule issued by the Director of the Administrative Office of the United States Courts.

(18) For filing a motion to divide a joint case filed under 11 U.S.C. § 302, the following fees apply:

- For filing a motion to divide a joint Chapter 7 case, \$245.
- For filing a motion to divide a joint Chapter 11 case, \$1000.
- For filing a motion to divide a joint Chapter 12 case, \$200.
- For filing a motion to divide a joint Chapter 13 case, \$235.

These fees are derived from and equal to the filing fees prescribed in 28 U.S.C. § 1930(a).

(19) For filing the following motions, \$150:

- To terminate, annul, modify or condition the automatic stay;
- To compel abandonment of property of the estate pursuant to Rule 6007(b)

of the Federal Rules of Bankruptcy Procedure; or

- To withdraw the reference of a case or proceeding under 28 U.S.C. § 157(d). This fee must not be collected in the following situations:

- For a motion for relief from the co-debtor stay;
- For a stipulation for court approval of an agreement for relief from a stay; or
- For a motion filed by a child support creditor or its representative, if the form required by § 304(g) of the Bankruptcy Reform Act of 1994 is filed.

There is no question that each of Defendants violated the discharge injunction.

BOA violated the discharge injunction when it referred the two accounts to CFG for Collection after it had notice of the bankruptcy. See *Faust v. Texaco Refining and Marketing Inc. (In re Faust)*, 270 B.R. 310 (Bankr. M.D. Ga. 1998). CFG violated the discharge injunction when Rebelo and Osborne contacted McClure attempting to collect on the two accounts. And Rebelo himself violated the discharge injunction when he attempted to collect on the account assigned to him. The issue, therefore, is whether Defendants violated the discharge injunction knowingly.

Though McClure was not listed as a co-obligor on the account worked by Osborne, Osborne obtained McClure's information and entered it into his computer.

When Osborne called McClure, McClure informed Osborne of both his and Qualico's bankruptcy filings, and Osborne entered that information into his computer and put the account on protected status. The fact that CFG's computer system does not transmit that information to other collectors who are working on another of that same debtor's accounts does not excuse CFG from violating the discharge injunction after having received notice of the McClures' bankruptcy. "Creditors are obligated to maintain procedures to ensure that they do not violate section 524, and may be held liable for damages and attorney's fees if they do not." 4 COLLIER ON BANKRUPTCY ¶ 524.02[2][b] (15th ed. rev. 2009) (citing *In re Rousch*, 88 B.R. 163 (Bankr. S.D. Ohio 1988); *In re Conti*, 50 B.R. 142 (Bankr. E.D. Va. 1985)); See *In re Nassoko*, 405 B.R. 515, 520-21 (Bankr. S.D.N.Y. 2009).



ENTERED

TAWANA C. MARSHALL, CLERK
THE DATE OF ENTRY IS
ON THE COURT'S DOCKET

The following constitutes the ruling of the court and has the force and effect therein described.

Signed November 23, 2009

United States Bankruptcy Judge

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION**

IN RE	§	
	§	CHAPTER 7
DANNY JOE MCCLURE AND	§	
KIMBERLY DESKINS MCCLURE,	§	CASE No. 07-43036 (DML)
	§	
DEBTORS.	§	
<hr/>		
DANNY JOE MCCLURE AND	§	
KIMBERLY DESKINS MCCLURE	§	
	§	
PLAINTIFFS,	§	
	§	
V.	§	ADV. No. 08-04000
	§	
BANK OF AMERICA,	§	
CREDITORS FINANCIAL GROUP, LLC,	§	
AND PETER REBELO,	§	
	§	
DEFENDANTS.	§	

Memorandum Opinion

The above-styled adversary proceeding was tried to the court on September 21 and 22, 2009. At trial, the court heard testimony from Danny McClure (“McClure”),

Kimberly McClure (with McClure, the “McClures”), Susan Sayarot, a performance manager for Bank of America (“BOA”), Henry Swayze (“Swayze”), President of Creditors Financial Group (“CFG”), Dr. Jonathan Lam, M.D. (“Lam”), McClure’s physician, and St. Clair Newbern, III (“Newbern”), attorney for the McClures. The parties designated for the court’s consideration the deposition of Kenni Hisel (“Hisel”), a portfolio officer at BOA. Various exhibits were also entered into evidence, identified below as necessary.

The court exercises core jurisdiction over this matter pursuant to 28 U.S.C. §§ 1334 and 157(b)(2)(O). This memorandum opinion embodies the court’s findings of fact and conclusions of law. FED. R. BANKR. P. 7052.

I. Background

The McClures filed for relief under chapter 7 of the Bankruptcy Code (the “Code”)¹ on July 18, 2007. Their schedules reflected numerous debts, including several owed to BOA. The BOA debts were a combination of the McClures’ personal debts and debts arising from personal guarantees on business debts incurred by Qualico, Inc. (“Qualico”), a corporation which was substantially owned by the McClures. Qualico filed for chapter 7 relief contemporaneously with the McClures. The McClures were granted a discharge pursuant to Code § 727 on November 15, 2007. None of the debts owed BOA by the McClures and Qualico were excepted from the McClures’ discharge.

Two debts in particular are relevant in this adversary proceeding. Those two debts are listed on the McClures’ schedule F as personal guarantees on business credit

¹ 11 U.S.C. §§ 101 *et seq.*

cards issued by BOA, with account numbers ending in 3299 and 2099.² Both of those debts are also reflected on Qualico's schedule F as BOA credit cards.³

Shortly after the McClures received their discharge, BOA referred those two accounts to CFG for collection. When CFG received the two accounts from BOA, each account was assigned to a different collector. The account ending in 3299 was assigned to Craig Osborne ("Osborne"), and the account ending in 2099 was assigned to Peter Rebelo ("Rebelo"). Osborne and Rebelo then went about attempting to collect the debts and, in furtherance of collection, contacted McClure, as discussed below.

II. Discussion

The McClures allege that CFG, Rebelo, and BOA (together, "Defendants") willfully and intentionally violated the discharge injunction of section 524(a)(2) of the Code. The McClures seek an order holding Defendants in civil contempt of this court and awarding the McClures damages.

A party seeking an order of civil contempt must establish by clear and convincing evidence: (1) that a court order was in effect; (2) that the order required (or prohibited) certain conduct by the respondent; and (3) that the respondent failed to comply with the court's order. *Piggly Wiggly Clarksville, Inc. v. Mrs. Baird's Bakeries*, 177 F.3d 380, 382 (5th Cir. 1999) (citing *FDIC v. LeGrand*, 43 F.3d 163, 170 (5th Cir. 1995)). In other words, "[a] party commits contempt when he violates a definite and specific order of the court requiring him to perform or refrain from performing a particular act or acts with

² See Plaintiff's exhibit 17.

³ See Plaintiff's exhibit 17.

knowledge of the court's order.” *Piggly Wiggly Clarksville*, 177 F.3d at 382 (citing *Travelhost, Inc. v. Blandford*, 68 F.3d 958, 961 (5th Cir. 1995)).

Section 524 of the Code provides that an order discharging a debt in a bankruptcy case “operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor” 11 U.S.C. § 524(a)(2). Even though section 524(a)(2) is a statutory provision, as it grants relief triggered by the discharge order, the injunction has been equated to an order of the court. 4 COLLIER ON BANKRUPTCY ¶ 524.02[2] (15th ed. rev. 2009). The discharge injunction is broad and prohibits any act taken to collect a discharged debt as a personal liability of the debtor. *Id.* Thus, the discharge injunction is a definite and specific court order that requires creditors to refrain from particular acts, *i.e.*, any act to collect, recover, or offset any discharged debt as a personal liability of the debtor. If any party knowingly violates the discharge injunction, the court may properly hold that party in civil contempt. *Id.*

There is no question that each of Defendants violated the discharge injunction. BOA violated the discharge injunction when it referred the two accounts to CFG for collection. *See Faust v. Texaco Refining and Marketing Inc. (In re Faust)*, 270 B.R. 310 (Bankr. M.D. Ga. 1998). CFG violated the discharge injunction when Rebelo and Osborne contacted McClure attempting to collect on the two accounts. And Rebelo himself violated the discharge injunction when he attempted to collect on the account assigned to him. The issue, therefore, is whether Defendants violated the discharge injunction knowingly.

A. Bank of America

Hisel testified at her deposition that BOA was aware of the McClures' personal bankruptcy no later than November 15, 2007, the date of the McClures' discharge.⁴ Thus, BOA knew as of that date that the McClures had been discharged from their personal guarantees on the two accounts. Nevertheless, on November 28, 2007, Hisel sent both accounts to CFG for collection. A creditor with knowledge of a debtor's discharge knowingly violates the injunction of section 524(a)(2) when the creditor thereafter attempts to collect from the debtor. *See* 4 COLLIER ON BANKRUPTCY ¶ 524.02[2][C] (15th ed. rev. 2009). Thus, BOA knowingly violated the discharge injunction and is liable for civil contempt.

B. Creditors Financial Group

The question of whether CFG knowingly violated the discharge injunction requires a more rigorous factual analysis. Swayze testified that, when BOA assigns accounts to CFG for collection, the account data is transmitted electronically from BOA to CFG.⁵ The account information then populates in the appropriate fields in CFG's computerized data system. Those fields include name, address, phone, social security number ("SSN"), etc.⁶

⁴ BOA has not suggested it did not receive all the notices required by FED. R. BANKR. P. 2002 in the McClures' case. Indeed, as BOA is listed in the McClures' schedules repeatedly, BOA surely received all notices in the case.

⁵ Trial transcript, vol. I, p. 183.

⁶ *See* Plaintiff's exhibit 25-1, CFG 0001 – CFG 0006.

CFG uses the number that populates the SSN field for each account to perform an automatic bankruptcy scrub on that account.⁷ The number that populated the SSN field for both accounts turned out to be Qualico's tax ID number (though in the xxx-xx-xxxx format of a SSN), not McClure's SSN.⁸ When that number was used to conduct a scrub for each account, neither detected Qualico's bankruptcy. And because CFG did not scrub using McClure's social security number, neither scrub detected the McClures' personal bankruptcy. In other words, the results of neither scrub indicated to Rebelo or Osborne that either McClure or Qualico had filed bankruptcy.

When Osborne received the account ending in 3299, McClure was not listed as a co-obligor on the account, nor was there a phone number listed. Swayze testified that, because no phone number was listed on the account assigned to Osborne, it appears that Osborne obtained an Accurint⁹ report on November 30, 2007, that identified McClure as the owner of Qualico and gave his date of birth, SSN, address, and telephone number (the same home telephone number that automatically populated the phone number field for the account assigned to Rebelo).¹⁰ Though at that point Osborne had McClure's SSN, presumably because he was assigned to collect only from Qualico he did not perform a separate bankruptcy scrub using McClure's SSN.

⁷ Swayze testified that CFG does not perform bankruptcy scrubs using any search criteria other than the number that populates the SSN field. Trial transcript, vol. I, p. 285 [dkt. no. 96]. For example, CFG does not scrub for bankruptcies by searching under the account holder's name. Trial transcript, vol. I, p. 285.

⁸ See Plaintiff's Exhibit 25-1, CFG 0001 and CFG 0004.

⁹ Accurint is a service provided by LexisNexis that debt collectors can use to locate debtors. See <http://www.accurint.com/collections.html>.

¹⁰ See Plaintiff's Exhibit 25-1, CFG 0002

When Rebelo received the account ending in 2099, McClure was listed on the account as a co-obligor. Despite the fact that both McClure and Qualico were listed as co-obligors on the account, only one bankruptcy scrub was performed.¹¹ Rebelo made no effort to perform a second bankruptcy scrub before attempting to collect the debt.

Osborne placed several calls to McClure on November 30, 2007. McClure attempted to return each call, and he finally reached Osborne that afternoon. McClure testified that Osborne said he was glad McClure finally called him back. Osborne also said that McClure was a man for facing up to his obligations.¹² According to McClure, Osborne told him that someone was likely headed to his house and that CFG would likely be filing suit against him that day to collect the debt owed to BOA.¹³ McClure testified that, because of Osborne's hostility on the phone, he anticipated a hostile confrontation with whomever was allegedly headed to his house.¹⁴

Before Osborne could go on, McClure interrupted him and informed him of the McClures' personal bankruptcy and of Qualico's bankruptcy.¹⁵ McClure also gave Osborne his bankruptcy attorney's contact information.¹⁶ Swayze testified that CFG employees are trained to put accounts on protected status if they learn of a bankruptcy

¹¹ See Trial transcript, vol. I, p. 278.

¹² Trial transcript, vol. I, p. 22.

¹³ Trial transcript, vol. I, p. 23. As Osborne was supposedly pursuing collection from Qualico, it is unclear why he apparently threatened McClure personally.

¹⁴ Trial transcript, vol. I, p. 24.

¹⁵ Trial transcript, vol. I, p. 27.

¹⁶ The fact that McClure informed Osborne of his personal bankruptcy, Qualico's bankruptcy, and his attorney's contact information is verified by the fact that Osborne entered that information into CFG's computer system. See Plaintiff's Exhibit 25-1, CFG 0002, line 45; Trial transcript, vol. I, p. 268 [dkt. no. 96].

filing.¹⁷ Protected status prevents employees from contacting the debtor on the protected account.

Because of the way CFG's computer system is designed, however, the protected status did not extend to the account assigned to Rebelo, even though Qualico was listed as the primary obligor for both accounts and the same address and tax ID number was reflected in CFG's system for both accounts.¹⁸ That is, the information that a particular collector enters into the system with respect to an account is not automatically available to other collectors working other accounts with the same name, address, and tax ID number.¹⁹ All of the information is, however, stored on the same server.²⁰

Thus, still personally unaware of the McClures' bankruptcy, Rebelo sent a collection letter to the McClures on December 3, 2007, three days after McClure's conversation with Osborne.²¹ Three days after that, on December 6, 2007, Rebelo attempted to call McClure, though the attempt was unsuccessful.

Because neither Osborne nor CFG was aware of the McClures' bankruptcy when Osborne contacted McClure to collect on the account that was assigned to him, Osborne's collection attempt does not amount to a knowing violation of the discharge injunction. The question, then, is whether notice to Osborne of the McClure's bankruptcy is

¹⁷ Trial transcript, vol. I, p. 235.

¹⁸ Plaintiff's Exhibit 25-1, CFG 0001 and CFG 0004.

¹⁹ An attempt to collect the debt from Qualico would not violate section 524(a)(2), since it could not receive a discharge. As violation as to Qualico of the injunction provided by Code § 362(a) has not been asserted in the McClures' complaint, the court need not discuss such a violation. However, that Osborne's knowledge that Qualico had filed bankruptcy was not available to Rebelo, thus leaving the latter believing he could pursue Qualico, illustrates the failure of CFG's system to protect adequately against efforts to collect from a bankrupt.

²⁰ Trial transcript, vol. I, p. 217.

²¹ Trial transcript, vol. I, p. 218.

sufficient to put CFG on notice such that Rebelo's collection attempt amounted to a knowing violation by CFG of the discharge injunction. The court concludes that such notice was sufficient with respect to CFG.

Though McClure was not listed as a co-obligor on the account worked by Osborne, Osborne obtained McClure's information and entered it into his computer. When Osborne called McClure, McClure informed Osborne of both his and Qualico's bankruptcy filings, and Osborne entered that information into his computer and put the account on protected status. The fact that CFG's computer system does not transmit that information to other collectors who are working on another of that same debtor's accounts does not excuse CFG from violating the discharge injunction after having received notice of the McClures' bankruptcy. "Creditors are obligated to maintain procedures to ensure that they do not violate section 524, and may be held liable for damages and attorney's fees if they do not." 4 COLLIER ON BANKRUPTCY ¶ 524.02[2][b] (15th ed. rev. 2009) (citing *In re Rousch*, 88 B.R. 163 (Bankr. S.D. Ohio 1988); *In re Conti*, 50 B.R. 142 (Bankr. E.D. Va. 1985)); *See In re Nassoko*, 405 B.R. 515, 520-21 (Bankr. S.D.N.Y. 2009).

CFG's procedures to ensure that it does not violate the discharge injunction are clearly inadequate. The initial bankruptcy scrub produced no hits, even though Qualico had filed for bankruptcy, and CFG did not perform a bankruptcy scrub using any other search criteria. When Osborne obtained McClure's personal information, he did not perform a second bankruptcy scrub, and Rebelo did not perform a second bankruptcy

scrub, even though there was a second obligor listed on the account.²² When Osborne finally learned about the McClures' and Qualico's bankruptcies (by unknowingly violating the discharge injunction), there were no means by which that information was transmitted to Rebelo, who was working on an account with the same primary obligor, address, and tax ID number. CFG simply cannot contend that it did not knowingly violate the discharge injunction because its left hand did not know what its right hand was doing. When Rebelo attempted to collect after CFG had received actual notice of the bankruptcy filings, CFG knowingly violated the discharge injunction and is liable for civil contempt.

C. Peter Rebelo

For the reasons discussed above with respect to CFG, the court concludes that there is no evidence that Rebelo had personal knowledge of the bankruptcy filings when he tried to collect on the account assigned to him. Thus, while his investigation—the bankruptcy scrub—was inadequate, he did not knowingly violate the discharge injunction, and he is not liable for civil contempt.

III. Damages

Pursuant to Code sections 105, 362, and 524, the McClures pray that the court hold the Defendants in contempt and award the McClures actual damages, attorney's fees, and punitive damages. Bankruptcy courts may award damages pursuant to the civil contempt power in section 105(a) of the Code. *Cadles Grassy Meadows II, LLC, v. Gervin (In re Gervin)*, 300 Fed. Appx. 293, 300 (5th Cir. 2008); *Placid Refining Co. v. Terrebonne Fuel and Lube (In re Terrebonne Fuel and Lube, Inc.)*, 108 F.3d 609, 613 (5th Cir. 1997). Section 105(a) of the Code states: "The court may issue any order,

²² Rebelo clearly would have known that his data—which included only Qualico's tax identification number—was incomplete and that any scrub he performed would produce results only for one of the two debtors assigned to him.

process, or judgment that is necessary or appropriate to carry out the provisions of this title.” 11 U.S.C. § 105(a). A civil contempt order “which compensates a debtor for damages suffered as a result of a creditor’s violation of [the discharge injunction is] both necessary and appropriate to carry out the provisions of the bankruptcy code.”

Terrebonne Fuel and Lube, 108 F.3d at 613. “In cases in which the discharge injunction was violated willfully, courts have awarded debtors actual damages, punitive damages and attorney’s fees.” 4 COLLIER ON BANKRUPTCY ¶ 524.02[2][c] (15th ed. rev. 2009) (and cases cited therein). Actual damages may include damages for emotional distress. *Id.*

Actions that violate the discharge injunction are willful if the creditor that violates the discharge injunction knows the injunction has been entered and intends the actions that violate it. *Id.* That the actions are intentional—as opposed to the actual violation of the injunction being intentional—is sufficient. *See Helmes v. Wachovia Bank (In re Helms)*, 336 B.R. 105, 109 (Bankr. E.D. Va. 2005). Based on the foregoing discussion in part II of this memorandum opinion, the court finds, based on clear and convincing evidence, that BOA and CFG willfully violated the discharge injunction.

A. Actual Damages

The McClures seek actual damages, including compensation for emotional distress. At the trial, McClure testified that he experienced severe emotional distress and sleeplessness as a result of the phone calls from CFG. The McClures, however, have established at most a tenuous, correlative relationship between McClure’s alleged emotional distress and CFG’s actions.²³ That limited and ambivalent evidence of

²³ In his initial response to requests for admission, McClure’s response to the query “Admit you have suffered no actual damages as the result of any act or omission committed by Defendant Creditors

correlation does not equate to evidence of causation.²⁴ The court concludes, therefore, that the McClures have not met their burden of proof in establishing that McClure's emotional distress and sleeplessness were caused by CFG's actions.

The McClures have, however, expended substantial time and effort in prosecuting this lawsuit. Without the willingness of aggrieved debtors to prosecute violations of the discharge injunction of section 524(a)(2), such violations would go unchecked by the court. The Code has as one of its underlying purposes providing a fresh start to a discharged debtor. *Marrama v. Citizens Bank*, 549 U.S. 365, 367 (2007) (citing *Grogan v. Garner*, 498 U.S. 279, 286-87 (1991)). If violations of the discharge injunction go unpunished, creditors will lack the necessary incentive to avoid violating the law, and an underlying purpose of the Code will be undermined.²⁵ In order to ensure that debtors are not hesitant to prosecute violations of the discharge injunction, they should be awarded actual damages to compensate them for the time and effort they expend in the process. In this case, the court awards the McClures \$2,500 in actual damages²⁶ for the time and

Financial Group, LLC" was "Admit at this time" (see Plaintiff's Exhibit 31-1), though he later amended the response to "Denied" (See Plaintiff's Exhibit 31-2). Lam, testifying based on his expertise as a physician, was ambivalent at best in establishing a causal relationship between CFG's actions and McClure's sleeplessness and anxiety. For example, on direct examination Lam testified that it is "possible" that Post Traumatic Stress Disorder could manifest several months after a threatening phone call. Trial Transcript, vol. II, p. 432. But during cross-examination Lam was asked whether "there is some causation between this phone call and any of [McClure's] medical conditions?". Lam responded, "Not the one phone call." Trial Transcript, vol. II, p. 440.

²⁴ This is not to say McClure's experience with CFG's employees was pleasant. The court does not consider the line between being an aggressive agent and a bully to be so fine that CFG cannot service its clients without resort to such crude scare tactics.

²⁵ McClure's distress and his communications with counsel also illustrate vividly that debtors may not fully appreciate the relief provided by a discharge. Should creditors feel safe in ignoring the discharge injunction, some debtors—especially if not represented, or if represented by counsel less diligent than the McClures—may be intimidated into paying discharged debts.

²⁶ This sum is based on the court's estimate that the trial, trial preparation, depositions, and consultation with their counsel required about 25 hours of each the McClure's time. At a rate of \$50 per hour, and in the absence of more in the record, \$2,500 is fair compensation for their time.

effort they expended in prosecuting this adversary proceeding, for which BOA and CFG will be jointly and severally liable.

B. Attorney's Fees

The McClures also ask the court to award them attorney's fees totaling \$85,189.09. The court has carefully reviewed the records submitted by the McClures' counsel for reasonableness and to ensure that all fees and expenses were incurred during the prosecution of this adversary proceeding. *See Flores v. Oh (In re Oh)*, 2009 U.S. App. LEXIS 23681 (9th Cir. 2009).²⁷ There were several items in those records that the court finds unreasonable. First, there were two attorneys for the McClures present at each deposition, and the court finds that attendance of more than one attorney was unnecessary and so unreasonable. Second, there were three attorneys present for the McClures at the trial of this adversary proceeding, and the court finds that more than two would be unreasonable. Third, the court finds that fees and expenses incurred in researching the Fair Debt Collection Practices Act (the "FDCPA") are unreasonable.²⁸ The total unreasonable fees and expenses incurred amount to \$5,349.95. Thus, the court awards the McClures \$79,839.14 in attorney's fees, for which BOA and CFG will be jointly and severally liable.

²⁷ CFG and BOA questioned the high cost of attorney services based on want of harm to the McClures. First, the need to encourage enforcement of the discharge injunction counsels against too great parsimony is assessing fees. Second, the refusal of CFG to acknowledge error—and a pre-trial dispute between CFG and BOA over responsibility for the violation of the injunction—added to the cost of attorneys. Had the two defendants accepted responsibility for their conduct early in this adversary proceeding, the cost of the McClures' counsel would have no doubt been much lower.

²⁸ Assuming this court had jurisdiction to entertain a claim under the FDCPA, the McClures asserted no such claim. Moreover, the FDCPA applies only to consumer debts, and the debts in question in this adversary proceeding are commercial debts. Finally, the purpose of payment of the fees is to offset the effort required to vindicate this court's order. Investigating FDCPA claims did not advance that vindication and so the fees incurred are not here compensable.

C. Sanctions

Finally, the court finds that the actions of BOA and CFG in violating the discharge injunction were sufficiently egregious to warrant sanctions. By failing to adopt measures sufficient to prevent violations of the discharge injunction and then willfully violating the discharge injunction, BOA and CFG have demonstrated a lack of concern for the law. The injunction of section 524(a)(2) and that provided by section 362(a), which in the McClures' case the former replaced (*see* Code § 362(c)(2)(C)), are at the heart of bankruptcy protection. *See, e.g., In re Waldo*, 2009 Bankr. LEXIS 3453, *81 (Bankr. E.D. Tenn. 2009); *In re Pappas*, 106 B.R. 268, 270 (D. Wyo. 1989). It is only by reason of these provisions that the court is able to ensure debtors the interim protection promised by the filing of a petition and the true fresh start that a discharge is supposed to bring. To protect its own authority as well as to give debtors the relief Congress intended, a bankruptcy court must act promptly and firmly to stop conduct violative of section 362(a) or 524(a)(2) and to prevent future breach of those provisions. This is particularly important when, as is true of BOA and CFG, the entity violating the stay deals with millions of consumers, many of whom will be in bankruptcy cases; BOA's and CFG's procedures for ensuring compliance with the law must be seamless.

The court, therefore, concludes that it is both reasonable and necessary to sanction BOA and CFG in order to deter BOA and CFG from violating any discharge injunction in the future. *See* 11 U.S.C. § 105(a).

The court hereby sanctions BOA in the amount of \$100,000, payable to the registry of the court, and sanctions CFG in the amount of \$50,000, also payable to the

registry of the court. Each sanction will be suspended and need not be paid if, within 90 days of the entry of this memorandum opinion, by affidavit either the President or General Counsel²⁹ of each company submits to the court new procedures his or her company has adopted to prevent future violations of any discharge injunction.

IV. Conclusion

BOA and CFG willfully violated the discharge injunction of Code § 524(a)(2) and are therefore in contempt of this court. The McClures have incurred actual damages in the amount of \$2,500 and reasonable attorney's fees in the amount of \$79,839.14, for total damages of \$82,339.14, for which the court hereby holds BOA and CFG jointly and severally liable. Additionally, BOA's and CFG's actions in violation of the discharge injunction were sufficiently egregious to warrant the imposition of sanctions in the amounts of \$100,000 for BOA and \$50,000 for CFG, payment of which may be mooted as described above. The court will enter a separate judgment to such effect.

END OF MEMORANDUM OPINION

²⁹

In order to avoid misunderstanding, the President of BOA is Kenneth D. Lewis, or any successor, and its General Counsel is Edward P. O'Keefe, or any successor.

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME:

**CHAPTER 13 CASE NO.
OUR FILE NO.**

ADDRESS:

SSN:

DEBTORS.

Adversary Proc. No. _____

Plaintiffs,

versus

**CITIFINANCIAL, INC.;
CITIGROUP, INC.; AND
NATIONAL ASSET RECOVERY SERVICES, INC.**

DEFENDANTS.

**COMPLAINT SEEKING DAMAGES IN NON-CORE ADVERSARY PROCEEDING FOR
VIOLATION OF THE DISCHARGE INJUNCTION AND STATE AND FEDERAL LAWS
(Attempt to Collect Discharged Debt)**

Introduction

1. This action seeks redress for the unlawful and deceptive practices committed by the Defendants in connection with their efforts to collect a debt discharged by the debtors' bankruptcy. Defendants' conduct involves falsely representing that a discharged debt is still owed, the sole purpose of which is to coerce the payment of a discharged debt. Plaintiff seeks monetary, declaratory and injunctive relief based on violations of 11 U.S.C. § 524, the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et seq* and the North Carolina Unfair and Deceptive Act and Practices Laws, G.S. Section 75-50 *et seq*.

2. This action is also filed to enforce the Order of Confirmation duly entered in this Chapter 13 case, the Order of Discharge duly entered in this case, and to enforce and to implement other Bankruptcy Code provisions and Rules related thereto, and to prevent an abuse of process and to preclude the frustration of the orderly discharge of the claims in this case.

Jurisdiction

3. Jurisdiction is conferred on this Court pursuant to the provisions of Section 1334 of Title 28 of the United States Code in that this proceeding arises in and is related to the above-captioned Chapter 13 case under Title 11 and concerns property of the Debtors in that case.

4. This Court has both personal and subject matter jurisdiction to hear this case pursuant to Section 1334 of Title 28 of the United States Code, Section 157(b)(2) of Title 28 of the United States Code, and pursuant to the Order entered by the Judges of the United States District Court for the Western District of North Carolina on July 30, 1984 (the Referral Order), which Order was entered in accordance with the Bankruptcy Amendments and Federal Judgeship Act of 1984.

5. This Court has supplemental jurisdiction to hear all state law claims pursuant to Section 1367 of Title 28 of the United States Code.

6. This Court also has jurisdiction to hear the Fair Debt Collection Practices Act violations pursuant to Section 1692 of Title 15 of the United States Code; thus, federal subject matter jurisdiction is properly founded upon Section 1331 of Title 28 of the United States Code.

7. This matter is primarily a core proceeding and therefore the Bankruptcy Court has jurisdiction to enter a final order. However, in the event this case is determined to be a non-core proceeding then and in that event the Plaintiffs consent to the entry of a final order by the Bankruptcy Judge.

8. Venue lies in this District pursuant to Section 1391(b) of Title 28 of the United States Code.

Parties

9. Plaintiff is a citizen and resident of _____, North Carolina.

10. The Defendant, Citigroup, Inc. ("Citigroup"), is a Delaware corporation that maintains its principal place of business at 153 E. 53rd Street, New York, New York 10043.

11. The Defendant, CitiFinancial, Inc. ("CitiFinancial"), is a wholly owned subsidiary of Citigroup. CitiFinancial is a Maryland corporation that maintains its principal place of business at 300 St. Paul Place, Baltimore, Maryland 21202. Citigroup and CitiFinancial transact business within the State of North Carolina.

12. The Defendant National Asset Recovery Services, Inc. ("NARS") is a corporation operating under the laws of the State of Missouri as a collection agency. NARS has a principal operating address of 733 Crown Industrial Ct., Unit G, Chesterfield, MO 63005. Upon information and belief, NARS is licensed by the State of North Carolina to collect debts within the State of North Carolina.

Facts

13. On June 11, 1996, the Plaintiff sought protection from his creditors by filing a voluntary Chapter 13 bankruptcy petition in the United States Bankruptcy Court for the Western District of North Carolina.

14. The 341(a) meeting of creditors was held in Shelby, North Carolina on July 12, 1996.

15. The Chapter 13 plan of the Plaintiff was subsequently confirmed by order of this Court dated July 30, 1996.

16. In the schedules filed with the petition in this case and on the master mailing matrix filed with the Clerk of this Court, a secured debt was listed in favor of Blazer Financial Services, Inc. ("Blazer") for an unsecured personal loan in the amount of \$1,897.42. This debt was identified on the records of the Trustee as claim number 0011.

17. Blazer filed a proof of claim for the subject debt with the Chapter 13 Trustee in the amount of \$2,082.65.

18. The Trustee disbursed the total sum of \$220.12 to Blazer at the following address: 413 S. Lafayette St., Shelby, NC 28150.

19. Sometime following the Plaintiff's bankruptcy filing, the debt to Blazer was sold, transferred or assigned to Washington Mutual Finance at 3405 McLemore Drive, Pensacola, Florida 32514.

20. On May 9, 2002, the Plaintiff was granted a discharge of all dischargeable debts pursuant to 11 U.S.C. § 524. The Plaintiff alleges that this Discharge included the debt to Blazer and/or Washington Mutual Finance.

21. Sometime following the Plaintiff's Discharge, the debt to Blazer/Washington Mutual Finance was sold, transferred or assigned to CitiFinancial, even though it was discharged by the debtor's bankruptcy case.

22. In approximately August, 2004, the Plaintiff received a written demand for payment from CitiFinancial. The letter stated that the regular payment due was \$1795.12 and the total payment due was \$1,795.12. The demand further stated that the total payment was due on September 1, 2004. The demand stated that statement inquiries could be made to CitiFinancial at 3405 McLemore Drive, Pensacola, Florida 32514 (the same address given to the Trustee by Washington Mutual Finance).

23. Subsequent to receiving the demand for payment identified above, the debtor was contacted by an agent of NARS by telephone on a number of occasions. The NARS agent advised the debtor that he was collecting the debt on behalf of CitiFinancial. The NARS agent further advised the debtor that NARS has no record of any bankruptcy filing by the Plaintiff and the money is owed.

24. The actions of the Defendants as alleged herein constitute willful, intentional, gross and flagrant violations of the provisions of Section 524 of Title 11 of the United States Code.

25. The actions of the Defendants as alleged herein are acts in violation and contempt of the Order of Discharge entered by this Court.

26. The actions of the Defendants as alleged herein are acts in violation of the Fair Debt Collection Practices Act, 15 U.S.C. Section 1692 et seq., and the North Carolina Deceptive Practices Law, G.S. Section 75-50, et seq.

27. The Defendants have a significant, substantial, and serious history of automatic stay and discharge violations in cases before this court and in other jurisdictions. The Plaintiff avers that this history enhances the seriousness of the violations in this case and in fact requires the award of substantial punitive damages in this matter.

28. CitiFinancial has failed to implement any effective policy to assure that its collection personnel comply with either the automatic stay or the discharge injunction.

29. CitiFinancial has failed to implement any effective procedure to review all of the defaulted files it has acquired from Washington Mutual Finance in order to confirm that appropriate bankruptcy codes have been entered or noted where necessary or to take other affirmative steps to properly disqualify such accounts from active collection efforts.

30. CitiFinancial has failed to implement any effective procedures to eliminate the improper contacts with consumer debtors who are involved or have been involved in bankruptcy proceedings.

31. CitiFinancial has failed to implement any effective procedures to insure that no effort will be made to contact consumer debtors who are represented by attorneys.

32. CitiFinancial has failed to implement any system to properly identify bankruptcy accounts notwithstanding that the fact that it knows the present system has no discernible impact on whether or not it continues collection activities.

33. The failure of the Defendants to correct the gross irregularities with their consumer credit collection systems is designed, upon information and belief, to prevent debtors from seeking redress through the courts due to their inability to afford and/or find competent legal counsel. The Defendants, by ignoring their obligations under the Bankruptcy Code and various Federal and State consumer protection statutes, have attempted to create for themselves a virtual immunity from civil liability by unlawfully collecting millions of dollars while paying only thousands of dollars for the very few causes where their illegal acts are subject to affirmative debtor enforcement cases. The Defendants have essentially granted to themselves a license to push the boundaries of responsible business practices beyond their furthest limits, fully aware that relatively few, if any, consumer debtors will be able to seek appropriate legal remedies. The Plaintiffs therefore allege that these grossly negligent and intentional acts of misconduct violate fundamental notions of fairness and are procedurally and substantively unconscionable.

34. The Plaintiffs have been severely agitated, annoyed, traumatized, emotionally damaged and have otherwise been unduly inconvenienced by the actions of the Defendants.

FIRST CLAIM – WILLFUL VIOLATION OF DISCHARGE INJUNCTION

35. The allegations of paragraphs 1-34 above are realleged and incorporated herein by reference.

36. The actions of Defendants in this case, in seeking to collect payment on a discharged debt by falsely and deceptively attempting to coerce the debtor are in violation of the discharge injunction entered in Plaintiff's bankruptcy case pursuant to 11 U.S.C. § 524, and constitute contempt of bankruptcy court orders.

37. The Plaintiff alleges that the actions of the Defendants in seeking to collect on a debt nearly three years after the debtor's lawful discharge, constitute a gross violation of the discharge injunction as set forth in 11 U.S.C. Section 524.

38. The conduct of the Defendants in this case has substantially frustrated the discharge order entered by this Court and has caused the debtor unwarranted and unnecessary time, effort and expense in seeking to enforce rights guaranteed by the Bankruptcy Code, by Contract, and by prior actions of the Defendants.

39. In order to carry out the provision of the Code and to maintain its integrity this Court must impose actual damages, punitive damages and legal fees against the Defendants pursuant to the provisions of Section 105 of the Code.

40. In order to protect debtors who have completed their Chapter 13 plans and secured a full discharge thereunder this Court must impose sanctions against the Defendants for their misconduct in this case.

41. As a result of the Defendants' violation of 11 U.S.C. Section 524, the Defendants are liable to the Plaintiff for actual damages, punitive damages and legal fees under Section 105 of Title 11 of the United States Code.

SECOND CLAIM - VIOLATION OF THE FAIR DEBT COLLECTION PRACTICES ACT

42. The allegations of paragraphs 1-41 above are realleged and incorporated herein by reference.

43. The foregoing acts and omissions by the Defendants constitute violations of the FDCPA, which include, but are not limited to, the following:

- (a) The Defendants violated 15 U.S.C. § 1692f(1) by collecting or attempting to collect amounts not permitted by law and by otherwise using unfair and unconscionable methods; and
- (b) The Defendants violated 15 U.S.C. Section 1692c(a)(2) in contacting the Plaintiffs when the Defendants knew the debtor was represented by an attorney.

44. The Plaintiff is therefore entitled to an award of statutory damages and legal fees pursuant to 11 U.S.C. § 1692k.

THIRD CLAIM – ADDITIONAL VIOLATION OF THE FDCPA

45. The allegations in paragraphs 1-44 of this complaint are realleged and incorporated herein by this reference.

46. The Defendants additionally violated the FDCPA. Defendants' violations include but are not limited to engaging in any conduct the natural consequences of which is to harass, oppress, or abuse any person in connection with the collection of a debt, 15 U.S.C. Section 1692d.

47. As a result of the above violations of the FDCPA, the Defendants are liable to the Plaintiff for actual damages, statutory damages of \$1,000.00, and attorney's fees.

FOURTH CLAIM - NORTH CAROLINA UNFAIR AND DECEPTIVE ACTS AND PRACTICES

48. The allegations in paragraphs 1-47 of this complaint are realleged and incorporated herein by this reference.

49. The Plaintiff is a "consumer" as that term is defined by Article 2 of Chapter 75 of the North Carolina General Statutes.

50. The Plaintiff's relationship with the Defendants arose out of a "consumer debt" as that term is defined in Article 2 of Chapter 75 of the North Carolina General Statutes.

51. The Defendants were and are "debt collectors" as that term is defined by applicable provisions of Article 2 of Chapter 75 of the North Carolina General Statutes.

52. Under the provision of Section 75-52 of the North Carolina General Statutes the Defendants were and are prohibited from engaging in any conduct the natural consequences of which is to oppress, harass or abuse any person.

53. As a result, the Defendants are liable for statutory damages in the sum of no less than \$2,000.00 for violation of N.C.G.S. Section 75-50, et seq. and the payment of legal fees and expenses.

FIFTH CLAIM – ADDITIONAL VIOLATION OF NCUDAP

54. The allegations in paragraphs 1-53 of this complaint are realleged and incorporated herein by this reference.

55. The actions and conduct of the Defendants were oppressive and abusive in violation of the applicable provisions of Article 2 of Chapter 75 of the North Carolina General Statutes as follows:

- (a) The Defendants violated 75-54(4) by falsely representing the character, extent, or amount of a debt owed by the debtor; and
- (b) The Defendants violated 75-54(4) by falsely representing the creditor's rights; and

- (c) The Defendants violated 75-55 by collecting or attempting to collect a debt by use of unconscionable means; and

56. The Defendants violated Sections 75-55(3) and 58-70-115(3) in contacting the Plaintiff when the Defendants knew the debtor was represented by an attorney.

57. The actions and conduct of the Defendants were oppressive and abusive in violation of the applicable provisions of Article 2 of Chapter 75 of the North Carolina General Statutes.

58. As a result of the above violations of the NCUDAP, the Defendants are liable to the Plaintiff for actual damages, statutory damages and attorney's fees.

WHEREFORE, the Plaintiff having set forth his claims for relief against the Defendants respectfully pray of the Court as follows:

- A. That the Plaintiff have and recover against the Defendants a sum to be determined by the Court in the form of actual damages;
- B. That the Plaintiff have and recover against the Defendants a sum to be determined by the Court in the form of statutory damages;
- C. That the Plaintiff have and recover against the Defendants a sum to be determined by the Court in the form of punitive damages;
- D. That the Plaintiff have and recover against the Defendants all reasonable legal fees and expenses incurred by their attorney;
- E. That this Court order the Defendants to pay additional actual damages and statutory damages in a sum to be determined by the Court for violation of N.C.G.S. Section 75-50, et seq.;
- F. That this Court order the Defendants to pay additional actual damages and statutory damages in a sum to be determined by the Court for violating the FDCPA pursuant to 15 U.S.C. Section 1692k;
- G. That the Plaintiff have such other and further relief as the Court may deem just and proper.

Date this the _____ day of March, 2005.

O. Max Gardner III
Law Offices of O. Max Gardner III, P.C.
Attorney for the Plaintiffs
N.C. State Bar No. 6164
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Shelby, NC 28151-1000
Phone (704) 487-0616
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**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME:

**CHAPTER 13 CASE NO.
OUR FILE NO.**

ADDRESS:

SSN:

DEBTORS.

Adversary Proc. No. _____

Plaintiffs,

versus

**DISCOVER BANK FKA GREENWOOD TRUST;
DISCOVER FINANCIAL SERVICES;
DISCOVER CARD SERVICES, INC.; and
NOVUS CREDIT SERVICES INCORPORATED.**

Defendants.

**Complaint Seeking Damages in Adversary Proceeding
for Violations of
The Discharge Order, the Fair Credit Reporting Act,
The Fair Debt Collection Practices, the Fair Credit Billing Act
And the North Carolina Unfair and Deceptive Practices Act

(Credit Dispute and Re-Reporting of Debt)**

Introduction

1. This is an action for actual damages, statutory damages, punitive damages, and legal fees and expenses filed by the Plaintiffs for the Defendants' improper and illegal actions and conduct which are not in compliance with and in fact are in violation of the Fair Credit Reporting Act, (15 USC Section 1681), the Fair Debt Collection Practices Act (15 USC Section 1692), the Discharge Injunction (11 USC Section 524), and the North Carolina Unfair Debt Collections Practices Act (Chapter 75 of the North Carolina General

Statutes).

Jurisdiction and Venue

2. Jurisdiction is conferred on this Court pursuant to Section 1334 of Title 28 of the United States Code in that this proceeding arises in and is related to the above-captioned Chapter 13 case under Title 11 and concerns property of the Debtors in that case.

3. Jurisdiction is also conferred on this Court pursuant to Section 1681p of Title 15 of the United States Code; Section 1692k(d) of Title 15 of the United States Code; Section 1640 of Title 15 of the United States Code; and Section 1331 of Title 28 of the United States Code.

4. This court has supplemental jurisdiction to hear all state law claims pursuant to Section 1367 of Title 28 of the United States Code.

5. Venue lies in this District pursuant to Sections 1391(b) and 1409 of Title 28 of the United States Code.

6. To the extent of the non-bankruptcy claims for relief, this matter is a non-core proceeding and the Plaintiffs consent to the entry of a final order in this case by the Bankruptcy Judge.

Parties

7. The Plaintiffs are natural persons residing in the City of Shelby, County of Cleveland, State of North Carolina, and are also debtors under the provisions of Chapter 13 of Title 11 of the United States Code.

8. The Plaintiffs are "consumers" and "debtors" as those terms are defined under the applicable Federal and State statutes.

9. The Defendant, Discover Bank, formerly known as Greenwood Trust (hereinafter "Discover Bank"), is a unit of Morgan Stanley, Dean Witter & Company. Discover Bank is a Delaware corporation that maintains its principal place of business at 100 W. Market Street, Greenwood, Delaware 19950.

10. The Defendant, Discover Card Services, Inc. (hereinafter "Discover Card"), is a wholly owned subsidiary of Discover Financial Services, (hereinafter "Discover Financial") which is in turn a wholly owned subsidiary of Discover Bank. Discover Financial and Discover Card are Delaware corporations that maintain their principal place of business at 2500 Lake Cook Road, Riverwoods, IL 60015-3851.

11. The Plaintiffs allege that all of these Defendants transact business within the State of North Carolina and have significant and substantial contacts with this State.

12. The Defendant, Novus Credit Services Incorporated, (hereinafter, "Novus")

is a Delaware corporation that is also a unit of Morgan Stanley, Dean Witter & Company. Novus maintains a principal place of business at 2500 Lake Cook Road, Riverwoods, IL 60015-3800.

13. The Plaintiffs allege that Novus does business in the State of North Carolina and is a collection agent for debt originated by Discover Bank.

Factual Allegations

14. Before the commencement of the Chapter 13 case, the Plaintiffs incurred a credit card debt to Discover Card.

15. The Plaintiffs' Chapter 13 case was commenced by the filing of a voluntary petition on October 31, 2003.

16. On or about October 31, 2003, the attorney for the debtors caused a written notice of his representation of the debtors, of the filing of the Chapter 13 case, and of the automatic stay to be mailed to the Defendants via first class mail, postage prepaid.

17. The Chapter Trustee in this case also caused a written notice of the filing, of the automatic stay, and of the 341 meeting of creditors to be mailed to all parties on the master mailing matrix by first class mail. This notice was mailed to and received by Discover Bank, Discover Financial, Discover Card and Novus.

18. The Defendants received the written notice of the Notice of Filing and the written notice of the 341(a) meeting of creditors.

19. The 341(a) meeting of creditors was held in Shelby, North Carolina on December 19, 2003.

20. The Plaintiffs' Chapter 13 plan was subsequently confirmed by order of this Court filed and entered on January 16, 2004. The Defendants received a copy of the Order of Confirmation from the Clerk of this Court.

21. The Confirmed Chapter 13 plan included the debt to Discover Card. Specifically, the debt to Discover Card was treated as an unsecured claim in the amount of \$1,266.86. The Trustee identified this debt on his records as claim number 0031.

22. Subsequent to the filing of their Chapter 13 Case, the debt to Discover Card was sold, transferred or assigned pursuant to a Forward Flow Agreement for Chapter 13 accounts to Novus. Novus thereafter filed a sworn proof of claim with the Chapter 13 Trustee on the Discover Card debt. The claim was in the amount of \$1,370.74.

23. The Plaintiffs have been advised by the Chapter 13 Trustee and therefore allege that all of the monthly payments from the Trustee on the Novus claim were mailed to Novus Services, Inc., P O Box 8003, Hilliard, Ohio 43026. The Plaintiffs allege that all of these checks were in fact received, endorsed, deposited and otherwise duly processed

by Novus and that none of the checks were returned to the Trustee's Office for any reason.

24. The Plaintiffs also allege upon information and belief that during the pendency of their Chapter 13 case numerous documents were served on and received by the Defendants and their successors including but not limited to the first meeting notice, the Trustee's motion for allowance of claims determination, the Trustee's motion for the entry of a Final Order of Discharge, and the Discharge Order itself.

25. The Plaintiffs made all of the required Chapter 13 plan payments and duly completed their Chapter 13 plan. As a result, a final Discharge Order was duly entered by this court on or about December 27, 2007.

26. The Discharge Order provided in pertinent part that the Plaintiffs were "discharged from all debts provided for by the plan" and that "[a]ll creditors are prohibited from attempting to collect any debt that has been discharged in this case." This discharge extended to and included the debt owed to the Defendants.

27. After the entry of the Discharge Order, the Plaintiffs caused certified letters to be mailed to Equifax, TransUnion and Experian in which they disputed all of the claims that had been discharged in this case. The certified letters included copies of the Final Report of claims filed and paid issued by the Trustee, the Discharge Order, a color copy of the drivers' license of each Plaintiff, and a color copy of their respective Social Security cards. In those letters, the Plaintiffs disputed all trade lines for claims discharged in their Chapter 13 case that showed anything other than a "0" balance.

28. The Plaintiffs also caused copies of the dispute letters identified in the preceding paragraph to be mailed to the Defendants by certified mail.

29. The Plaintiffs allege that as a result of these notices the Discover Card debt was changed on their consumer credit reports to reflect a "0" balance.

30. The Plaintiffs subsequently secured a copy of the consumer credit reports from Equifax, Experian and TransUnion and determined that all three of these reports had been changed to indicate a "0" balanced owed to the Defendants.

Factual Allegations (Post-Discharge)

31. The Plaintiffs are informed and believe that at some point after they secured the consumer credit reports identified in the preceding paragraph the Defendants subsequently re-reported to the consumer credit reporting agencies identified herein a debt owed to Discover Financial Services on the subject account as a "CHARGED OFF ACCOUNT" with an outstanding balance on the Plaintiffs' public credit files.

32. An example of such reporting is indicated on the consumer credit report secured by the Plaintiffs from Equifax Credit Information Services, a redacted copy of

which is attached hereto as Exhibit A. This report states that the discharged debt to the Defendants has a current past due balance of \$1,049.00; that the debt was originated in July of 1995; and that this information was reported to a consumer credit reporting agency in November of 2008, nearly one (1) year after the debt had been discharged in this case. The consumer credit report also reflects that the Plaintiffs have a negative prior payment history on this debt and specifically have been past due 30 days one time and past due 60 days one time.

33. The Plaintiffs, who have been unable to secure new credit due to this erroneous negative credit history, took this matter up with their Chapter 13 attorney, O. Max Gardner III.

34. Section 350(b) of the Bankruptcy Code provides that "a case may be reopened in the court in which such case was closed to administer assets, to accord relief to the debtor, or for other cause." As a result of the conduct of the Defendants, as alleged in this complaint, the Plaintiff's filed a motion to reopen their Chapter 13 case and this motion was granted without objection on November 30, 2008.

35. The Plaintiffs aver that at all times relevant to the allegations herein:

A. The Defendants have substantially frustrated the discharge order entered in this case and their conduct constitutes gross violations of the discharge injunction as provided by Section 524 of Title 11 of the United States Code and further have caused the Plaintiffs unwarranted and unnecessary time, effort and expense in seeking to enforce rights guaranteed by the Bankruptcy Code;

B. The Defendants knew and in fact had actual knowledge that the Plaintiffs were previously involved in bankruptcy and were therefore protected from any direct or indirect collection acts whatsoever by virtue of the Discharge Injunction provided for by Section 524 of Title 11 of the United States Code and notwithstanding such knowledge willfully failed to withdraw their erroneous credit information within the statutory time allowed by the Fair Credit Reporting Act (15 USC 1681s);

C. The Defendants at all times relevant to the allegations in this complaint knew that the Plaintiffs were represented by an attorney in connection with their bankruptcy filing and that the underlying debt owed by the Plaintiffs was in fact a "consumer debt" as that term is defined by applicable Federal and State statutes;

D. The Defendants intentionally failed to correct the erroneous credit information in an effort to indirectly collect a discharged debt from the Plaintiffs in direct violation of the specific provisions of Section 1681s of Title 15 of the United States Code, commonly known as the Fair Credit Reporting Act, in violation of the applicable provisions of Chapter 75 of the North Carolina General Statutes, commonly known as the Unfair Debt Collection Practices Act, in violation of the North Carolina Retail Installment Sales Act,

and in violation of Section 1692 of Title 15 of the United States Code, commonly known as the Fair Debt Collections Practices Act;

36. The Plaintiffs allege that the violations of the non-bankruptcy laws justify and enhance the necessity for the award of substantial and significant punitive damages in this case.

37. The Plaintiffs are informed and believe and therefore allege that as a result of these allegations they are entitled to the recovery of actual damages, including emotional distress, punitive damages, statutory damages, legal fees and expenses.

38. The Plaintiffs allege that they have engaged in numerous meetings with their attorney and members of his staff about this matter.

39. The Plaintiffs are informed and believe and therefore allege that the Defendants had an affirmative duty under *Nelson v Chase Manhattan Mortgage Corp.*, 282 F.3d 1057 (9th Cir. 2002) to conduct a proper reinvestigation and to correct all erroneous consumer credit information after receiving notice of the order of discharge entered on December 27, 2007. The Plaintiffs allege that the Defendants willfully, intentionally and without any just cause failed to comply with this duty. The Plaintiffs allege that the receipt of the order of discharge constituted the receipt of a dispute with regard to the completeness and accuracy of the pre-bankruptcy information in their consumer credit reports as provided for by Section 1681i(a)(2) of Title 15 of the United States Code.

40. The Plaintiffs also allege that the Defendants failed to cause the consumer credit reports of the Plaintiffs to be amended so as to list all debts discharged in bankruptcy as having a "0" credit balance. The Plaintiffs allege that the Official Staff Commentary to Section 607 of the Fair Credit Reporting Act provides as follows: "A consumer report may include an account that was discharged in bankruptcy (as well as the bankruptcy itself), as long as it reports a zero balance due to reflect the fact that the consumer is no longer liable for the discharged debt."

41. The Plaintiffs allege that the issuance of the discharge order by this Court and the receipt of the same by Equifax, Experian and TransUnion and the Defendants, constituted the initiation of a dispute pursuant to Section 1681i of Title 15 of the United States Code.

First Claim for Relief (Fair Credit Reporting Act)

42. The allegations in paragraphs 1 through 41 of this complaint are realleged and incorporated herein by this reference.

43. The Plaintiffs aver that as a result of the unlawful actions of the Defendants as alleged herein they have been required to devote countless and unnecessary hours to seek to correct the erroneous information on their consumer credit report.

44. The Plaintiffs further allege that upon receipt of the Discharge Order in this case the Defendants were under a statutory duty to correct and update previously reported information determined to be incomplete or inaccurate, and to report as disputed any information known to be disputed by the Plaintiffs.

45. The Plaintiffs further allege that the receipt of the Discharge Order in this case constituted notice pursuant to Section 1681i(a)(2) of Title 15 of the United States Code (the Fair Credit Reporting Act) that all debts previously reported as owed were no longer accurate and should be thereafter reported as having a "0" balance.

46. The Plaintiffs also aver that they have constantly worried about this situation and have feared that the Defendants had some improper motive for the improper credit reporting.

47. The Plaintiffs allege that as a result of the willful and intentional violations of this statute they are entitled to the recovery of actual damages, statutory damages, costs and legal fees.

Second Claim for Relief
(Unfair Deceptive Acts and Practices)

48. The allegations in paragraphs 1 through 47 of the complaint are realleged and incorporated herein by this reference.

49. The Plaintiffs are "consumers" as that term is defined by Article 2 of Chapter 75 of the North Carolina General Statutes.

50. The relationship between the Plaintiffs and the Defendants arose out of a "consumer debt" as that term is defined in Article 2 of Chapter 75 of the North Carolina General Statutes.

51. The Defendants were and are "debt collectors" as that term is defined by applicable provisions of Article 2 of Chapter 75 of the North Carolina General Statutes.

52. Under the applicable provision of Section 75-52 of the North Carolina General Statutes, the Defendants were and are prohibited from engaging in any conduct the natural consequences of which is to oppress, harass or abuse any person.

53. The actions and conduct of the Defendants were oppressive and abusive in violation of the applicable provisions of Article 2 of Chapter 75 of the North Carolina General Statutes.

54. As a result thereof, the Defendants are liable to the Plaintiffs for statutory damages in the sum of no less than \$2,000.00 and the payment of legal fees and expenses.

Third Claim for Relief
(Fair Debt Collection Practices Act)

55. The allegations in paragraphs 1 through 54 of this complaint are realleged and incorporated herein by this reference.

56. The actions and conduct of the Defendants in this case constitute unfair and deceptive acts and practices in violation of the provisions of Fair Debt Collection Practices Act.

57. The Plaintiffs specifically allege that the unfair acts and practices of the Defendants arose out of their willful failure to amend, modify and correct the erroneous reporting of credit information months after entry of the Order of Discharge and out of their breach of the affirmative duty to report a zero balance owed on the Plaintiffs' account.

58. The Plaintiffs also allege that by re-reporting a balance owed on the discharged trade line to the consumer credit reporting agencies the Defendants violated Section 1692 e(8) of the Fair Debt Collection Practices Act by transmitting false information about the status of the debt.

59. The Plaintiffs also allege that in communicating the false information to the consumer credit bureaus as alleged herein the Defendants failed to indicate that the debt was disputed in violation of 1692 e(8) of the Fair Debt Collection Practices Act

60. The Plaintiffs allege that the actions of the Defendants were intentional and designed to coerce the Plaintiffs into paying a debt that had been discharged in bankruptcy in order to "clear" the negative information from their credit history.

61. As a result of the unfair acts and deceptive practices of the Defendants, the Plaintiffs are entitled to the recovery of actual damages, statutory damages, legal fees and expenses.

Fourth Claim for Relief
(Discharge Injunction)

62. The allegations in paragraphs 1 through 61 of this complaint are realleged and incorporated herein by this reference.

63. The Plaintiffs allege that the conduct of the Defendants in this case has substantially frustrated the discharge order entered in this case and has caused the Plaintiffs unwarranted and unnecessary time, effort and expense in seeking to enforce rights guaranteed by the Bankruptcy Code.

64. The Plaintiffs also allege that in order to carry out the provision of the Code and to maintain its integrity this Court must impose actual damages, punitive damages and legal fees against the Defendants pursuant to the provisions of Section 105 of the Code.

65. The Plaintiffs allege that by re-reporting the debt as an outstanding balance owed to the consumer credit reporting agencies the Defendants engaged in an affirmative act in violation of the discharge injunction of Section 524.

66. The Plaintiffs further allege that the only reasonable purpose for re-reporting the debt after the balance had been "zeroed" out was to collect the discharge debt.

67. The Plaintiffs further allege that in order to protect the Debtors who have completed their Chapter 13 plans and secured a full discharge thereunder this Court must impose sanctions against the Defendants for their misconduct in this case.

WHEREFORE, the Plaintiffs having set forth their claims for relief against the Defendants respectfully pray of the Court as follows:

- A. That the Plaintiffs have and recover against the Defendants a sum in excess of \$5,000.00 in the form of actual damages;
- B. That the Plaintiffs have and recover against the Defendants a sum in excess of \$5,000.00 in the form of punitive damages;
- C. That the Plaintiffs have and recover against the Defendants all reasonable legal fees and expenses incurred by their attorney;
- D. That the Defendants be required to pay to the Plaintiffs as an additional damage award in this case all funds received from the Chapter 13 Trustee during the pendency of the plan in this case; and
- E. That the Plaintiffs have such other and further relief as the Court may deem just and proper.

Date this the _____ day of _____, 2008.

O. Max Gardner III
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N.C. State Bar No. 6164
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**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME: ENGLAND, RODNEY BENTON Chapter 13 No. 01-401471
ENGLAND, CYNTHIA GORDON Our File No. 9917

ADDRESS: 109 WHITEROCK ROAD
GROVER, NC 28073

SSN: --- -- 0451 & --- -- 7289

Debtors.

RODNEY BENTON ENGLAND AND WIFE,
CYNTHIA GORDON ENGLAND

Adversary Proc. No. 07-_____

Plaintiffs,

versus

LITTON LOAN SERVICING, LP AND
STAWIARSKI & ASSOCIATES, P.C.

Defendants.

**COMPLAINT SEEKING DAMAGES IN NON- CORE ADVERSARY PROCEEDING
FOR VIOLATION OF THE DISCHARGE INJUNCTION AND
VIOLATIONS OF STATE AND FEDERAL LAWS
(Against Originator and Collection Lawyer)**

Introduction

1. This action seeks redress for the unlawful and deceptive practices committed by the Defendants in connection with their efforts to collect a debt discharged by the debtors' bankruptcy. Defendants' conduct involves falsely representing that a discharged debt is still owed, the sole purpose of which is to coerce the payment of a discharged debt. Plaintiffs seek monetary, declaratory and injunctive relief based on violations of 11 U.S.C. § 524, the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et seq* and the North Carolina Unfair and Deceptive Act and Practices Laws, G.S. Section 75-50 *et seq*.

2. This action is also filed to enforce the Order of Confirmation duly entered in this Chapter 13 case, the Order of Discharge duly entered in this case, and to enforce and to implement other Bankruptcy Code provisions and Rules related thereto, and to prevent an abuse of process and to preclude the frustration of the orderly discharge of the claims in this case.

Jurisdiction

3. Jurisdiction is conferred on this Court pursuant to the provisions of Section 1334 of Title 28 of the United States Code in that this proceeding arises in and is related to the above-captioned Chapter 13 case under Title 11 and concerns property of the Debtors in that case.

4. This Court has both personal and subject matter jurisdiction to hear this case

pursuant to Section 1334 of Title 28 of the United States Code, Section 157(b)(2) of Title 28 of the United States Code, and pursuant to the Order entered by the Judges of the United States District Court for the Western District of North Carolina on July 30, 1984 (the Referral Order), which Order was entered in accordance with the Bankruptcy Amendments and Federal Judgeship Act of 1984.

5. This Court has supplemental jurisdiction to hear all state law claims pursuant to Section 1367 of Title 28 of the United States Code.

6. This Court also has jurisdiction to hear the Fair Debt Collection Practices Act violations pursuant to Section 1692 of Title 15 of the United States Code; thus, federal subject matter jurisdiction is properly founded upon Section 1331 of Title 28 of the United States Code.

7. This matter is primarily a non-core proceeding and therefore the Bankruptcy Court has jurisdiction to enter a final order. However, in the event this case is determined not to be a non-core proceeding then and in that event the Plaintiffs consent to the entry of a final order by the Bankruptcy Judge.

8. Venue lies in this District pursuant to Section 1391(b) of Title 28 of the United States Code.

Parties

9. Plaintiffs are citizens and residents of Grover, Cleveland County, North Carolina, and are debtors under Chapter 13 of Title 11 of the United States Code. The Plaintiffs are hereinafter referred to as the Plaintiffs or the Debtors.

10. The Defendant, Litton Loan Servicing, LP ("Litton") is a Limited Partnership organized and existing under the laws of the State of Delaware with its principal place of business located at 1013 Centre Road, Wilmington, DE 19805. Litton is the successor in interest to Consec Finance Servicing Corporation ("Consec") pursuant to a Notice of Transfer of Claim filed in the debtors' Chapter 13 case on December 31, 2003. Pursuant to this Notice of Transfer, Litton became the servicer of the debtors' loan on a 1987 Sterling Providence manufactured home bearing serial number ending in "20807" which is the subject of this action.

11. The Defendant Stawiarski & Associates, P.C. ("S&A") is a Professional Corporation organized and existing under the laws of the State of Colorado with a principal office address of 6560 Greenwood Plaza Blvd., Suite 325, Englewood, CO 80111. S&A is a law firm in the business of collecting debts and regularly represents Litton and other parties in the collection of debts such as the alleged debt which is the subject of this action.

Facts

12. On December 29, 1987 the Plaintiffs purchased a 1987 Sterling Providence mobile home, bearing a serial number ending in "20807" from Quality Built Homes, Inc. in Cherryville, NC for the purchase price of \$26,200.00. The loan was originally financed by All Valley Acceptance Company who transferred, sold or assigned the loan to Consec sometime prior to the filing of the debtors' Chapter 13 petition.

13. On February 9, 2001, the Plaintiffs sought protection from their creditors by filing a voluntary Chapter 13 bankruptcy petition in the United States Bankruptcy Court for the Western District of North Carolina.

14. The 341(a) meeting of creditors was held in Shelby, North Carolina on March 16, 2001.

15. The Chapter 13 plan of the Plaintiffs was subsequently confirmed by order of this Court dated April 3, 2001.

16. In the schedules filed with the petition in this case and on the master mailing matrix filed with the Clerk of this Court, a secured debt was listed in favor of Conseco for the first lien on the debtors' 1987 Sterling Providence manufactured home in the approximate amount of \$16,873.44, with \$5014.00 to be paid through the plan as a secured debt and \$11,859.44 to be paid as an unsecured split claim.

17. Conseco filed an Objection to Confirmation, incorrectly identifying the subject personal property as a 1997 All Valley Services manufactured home, and identifying the serial number as "SMIINC20807." Conseco alleged that the value of the property was \$16,309.15 and not \$5014.00 as set forth in the debtors' petition.

18. On April 30, 2002, a Consent Order was entered in the debtors' bankruptcy case wherein the value of the subject mobile home was set at \$8500.00 to be paid as a secured claim in favor of Conseco at 10% interest. The unsecured split claim was set on the records of the Trustee at \$7996.35.

19. The Trustee disbursed the total sum of \$8500.00 plus interest in the sum of \$1957.31 on the secured claim, and \$2333.43 on the unsecured split claim. The Trustee disbursed payments to Conseco until December 31, 2003 at which time the disbursements began going to Litton pursuant to the Notice of Transfer of Claim.

20. At all times alleged herein, the Plaintiffs state that the subject debt to Litton was secured by a mobile home which was and is a 1987 Sterling Providence manufactured home bearing a serial number ending in "20807" but otherwise not accurately identifiable at the time of the filing of this complaint. However, Litton assigned the subject debt an account number of 8717043.

21. At all times alleged herein, the Plaintiffs further state that the subject debt to Litton was and is not secured by any real property whatsoever.

22. On May 19, 2006, the Plaintiffs were granted a discharge of all dischargeable debts pursuant to 11 U.S.C. § 524. The Plaintiffs allege that this Discharge included the debt to Litton on the subject mobile home.

23. On July 17, 2006, the Plaintiffs' attorney sent via certified mail return receipt requested, a demand for the release of the lien on the title to the subject mobile home to Litton at 4828 Loop Central Drive, Houston, TX 77081-2226.

24. On August 15, 2006, Litton responded with written correspondence which stated in pertinent part, "Litton Loan Servicing is in the process of releasing the lien on the property." The said letter referenced loan number 8717043.

25. On September 12, 2006, Litton provided the Plaintiffs with Loan Satisfaction Documents including a Lien Release and a copy of the Manufactured Home Retail Installment Sales Contract and Security Agreement. The said Loan Satisfaction Documents referenced loan number 8717043.

26. The Plaintiffs allege that on January 09, 2007, they received a telephone call from an agent at Litton who advised them via a message left on their answering machine that the debtors owed a "charge off" amount on the subject loan. The call originated from the phone number 713-218-4513.

27. The male debtor alleges that he returned the call on January 9, 2007 and spoke to

an agent for Litton. The agent stated to the male debtor that money was owed, but the agent did not identify a specific amount. The agent further represented to the male debtor that the debt was on the debtors' residence at 109 Whiterock Road, Grover, NC. The male debtor attempted to correct the agent by explaining that the debt was for a mobile home which had been paid through his plan and that he had obtained the lien release from Litton. The agent denied that the subject debt was for a mobile home.

28. In another attempt to get this matter straightened out, the male debtor called Litton on January 19, 2007 and spoke to an agent for Litton who identified himself as "Emilio Martinez" ("Martinez"). The male debtor asked how much Litton was showing he owed and Martinez stated that the payoff was \$12,751.63 good through February 8, 2007. Martinez further identified the account number as 8717043 and that this debt was a "charge off" for property located at 109 Whiterock Road, Grover, NC. Martinez' phone number was 1-800-247-9727 Extension 4513. The debtor again tried to explain that the debt originated with the purchase of a 1987 Sterling Providence mobile home which had been paid through his bankruptcy and that he had received the title with the lien release. Martinez insisted that the debt was not for a mobile home but for the debtors' residence.

29. On or about March 17, 2007, the Plaintiffs received a letter from Litton advising them that their loan had been transferred and/or referred to "Mountain Peaks Financial Services, Inc." for collection; however the Plaintiffs never received any correspondence from this entity.

30. On or about April 27, 2007 the Plaintiffs received a demand letter from the Defendant S&A dated April 23, 2007. The letter identified the debt as the Litton debt having account number 8717043 and demanded the sum of \$12,894.14.

31. The said demand letter stated in pertinent part, "Please be advised that Stawiariski & Associates, P.C. represents Litton Loan Servicing, Lp with regard to the balance due and owing on the above referenced promissory note ("Note"). Pursuant to the Fair Debt Collection Practices Act, you are advised that this law firm is deemed to be a debt collector attempting to collect a debt and any information obtained will be used for that purpose." The said demand further stated, " Nonpayment of the Note has resulted in a default and the total amount of \$12894.14 is now due and owing as of the date of this letter. The total amount due includes unpaid principal of \$9272.52, interest of \$3621.62 and miscellaneous fees or advances of \$0.00." The said demand further stated in all capital letters and in bold, **"FOR INFORMATION ABOUT THE COLORADO FAIR DEBT COLLECTION PRACTICES ACT, SEE www.ago.state.co.us/CADC/CADCmain.cfm."**

32. The Plaintiffs received a telephone call from S&A on April 27, 2007. The calling agent for S&A only left a voice message stating to return the call at 1-800-868-9685, but left no further details.

33. On approximately May 9, 2007, the male debtor contacted S&A and spoke to an agent for S&A who identified herself as "Mandy." Mandy stated that the amount owed was \$12,949.02 and that the loan was a mortgage from Litton that originated in 1988. Mandy stated to the male debtor that he needed to get some type of payment arrangement made and start making payments this month "because the lawyers are going to start reviewing cases very soon." On or about May 11, 2007, the debtors received a letter from S&A that included a request for a "Financial Profile" for the debtors with a summary of their monthly income and expenses and places of employment.

34. The actions of the Defendants as alleged herein constitute negligence and willful, intentional, gross and flagrant violations of the provisions of Section 524 of Title 11 of the United States Code.

35. The actions of the Defendants as alleged herein are acts in violation and contempt of the Order of Discharge entered by this Court.

36. The actions of the Defendants as alleged herein are acts in violation of the Fair Debt Collection Practices Act, 15 U.S.C. Section 1692 et seq., and the North Carolina Deceptive Practices Law, G.S. Section 75-50, et seq.

37. The Plaintiffs have been severely agitated, annoyed, traumatized, harassed, emotionally damaged and have otherwise been unduly inconvenienced by the actions of the Defendants and have feared losing their residence, which is not now and never has been secured by the subject debt or Litton. Furthermore, the Plaintiffs have been led to believe by Defendant S&A that the Plaintiffs are subject to the laws of the State of Colorado and that they would have to defend themselves in that state.

FIRST CLAIM – WILLFUL VIOLATION OF DISCHARGE INJUNCTION

38. The allegations of paragraphs 1-37 above are realleged and incorporated herein by reference.

39. The actions of Defendants in this case, in seeking to collect payment on a discharged debt by falsely and deceptively attempting to coerce the debtors are in violation of the discharge injunction entered in Plaintiffs' bankruptcy case pursuant to 11 U.S.C. § 524, and constitute contempt of bankruptcy court orders.

40. The actions of the Defendants in seeking to collect on a debt after the debtors' lawful discharge, constitute a gross violation of the discharge injunction as set forth in 11 U.S.C. Section 524.

41. The conduct of the Defendants in this case has substantially frustrated the discharge order entered by this Court and has caused the debtors unwarranted and unnecessary time, effort and expense in seeking to enforce rights guaranteed by the Bankruptcy Code.

42. In order to carry out the provision of the Code and to maintain its integrity this Court must impose actual damages, punitive damages and legal fees against the Defendants pursuant to the provisions of Section 105 of the Code.

43. In order to protect debtors who have completed their Chapter 13 plans and secured a full discharge thereunder this Court must impose sanctions against the Defendants for their misconduct in this case.

44. As a result of the Defendants' violations of 11 U.S.C. Section 524, the Defendant is liable to the Plaintiffs for actual damages, punitive damages and legal fees under Section 105 of Title 11 of the United States Code.

SECOND CLAIM - VIOLATION OF THE FAIR DEBT COLLECTION PRACTICES ACT

45. The allegations of paragraphs 1-44 above are realleged and incorporated herein by reference.

46. The foregoing acts and omissions by the Defendants constitute violations of the FDCPA, which include, but are not limited to, the following:

- (a) The Defendants violated 15 U.S.C. § 1692f(1) by collecting or attempting to collect amounts not permitted by law and by otherwise using unfair and unconscionable methods; and
- (b) The Defendants violated 15 U.S.C. Section 1692c(a)(2) in contacting the Plaintiffs when the Defendants knew the debtors were represented by an

attorney.

47. The Plaintiffs are therefore entitled to an award of statutory damages and legal fees pursuant to 11 U.S.C. § 1692k.

THIRD CLAIM – ADDITIONAL VIOLATION OF THE FDCPA

48. The allegations in paragraphs 1-47 of this complaint are realleged and incorporated herein by this reference.

49. The Defendants additionally violated the FDCPA. Defendants' violations include but are not limited to engaging in any conduct the natural consequences of which is to harass, oppress, or abuse any person in connection with the collection of a debt, 15 U.S.C. Section 1692d.

50. As a result of the above violations of the FDCPA, the Defendants are liable to the Plaintiffs for actual damages, statutory damages of \$1,000.00, and attorney's fees.

FOURTH CLAIM - NORTH CAROLINA UNFAIR AND DECEPTIVE ACTS AND PRACTICES

51. The allegations in paragraphs 1-50 of this complaint are realleged and incorporated herein by this reference.

52. The Plaintiffs are "consumers" as that term is defined by Article 2 of Chapter 75 of the North Carolina General Statutes.

53. The Plaintiffs' relationship with the Defendants arose out of a "consumer debt" as that term is defined in Article 2 of Chapter 75 of the North Carolina General Statutes.

54. The Defendants were and are "debt collectors" as that term is defined by applicable provisions of Article 2 of Chapter 75 of the North Carolina General Statutes.

55. Under the provision of Section 75-52 of the North Carolina General Statutes the Defendants were and are prohibited from engaging in any conduct the natural consequences of which is to oppress, harass or abuse any person.

56. As a result, the Defendants are liable for statutory damages in the sum of no less than \$2,000.00 for violation of N.C.G.S. Section 75-50, et seq. and the payment of legal fees and expenses.

FIFTH CLAIM – ADDITIONAL VIOLATION OF NCUDAP

57. The allegations in paragraphs 1-56 of this complaint are realleged and incorporated herein by this reference.

58. The actions and conduct of the Defendants were oppressive and abusive in violation of the applicable provisions of Article 2 of Chapter 75 of the North Carolina General Statutes as follows:

- (a) The Defendants violated 75-54(4) by falsely representing the character, extent, or amount of a debt owed by the debtors; and
- (b) The Defendants violated 75-54(4) by falsely representing the creditors' rights; and

- (c) The Defendants violated 75-55 by collecting or attempting to collect a debt by use of unconscionable means; and

59. The Defendants violated Sections 75-55(3) and 58-70-115(3) in contacting the Plaintiffs when the Defendants knew the debtors were represented by an attorney.

60. The actions and conduct of the Defendants were oppressive and abusive in violation of the applicable provisions of Article 2 of Chapter 75 of the North Carolina General Statutes.

61. As a result of the above violations of the NCUDAP, the Defendants are liable to the Plaintiffs for actual damages, statutory damages and attorney's fees.

WHEREFORE, the Plaintiffs having set forth their claims for relief against the Defendants respectfully pray of the Court as follows:

- A. That the Plaintiffs have and recover against the Defendants a sum to be determined by the Court in the form of actual damages;
- B. That the Plaintiffs have and recover against the Defendants a sum to be determined by the Court in the form of statutory damages;
- C. That the Plaintiffs have and recover against the Defendants a sum to be determined by the Court in the form of punitive damages;
- D. That the Plaintiffs have and recover against the Defendants all reasonable legal fees and expenses incurred by their attorney;
- E. That this Court order the Defendants to pay additional actual damages and statutory damages in a sum to be determined by the Court for violation of N.C.G.S. Section 75-50, et seq.;
- F. That this Court order the Defendants to pay additional actual damages and statutory damages in a sum to be determined by the Court for violating the FDCPA pursuant to 15 U.S.C. Section 1692k;
- G. That the Plaintiffs have such other and further relief as the Court may deem just and proper.

Date this the _____ day of May, 2007.



O. Max Gardner III
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**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME:

**CHAPTER 13 CASE NO.
OUR FILE NO.**

ADDRESS:

SSN:

DEBTORS.

Adversary Proc. No. _____

Plaintiffs,

versus

**DISCOVER BANK FKA GREENWOOD TRUST;
DISCOVER FINANCIAL SERVICES;
DISCOVER CARD SERVICES, INC.; AND
NOVUS CREDIT SERVICES INCORPORATED**

Defendants.

**FIRST INTERROGATORIES AND REQUEST FOR PRODUCTION
OF DOCUMENTS FROM THE PLAINTIFF TO THE DEFENDANTS
(Improper Credit Reporting Case)**

COME NOW the above-named debtors and plaintiffs herein, by and through their attorney of record, and herewith serve upon the Defendants in this case the following written interrogatories pursuant to the provisions of Rule 7033 of the Rules of Bankruptcy Procedure and Rule 33 of the Federal Rules of Civil Procedure and the following request for the production and inspection of documents pursuant to Rule 7034 of the Rules of Bankruptcy Procedure and Rule 34 of the Federal Rules of Civil Procedure as provided for and set forth in the foregoing rules. Answers to these Interrogatories and Request for Production of Documents must be furnished within forty-five (45) days of the service of the Summons and Complaint or within thirty (30) days of the service of these Interrogatories, whichever is later.

DEFINITIONS AND INSTRUCTIONS

A. If there is insufficient space after each interrogatory for you to provide a full and complete answer, then you should state your full and complete answer on a separate page, identify the page, and attach the page to your response as a properly identified and marked exhibit thereto.

B. The term "Document" means all writings of any kind, including the originals and all other non-identical copies, whether different from the originals by reason of any notation made on such copies or otherwise, including but not limited to correspondence, memoranda, notes, diaries, desk or other calendars, statistics, letters, telegrams, minutes, business records, personal records, accountants' statements, account statements, contracts, reports, credit reports, studies, checks, statements, receipts, invoices, bills, return checks, summaries, pamphlets, books, inter-office and intra-office communications, notations of any sort of conversations or meetings, telephone call meetings or other communications, written agreements, bulletins, printed matter, computer printouts, teletypes, telefaxes, invoices, worksheets, all drafts, alterations, modifications, changes and amendments of any kind with respect to any of the foregoing, graphic or oral records or representations of any kind (including, without limitation, tapes, cassettes, discs, recordings, electronic mail records, computer memory records such as hard disk drives and master back-up tapes, diskettes, or other devices such as zip drive records).

C. The term "act" as used herein includes acts of every kind and description.

D. The term "identify" or "describe" when used in reference to a "document" means to state:

- a. The type of document (e.g., letter, memorandum, report, electronic mail records, notes, etc.);
- b. The date of the document;
- c. The name of the parties or parties who originated the document, their past or present position with the defendants, their general duties and responsibilities, their current physical location with the company, and their e-mail, telephone number and telephone extension;
- d. The name and address of the current custodian of the document;
- e. The name and current address of each signatory thereon;
- f. The reason, in detail, for the preparation of the document;
- g. The subject or subjects covered by the document;
- h. The names, business addresses and titles of the persons to whom the document writing was directed; and
- i. The name and address and title of each person who originated, read or received the document.

E. The term "identify" as used herein in connection with a "person" or "persons" means to state the names, titles, the present employer of such "person" or "persons," the relationship of such person or persons to any of the defendants, and such person's current business address and business telephone number.

F. The term "identify" as used herein with respect to or in connection with an "act" means to:

- a. Furnish the date and place of the act;

- b. Identify the person acting, the person for whom the act was performed, and the person against whom the act was directed; and
- c. Describe in detail the act.

G. The terms "describe" or "state" as used herein mean:

- a. Describe or state fully by reference to underlying facts rather than by ultimate facts or conclusions of law;
- b. Particularize as to the:
 - i. Time;
 - ii. Date;
 - iii. Manner; and
 - iv. Place.

H. The term "oral communication" as used herein means and includes any face-to-face conversation, meeting, conference, telephone conversation, cell-phone conversation, computer conversation with voice mail, or any one for more of these or related devices.

I. The term "person" or "persons" as used herein means and includes all natural persons, public and private corporations, associates, wholly owned affiliates or subsidiary corporations or any other form of a business association, and any other type of entity and the agents, employees, officers, deputies and representatives thereof.

J. The terms "you" or "your" as used herein shall refer to any one or all of the named defendants and any related or affiliated companies associated in any way therewith.

K. All requests shall be deemed to include any documents made by, held by, or maintained in the files of any predecessor, successor, employee, agent or assignee of either one or all of the defendants.

L. The term "the transaction" or "the transactions" or "account" or "accounts" when used herein without qualification means the transactions and accounts between or among the debtors and the named defendants and all related activities and agents or assigns of either party.

M. If the space provided below each interrogatory is not sufficient for your answer, then use additional sheets, numbered consecutively after each such interrogatory, and inserted in the proper order of all copies filed and served. For example, in the case of Interrogatory number 1, any additional sheets for your answers would be numbered as 1-A, 1-B, 1-C, etc.

N. Each of the following requests for production of documents and interrogatories is intended to be a continuing request to produce and answer. As a result, the debtors hereby demand that, in the event that at any later date you obtain any additional facts, or form any conclusions, opinions or contentions different from those set forth in your responses herein, then you shall amend your answers to such responses and document production promptly and sufficiently in advance of any trial date, to fully set forth such differences and to produce and documents in connection therewith.

INTERROGATORIES AND REQUEST FOR PRODUCTION OF DOCUMENTS

1. Please identify by name, bankruptcy case number, and bankruptcy district, any and all cases where you have been found to have violated the automatic stay or the discharge

injunction or where you have settled a stay violation or a discharge violation case by way of the payment of United States currency to debtors or the attorney for the debtors. This question relates to any such actions taken within five (5) years of the date of the filing of the Complaint in this contested case.

ANSWER:

2. As to each bankruptcy case identified in Interrogatory No. 1, please state whether or not the matter was resolved by a settlement or a court order and state the specific terms and conditions of every settlement and of every court order or settlement agreement that was subsequently approved any court order. Please identify any and all parties or attorneys of the defendants who approved, drafted or recommended the said settlements for approval and the names of all parties who endorsed the settlement checks.

ANSWER:

3. State whether or not you received any notice of this bankruptcy case on or after the filing date as alleged in the Complaint, and if so state the type and nature of said notice or notices and describe each and every action that was taken upon the receipt of each such notice or notices to properly identify and code the account as a bankruptcy account.

ANSWER:

4. State the date when the account or accounts of the debtor herein was or were acquired by you and identify all parties and documents associated with or related to the account. Also, if the account or accounts of the debtor was or were transferred or assigned post-petition to a collection division or department or to a bankruptcy division or department then state and describe all steps and documents employed to identify the account or each of the accounts as a former or current bankruptcy account and describe in detail all actions taken thereafter to determine if the debt had been discharged in bankruptcy, had been involved in a bankruptcy case that was dismissed before discharge, or was involved in a pending bankruptcy case. Identify any and all parties who were responsible for these review and identification procedures.

ANSWER:

5. Please provide a copy of your Articles of Incorporation.

ANSWER:

6. Please provide a list of all your company's Board of Directors Members, including names and addresses.

ANSWER:

7. Please provide a list of all your company's officers, including names and addresses.

ANSWER:

8. Please provide a list of all your company's stockholders, including names and addresses.

ANSWER:

9. Please provide a copy of any Plan of Merger and Acquisition or Asset Purchase Agreement between you and any of the other named Defendants.

ANSWER:

10. Describe in detail how your collection system is organized with respect to the receipt, processing and reporting of bankruptcy accounts, including the written procedures and documents related to the said procedures including but not limited to the "due diligence" review of any and all such accounts to confirm accurate bankruptcy coding.

ANSWER:

11. Describe all procedures taken by you for the implementation of any and all stop codes for bankruptcy accounts identified as such and describe in detail any and all actions collection agents and employees were instructed to take when they were notified of a bankruptcy filing by any consumer, the attorney for any consumer, any bankruptcy Trustee, or any bankruptcy court.

ANSWER:

12. Describe in detail any and all actions collection agents and employees were instructed to take when they were notified of the discharge of a consumer by the attorney for any consumer, any bankruptcy Trustee, or any bankruptcy court.

ANSWER:

13. Describe in detail the system or systems you employ to identify bankruptcy files and to implement procedures to terminate the collection process and/or to correct any negative reporting with any public credit reporting agency with respect to such files.

ANSWER:

14. Attach and identify copies of all credit reporting records prepared by you in connection with and related to the account which is the subject of the Complaint. This request specifically includes, but is not limited to, any and all "frozen data scans" or file records that have been removed from the master file for the plaintiff and placed in a quarantined file or on a hard copy document or other report, log or other documentation.

ANSWER:

15. Attach and identify all documents that refer to or otherwise describe and document any problems or other deficiencies related to the identification of "bankruptcy" accounts including but not limited to the nature and extent of those problems and those deficiencies, the date such problems and deficiencies were initially identified, and any and all steps taken to remedy any and all such problems and deficiencies:

ANSWER:

16. Describe in detail the nature and extent of the method or means by which you code accounts as active or discharged bankruptcy accounts in your data collection systems, how such information is retrieved and recognized from such systems, all parties who have access

to those systems, the additional steps in the process or procedures to verify the accuracy of the account data, and identify all documents in connection therewith.

ANSWER:

17. Identify and attach all documents related to the problems encountered by you regarding your failure or your inability to identify any of your accounts as either active or discharged bankruptcy accounts.

ANSWER:

18. Identify and attach all documents, memos, records, and telephone messages written, recorded or otherwise, with respect to the debtor's account which is the subject of the Complaint.

ANSWER:

19. Describe in detail how your computer system is operated, how it functions, the information it can secure on a consumer including but not limited to on-line credit reports from Equifax, Experian and TransUnion, the time for this system to acquire any such information, and the names of all parties who have access to this system. Also, attach all documents related to the use, operation and maintenance of this system.

ANSWER:

20. State whether or not you have access to the PACER System employed by the Federal Bankruptcy courts and if so identify and attach all documents related to the terms and conditions under which you use this system.

ANSWER:

21. If the answer to interrogatory number 20 is yes, then state how many PACER accounts you use, whether or not the PACER system is integrated into your customer data systems, and the time required for any employee to gain access to the PACER system.

ANSWER:

22. State the date that you received the first notice of any alleged bankruptcy violation regarding the improper credit reporting by the defendants, of the account which is the subject of this proceeding, the nature and description of such notice, and all actions taken by you thereafter to identify the problem and prevent any future violations. Attach copies of all relevant documents to your answer.

ANSWER:

23. State the name, title or position, address and telephone number of each and every witness that you plan to call to testify at the hearing in this case and state the substance of the testimony expected from each such witness.

ANSWER:

24. Identify with particularity each and every exhibit that you will seek to introduce into evidence at the hearing in this matter.

ANSWER:

25. State each and every contention that you will present at the hearing in this matter as to why there is no violation of the discharge injunction in this case.

ANSWER:

26. Please describe all training provided to your employees who are involved in the collection or reporting of consumer debts with respect to the automatic stay and the discharge injunction of Title 11 of the United States Code and fully describe the content, timing, and duration of such training, identify and attach all manuals, books, records, video tapes, and other documents used in connection therewith.

ANSWER:

27. State the name, address and title of each and every party providing any information with respect to the answers to these interrogatories.

ANSWER:

28. State the name, address and title of all your employees who have the primary responsibility of providing credit information to public credit reporting agencies.

ANSWER:

Dated this the _____ day of _____, 20_____.

O. Max Gardner III
Law Offices of O. Max Gardner III, PC
Attorney for Plaintiff
403 South Washington Street
PO Box 1000
Shelby NC 28151-1000
704.487.0616
maxgardner@maxgardner.com

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME:	PUBLIC, JOHN Q. PUBLIC, MARY Q.	CHAPTER 13 NO. 07-12345 OUR FILE NO. 12345-B
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**ADDRESS: 123 MAPLE STREET
SHELBY, NC 28000**

SSN: --- -- 1234 & --- -- 5678

DEBTOR(S).

**John and Mary Public,

Plaintiffs,**

**Adversary Proceeding No:
07-40-----**

vs.

CITIFINANCIAL, INC.

Defendant.

**FIRST INTERROGATORIES AND REQUEST FOR PRODUCTION
OF DOCUMENTS FROM THE DEBTOR TO DEFENDANT**

(Debt Buyer Dischargeability Case)

COMES NOW the above-named Debtor herein, by and through his attorney of record, and herewith serves upon the Defendant(s) named herein the following written interrogatories and request for production of documents pursuant to the provisions of Rules 7001, 7033 and 7034 of the Rules of Bankruptcy Procedure and Rules 33 and 34 of the Federal Rules of Civil Procedure as provided for and set forth in the foregoing rules. Answers to these Interrogatories and Request for Production of Documents must be furnished within thirty (30) days of the service of these Interrogatories.

DEFINITIONS AND INSTRUCTIONS

A. If there is insufficient space after each interrogatory for you to provide a full and complete answer, then you should state your full and complete answer on a separate page, identify the page, and attach the page to your response as a properly identified and marked exhibit thereto.

B. Document means all writings of any kind, including the originals and all other non-identical copies, whether different from the originals by reason of any notation made on such copies or otherwise, including but not limited to correspondence, memoranda, notes, diaries, desk or other calendars, statistics, letters, telegrams, minutes, business records, personal records, accountants' statements, account statements, contracts, reports, credit reports, studies, checks, statements, receipts, invoices, bills, return charts, summaries, pamphlets, books, interoffice and intraoffice communications, notations of any sort of conversations or meetings, telephone call meetings or other communications, written agreements, bulletins, printed matter, computer printouts, teletypes, telefaxes, invoices, worksheets, all drafts, alterations, modifications, changes and amendments of any kind of the foregoing, graphic or oral records or representations of any kind (including, without limitation, tapes, cassettes, discs, recordings, electronic mail records, computer memory records such as hard disk drives and master back-up tapes, diskettes, or other devices such as zip drive records).

C. The term "act" as used herein includes acts of every kind and description.

D. The term "identify" or "describe" when used in reference to a "document" means to state:

- a. The type of document (e.g., letter, memorandum, report, electronic mail records, notes, etc.);
- b. The date of the document;
- c. The name of the parties or parties who originated the document, their past or present position with the Creditor, their general duties and responsibilities, their current physical location with the company, and their e-mail, telephone number and telephone extension;
- d. The name and address of the current custodian of the document;
- e. The name and current address of each signatory thereon;
- f. The reason, in detail, for the preparation of the document;
- g. The subjects or subjects covered by the document;
- h. The names, business addresses and titles of the persons to whom the document writing was directed; and
- i. The name and address and title of each person who originated, read or received the document.

E. The term "identify" as used herein in connection with a "person" or persons" means to state the names, titles, the present employer of such "person" or "persons," the relationship of such person to the Defendant, and such person's current business address and business telephone number.

F. The term "identify" as used herein with respect to or in connection with an "act" means:

- a. Furnish the date and place of the act;
- b. Identify the person acting, the person for who the act was performed, and the person against whom the act was directed; and
- c. Describe in detail the act.

G. The terms "describe" or "state" as used herein means:

- a. Describe or state fully by reference to underlying facts rather than by ultimate facts or conclusions of law;
- b. Particularize as to:

- i. Time;
- ii. Date;
- iii. Manner; and
- iv. Place.

H. The term "oral communication" means and includes any face-to-face conversation, meeting, conference, telephone conversation, telephone conversation, cell-phone conversation, computer conversation with voice mail, or any one for more of these or related devices.

I. The term "person" or "persons" means and includes all natural persons, public and private corporations, associates, wholly owned affiliates or subsidiary corporations or any 3 other form of a business association, and any other type of entity and the agents, employees, officers, deputies and representatives thereof.

J. The terms "you" or "your" shall refer to any one or all of the named defendants and any related or affiliated companies associated in any way therewith. Likewise, the term "defendant" shall refer to any one or all of the named defendants and any related or affiliated companies associated in any way therewith.

K. All requests shall be deemed to include any documents made by, held by or maintained in files of any predecessor, successor, employee, agent or assignee of either one or all of the Creditor.

L. The term "the transactions" or "the transactions" or "account" or "accounts" when used without qualification herein means the transactions and accounts between or among the debtors and the named Defendant named herein and any and all related activities by any agents or assigns of either party.

M. If the space provided at each interrogatory is not sufficient for your answer, then use additional sheets, numbered consecutively after each such interrogatory, and inserted in the proper order of all copies filed and served. For example, in the case of Interrogatory number 1, any additional sheets for your answers would be numbered as 1-A, 1-B, 1-C, etc.

N. Each of the following requests for production and interrogatories is intended to be a continuing request to produce and interrogatory. As a result, the debtors hereby demand that, in the event at any later date you obtain any additional facts, or form any conclusions, opinions or contentions different from those set forth in your responses herein, then you shall amend your answers to such responses promptly and sufficiently in advance of any trial date, to fully set forth such differences and to produce and documents in connection therewith.

INTERROGATORIES AND REQUEST FOR PRODUCTION OF DOCUMENTS

1. Please identify by name, bankruptcy case number, and bankruptcy district, any and all cases where the Defendant named herein has been found to have violated the discharge injunction of Section 524 of Title 11 of the United States Code

and/or the automatic stay provided for by Section 362 of Title 11 of the United States Code or where said Defendant has settled any alleged discharge violation or automatic stay violation case by way of the payment of any United States currency to the debtor(s) or the attorney for the debtor(s). This question relates to any such actions taken within five (5) years of the date of the filing of the date of your responses to this discovery.

ANSWER:

2. As to each bankruptcy case identified in Interrogatory No. 1, please state whether or not the matter was resolved by a settlement or a court order and state the specific terms and conditions of every settlement and of every court order or settlement agreement that was subsequently approved by any court order. Please identify any and all parties or attorneys of said Creditor who approved, drafted or recommended the said settlements and the names of all parties who endorsed the settlement checks.

ANSWER:

3. Please identify by name, bankruptcy case number, and bankruptcy district, any and all cases where you have been found to have violated the Fair Debt Collection Practices Act or where you have settled a Fair Debt Collection Practices Act case by way of the payment of any United States currency to the debtor(s) or the attorney for the debtor(s). This question relates to any such actions taken within five (5) years of the date of the filing of your answers to this discovery. This question also relates to any allegations made by debtor(s) or any attorney(s) for such debtor(s), whether or not a case has been filed.

ANSWER:

4. As to each bankruptcy case identified in Interrogatory No. 3, please state whether or not the matter was resolved by a settlement or a court order and state the specific terms and conditions of every settlement and of every court order or settlement agreement that was subsequently approved by any court order. Please identify any and all parties or attorneys who approved, drafted or recommended the said settlements and the names of all parties who endorsed the settlement checks.

ANSWER:

5. Have you been subject to an investigation by the Federal Trade Commission in the past 5 years? If yes, please provide the specific details of each and every investigation including a copy of each complaint, notice, letter, document and your response.

ANSWER:

6. Describe in detail how your collection system is organized to receive and process bankruptcy accounts including the written procedures and documents related to the said procedures with respect to a "due diligence" review of any and all such accounts. In connection therewith, please identify any and all systems (such as BANKO) that you use to disqualify any accounts from active or passive collection efforts.

ANSWER:

7. Describe all procedures taken by you for the implementation of any and all stop codes for bankruptcy accounts identified as such and describe in detail any and all actions collection agents and employees must take when they are notified of a bankruptcy filing by any consumer. Also, describe in detail how your collection system provides a notice of a bankruptcy filing on the monitors used by your employees and collectors to access an account.

ANSWER:

8. State when this case was first referred to your internal collection division and describe in detail when and under what circumstances any and all demands for payment were prepared and mailed to the Debtor. Please produce copies of any and all such documents including but not limited to your "collection notes" and "collection history" whether such information is in a written or a digital format.

ANSWER:

9. Describe in detail any manual system or systems you employ to identify bankruptcy files and to implement procedures to terminate the collection process in such cases.

ANSWER:

10. Describe all procedures taken by you with respect to screening debt you receive to make sure the debt has not been discharged in a bankruptcy proceeding or that a bankruptcy notice has not been received?

ANSWER:

11. Of the total amount of debt you collect, how many separate accounts were included in a Chapter 13 bankruptcy or Chapter 7 bankruptcy at some point in the account's history?

ANSWER:

13. Describe the Documents that CITIFINANCIAL relied upon to form the Complaint verification that the Debtor owed money to HOMECOMINGS FINANCIAL

ANSWER:

14. Describe all efforts made by CITIFINANCIAL to locate the Debtor and his assets.

ANSWER:

15. Has CITIFINANCIAL performed, or had performed on their behalf, any studies on their success rate involving collection on debts otherwise un-collectable? Provide any copies of these studies.

ANSWER:

16. Has CITIFINANCIAL performed, or had performed on their behalf, any studies on their success rate involved with collection on debts based upon the age of the debt? Provide any copies of these studies.

ANSWER:

17. Does the Defendant have the ability to track its employee's collection attempts and accordingly identify each employee's actions by their name and time of call? Please provide any logs, recordings, or records of all employee collection attempts that occurred from 1/1/2006 through to 2/1/2007, on this account.

ANSWER:

18. Please provide all documents and logs concerning the debt that is the subject of this case created by CITIFINANCIAL.

ANSWER:

19. Please provide a list and explanation of abbreviations used in any logs or documents.

ANSWER:

20. Attach and identify copies of all Agreements between the original creditor on this debt and any other parties regarding the sale, transfer, assignment and/or collection of the subject account including but not limited to:

- a. All Asset Purchase Agreements;
- b. All Forward Flow Agreements;
- c. All Assignments from the Originator to the first Transferees;
- d. All Assignments from the first Transferee to any the next transferee and all subsequent transfer documents;
- e. All Pooling and Servicing Agreements;
- f. All Trust Agreements;
- g. All Contingency Servicing Agreements;
- h. All Sub-Servicing Agreements;
- i. All Servicing Agreements;
- j. A list of all owners of the receivable at any time after the receivable was first sold by the originator;
- k. A list of all owners of the account for the receivable;
- l. The identify of the current owner of the Account;
- m. The identity of the Current owner of the Receivable;
- n. All Credit Reporting Agreements between any owner or transferee;
- o. All Power of Attorney Forms executed by any of the parties; and
- p. All Authorizations of any type issued to any parties granting them the authority to sign any documents.

ANSWER:

21. State whether or not you have access to the PACER System employed by the Federal Bankruptcy courts and if so identify and attach all documents related to the terms and conditions under which it uses this system and describe the software programs you use for such purposes.

ANSWER:

22. If you in fact have access to the PACER System, then attach and identify all "Review Billing History" printouts from the PACER user(s)' account for the time period representing the date you acquired the rights to this receivable or were assigned the rights to collect this receivable up to and including the date of your answers to this discovery.

ANSWER:

23. Attach and identify any and all inquiries of the Debtor's credit report made by you or made on your behalf and copies of all documents generated as a result of such inquiries. Please state the purpose for each such inquiry or review.

ANSWER:

24. State the name, title or position, address and telephone number of each and every witness that you plan to call to testify at the hearing in this case and state the substance of the testimony expected from each such witness.

ANSWER:

25. Identify with particularity each and every exhibit that you will seek to introduce into evidence at the hearing in this matter.

ANSWER:

26. State each and every contention that you will present at the hearing in this matter as to why there has been no damage to the Debtor due to the violation of the discharge provisions /permanent injunction in this case.

ANSWER:

27. State the name, address and title of each and every party providing any information with respect to the answers to these interrogatories.

ANSWER:

28. Identify each and every document that has been reviewed or data source that has been accessed in connection with the preparation of your responses to this discovery.

ANSWER:

29. If any document that is or would have been responsive to Plaintiff's Request for Production of Documents to you was destroyed, lost, mislaid, or otherwise missing, identify the document, state the date of and the reason for its destruction and identify all persons having knowledge of its contents and/or the reason for its destruction.

ANSWER:

30. State the date the subject receivable was charged off, the name of the party executing such charge off, and the name of the owner of the receivable and the name of the owner of the account as of that date.

ANSWER:

31. Please produce copies of any and all documents related to this account regarding any type of written or electronic communication with Equifax, Experian or TransUnion.

ANSWER:

32. State the name and address of the last party who made any type of report to Equifax, Experian or TransUnion and state with detail the exact language in such report including all Metro I or Metro II Codes.

ANSWER:

33. Produce all copies of any documents received from the debtor or from any third-parties which indicated that the debtor had disputed all or any part of the amount alleged owed.

ANSWER:

34. Produce copies of all Automated Dispute Verification forms related to this account and received at any time from Equifax, Experian or Trans Union.

ANSWER:

35. Produce full and complete copies of all data related to this account generated by the E-Oscar reporting system.

ANSWER:

36. Produce copies of all "frozen scans" of the debtor's consumer credit report or of the tradeline on such reports related to this account made at any time within 5 years of the date of your response to this discovery.

ANSWER:

37. State your specific rights and responsibilities for reporting the status of this account to any consumer credit reporting agency. And, attach all documents related to those rights and responsibilities.

ANSWER:

38. If you do not have the right to make any reports to any consumer credit reporting agency with respect to this account, then state why you have no such authority and attach all documents in support thereof.

ANSWER:

39. Produce all documents related to how accounts are reported to the consumer credit reporting agencies after the receivable has been discharged in a bankruptcy case.

ANSWER:

40. Produce all documents related to any communications issued by any party with respect to this account using the E-Oscar system.

ANSWER:

41. Produce any documents that would prohibit you from changing or modifying any report to any consumer credit reporting agency with respect to this account.

ANSWER:

42. Produce any documents that would limit to any extent your right to report or to change in report with any consumer credit reporting agency with respect to this account.

ANSWER:

43. State whether or not you either buy or sell receivables that have been discharged in either a Chapter 7 or 13 case.

ANSWER:

44. If the answer to number 43 is yes, then identify the method for purchasing such receivables, the financing used for such acquisitions, and state specifically how you recover your investments from Chapter 13 accounts and then for Chapter 7 accounts.

ANSWER:

45. Identify all policies and procedures you have in place for dealing with the receipt of a payment from a consumer where the underlying account has been discharged in either a Chapter 7 or 13 case.

ANSWER:

46. State the name and address of each and every expert witness that you intend to use or call on to testify at the trial of this case.

ANSWER:

47. Please state the substance of the opinions you expect to solicit from each such expert and attach a *Curriculum Vitae* for each such party along with a copy of his or her preliminary and final reports.

ANSWER:

48. Please identify by attaching hereto a copy of each document you intend to present to the court for evidentiary consideration, judicial notice or otherwise, at the trial of this matter.

ANSWER:

49. Please identify all websites that you have used at any time within the past 5 years.

ANSWER:

50. State the name and address of your "account manager" for the subject account; the name and address of the "supervisor" for the "account manager" and the names and addresses of all other agents or employees who have any knowledge of this account.

ANSWER:

Dated this the _____ day of _____, 2008.

A handwritten signature in black ink, appearing to read "O. Max Gardner III", is written over a horizontal line.

O. Max Gardner III
Law Offices of O. Max Gardner III
Attorney for Plaintiffs
403 South Washington Street
PO Box 1000
Shelby NC 28151-1000
PH 704.487.0616
maxgardner@maxgardner.com

SETTLEMENT AGREEMENT AND RELEASE OF LIABILITY

This Settlement Agreement and Release of Liability (hereinafter referred to as the "Agreement") is made and entered into this ____ day of _____ 2007, by and between:

(a) John Q. Public and Mary E. Public (collectively, "Claimants");

(b) Avco Financial Services of Fayetteville, Inc., Associates First Capital Corporation, Associates Corporation of North America, Citifinancial Mortgage Company, and Citigroup, Inc. (collectively "Citifinancial"); and

(c) National Asset Recovery Services, Inc. ("NARS")

Collectively, Citifinancial and NARS are referred to herein as "Defendants."

RECITALS

WHEREAS, Claimants allege that Defendants violated provisions of law, including, but not limited to § 524 of Title 11 of the United States Code (the "Bankruptcy Code"), and various North Carolina consumer protection statutes with respect to account number _____ (the "Account") (all hereinafter referred to as the "Alleged Violations");

WHEREAS, the Parties desire to fully resolve this dispute concerning the Alleged Violations and all claims for alleged personal injuries that were asserted, or could have been asserted in Claimants' lawsuit filed as Adv. Pro. No. _____, pending in the United States Bankruptcy Court for the Western District of North Carolina, Shelby Division (the "Lawsuit");

WHEREAS, Defendants deny any liability in any way regarding the dispute with Claimants;

NOW, THEREFORE, IT IS HEREBY AGREED by and between Claimants and Defendants that:

1. Defendants agree to pay a total of _____ to Claimants, in exchange for Claimants' dismissing the Lawsuit with prejudice, and their contemporaneous release of Defendants from any and all liability for alleged injuries concerning the Alleged Violations that were asserted, or that could have been asserted in the Lawsuit.

2. The Defendants will permanently remove the subject account from their respective data bases and agree to terminate any further collection efforts regarding the alleged debt and further agree that the alleged debt is paid in full, and no further collection activity shall occur relative to this alleged debt. The Defendants will agree to remove any negative credit entries on any and all of the Claimants' consumer credit reports with regard to the alleged debt by making a written request for the removal of these entries from each of the major credit reporting agencies. Such removal shall be executed by a Uniform Data Report request or by any other type of written or electronic communication. The Defendants also agree not to verify the debt if they receive a reinvestigation dispute from a credit reporting agency.

3. The parties hereto warrant and agree that the subject account will not be sold, and the Defendant will not attempt to sell the subject account, and the same is hereby forever canceled and discharged in full and final settlement of any alleged liability of the Plaintiff or any other party. Defendant further covenants and agrees that it will not sell, assign or otherwise transfer the subject account or any rights to service the subject account (whether such rights are direct, derivative, contingent or otherwise) to any party at any time subsequent to the execution of this settlement agreement. To the extent that said account or the rights to service said account are so transferred, sold or assigned, then and in that event such action or actions shall be deemed a breach of this agreement and Defendant shall be jointly responsible with any transferee or transferees for any future attempts of any nature to collect all or any part of the subject account.

4. Claimants and their attorneys, heirs, executors and/or administrators, trustees, successors and assigns hereby release, waive and forever discharge any and all claims, liabilities, demands, costs or losses, expenses including attorney's fees and costs, damages, causes of action, controversies, adversary proceedings or suits, whether in law or in equity, known or unknown, including emotional distress, and any and all other loss and damage of every kind and nature, resulting from or to result from alleged actions and/or omissions, that they or their estate has or may have against Defendants and Defendants' companies, corporate parents, subsidiaries, affiliates, divisions, or any other business entity connected, or related to NARS and Citifinancial, including their predecessor and successor businesses, as well as assigns, including all related respective successors in interest, officers, directors, employees, agents, servants, representatives, attorneys, insurers, shareholders and agents up to and including the date of this Agreement.

5. Claimants, their attorneys, heirs, successors, executors and/or administrators further represent and agree that the terms and conditions of this Agreement, all facts and circumstances regarding the lawsuit or the dispute between the parties, and the final negotiations regarding this Agreement are strictly confidential and have not previously and shall not in the future be disclosed, discussed or revealed to any persons, entities or organizations other than the parties hereto and their counsel. This confidentiality representation and agreement does not apply to: the Claimants' duly appointed Trustee in bankruptcy, tax preparers, accountants, spouses, and as may otherwise be required by federal, state or local law, rule, regulation, court or tribunal of competent jurisdiction; and further shall not apply to any necessary filing of a motion for approval of this Agreement with notice to all parties and entities as provided for by Bankruptcy Rule 9019(a).

6. The Parties acknowledge and state that the settlement of the Lawsuit between the parties is a compromise of all disputed claims. This settlement is made for the express purpose of avoiding the expense of litigation and to resolve the issues raised by the Lawsuit and is not, nor shall it be construed as, an admission of wrongdoing, negligence, or liability on the part of any Defendant.

7. Claimants, their heirs, executors and/or administrators represent that they will not individually, or as a member of a class commence any action or proceeding or solicit class members against Defendants, agents or make any claim or complaint to any agency, federal, state or local regarding the subject matter of this Agreement.

8. None of the Defendants, nor anyone acting on their behalf, has made any representation or statement of fact or opinion to induce the execution of this Agreement by Claimants, other than as expressly set forth herein.

9. The terms of this Agreement are contractual and not merely a recital. This Agreement contains the entire understanding concerning the subject matter that exists between the parties and supersedes and replaces all prior negotiations and proposed agreements, written or oral, between the parties arising out of the facts alleged in and circumstances surrounding the Lawsuit. No modification or waiver of any provision of this Agreement, and no consent by any party to such modification or waiver, shall be effective unless such modification or waiver shall be in writing and signed by said party or duly authorized representative thereof, and then the same shall be in effect only for the period, and on the conditions and for the specific instances and purposes specified in such writing.

10. This Agreement shall be interpreted in accordance with the laws of the State of North Carolina.

11. The Parties will bear their own respective attorney's fees, expenses and costs in connection with the preparation of this Agreement and the Lawsuit.

12. In the event that any of the provisions of this Agreement are held invalid or unenforceable, all other provisions shall continue in full force and effect.

13. This Agreement may be executed in multiple counterparts. All counterparts executed by the Parties shall be construed as one Agreement.

14. CLAIMANTS HAVE: (A) READ THIS AGREEMENT CAREFULLY; (B) OBTAINED THE ADVICE OF LEGAL COUNSEL, OR HAVE VOLUNTARILY ELECTED NOT TO DO SO; AND (C) ARE FULLY INFORMED OF THE CONTENT AND MEANING OF THIS SETTLEMENT AND RELEASE. CLAIMANTS ARE EXECUTING THIS NEGOTIATED SETTLEMENT AND RELEASE VOLUNTARILY AND NOT UNDER DURESS OF ANY KIND.

IN WITNESS WHEREOF, John Q. Public and Mary E. Public; Avco Financial Services of Fayetteville, Inc., Associates First Capital Corporation, Associates Corporation of North America, Citifinancial Mortgage Company, and Citigroup, Inc.; and National Asset Recovery Services, Inc. have caused this Agreement to be duly executed, effective on the date first written above.

John Q. Public

Mary E. Public

I HEREBY APPROVE THE TERMS AND CONDITIONS OF THIS AGREEMENT AS ATTORNEY FOR THE PLAINTIFFS AND CLAIMANTS NAMED HEREIN.

O. Max Gardner III, Attorney for the Plaintiffs

**WE HEREBY ACCEPT AND AGREE TO THE TERMS AND CONDITIONS OF THIS
SETTLEMENT AGREEMENT**

**AVCO FINANCIAL SERVICES OF
FAYETTEVILLE, INC.**

By: _____

Its: _____

ASSOCIATES FIRST CAPITAL CORPORATION

By: _____

Its: _____

ASSOCIATES CORPORATION OF NORTH AMERICA

By: _____

Its: _____

CITIFINANCIAL MORTGAGE COMPANY, INC.

By: _____

Its: _____

CITIGROUP, INC.

By: _____

Its: _____

NATIONAL ASSET RECOVERY SERVICES, INC.

By: _____

Its: _____

P – GRAMM LEACH BLILEY ACT

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION

IN THE MATTER OF:
DEBTOR.

CHAPTER 13 CASE NO.

PLAINTIFF

VS.

ADVERSARY NO. _____

DEFENDANT

**COMPLAINT FOR CONTEMPT OF COURT, INJUNCTIVE RELIEF, DAMAGES,
DISALLOWANCE OF CLAIM, AND OTHER RELIEF
IN A CORE ADVERSARY PROCEEDING
(Invasion of Privacy)**

COMES NOW, plaintiff and files this action for disallowance of claim, injunctive relief and contempt of court pursuant to 11 U.S.C. § 105, and to recover actual, punitive and compensatory damages, sanctions, attorney fees and costs for the defendant's willful and negligent actions that constitute invasion of privacy and would show the following:

JURISDICTION AND VENUE

1. Jurisdiction is conferred on this Court pursuant to the provisions of § 1334 of Title 28 of the United States Code in that this core proceeding arises in and is related to the above-captioned Chapter 13 case under Title 11 and concerns property of the debtor and the estate. Venue lies in this district pursuant to 28 U.S.C. § 1391(b).

2. This Court has both personal and subject matter jurisdiction to hear this case pursuant to § 1334 of Title 28 of the United States Code, § 157(b)(2) of Title 28 of the United States Code.

3. This Court has supplemental jurisdiction to hear state law claims pursuant to § 1367 of Title 28 of the United States Code.

PARTIES

4. The plaintiff is a debtor in the above entitled Chapter 13 case number pending before this court. The plaintiff is referred to as the plaintiff or the debtor.

5. The defendant is a corporate entity with a principal office address of _____ and a registered agent at _____

FACTUAL ALLEGATIONS WHICH APPLY TO ALL CAUSES OF ACTION

6. The plaintiff filed a voluntary Chapter 13 petition and notice of filing was sent to the defendant by the Clerk of the Court or the Bankruptcy Noticing Center.

7. The defendant has an account or claim against the plaintiff that was for household or consumer use.

8. The defendant filed a Proof of Claim in the plaintiff's Chapter 13 case.

9. The defendant's claim displayed the plaintiff's Social Security Number and other nonpublic information without redaction.

10. The Proof of Claim is a public document and the defendant has made the plaintiff's private, sensitive and personal nonpublic information available to the general public at large.

11. The defendant is a sophisticated financial creditor with knowledge of the Bankruptcy Rules and procedure.

12. The defendant has an obligation to comply with all applicable rules and statutes when filing claims and participating in the bankruptcy process.

13. Defendant failed to comply with the Form B10 instructions in paragraph numbers

2 and 7 and the Definitions section on “Redacted”.

14. The defendant has intentionally communicated and made available to the general public the personal, sensitive and private data of the plaintiff in direct violation of The Local Rules of the United States Bankruptcy Courts for the Western District of North Carolina, The E-Government Act of 2002, Federal Rule of Bankruptcy Procedure 9037, Federal Rule of Civil Procedure 5.2, and the standard of care set out by The Gramm-Leach-Bliley Act.

**FIRST CAUSE OF ACTION:
RESTRICT PUBLIC ACCESS TO PROOF OF CLAIM**

15. The Court should strike the proof of claim as filed. (INSERT OR CHANGE THIS PARAGRAPH TO OBJECTION TO POC IF YOU HAVE INDEPENDENT OBJECTIONS TO THE CLAIM and RE-TITLE the FIRST CAUSE OF ACTION)

16. The Court should order the claim disabled within the ECF and PACER system or have the claim removed so that access is restricted and it is inaccessible to any further members of the general public through the PACER and ECF systems.

17. Disabling this claim and its attachments in the PACER and ECF systems only limits continued access by so called “legitimate users” of PACER and the ECF systems, such as subscribers to PACER, licensed attorneys and staff, non-attorney trustees and staff, creditors and their staff, claims agents and their employees, court reporters, and any members of the public at large that can travel to the divisional office of the clerk located in Charlotte, NC and use the computer terminals available for free viewing to any one who strolls in.

18. This remedial action will not remove the claim and its offending attachments from other PACER copycat systems such as AACER, BANKO, MERLIN, KNOWX and numerous other companies which immediately and automatically collect all PACER bankruptcy data from

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all fifty states, the District of Columbia and Puerto Rico the second it is available and the store all of the individual forms, organized by case, in their own proprietary databases for sale and use by their customers and subscribers. These providers and resellers do not limit their product to the “legitimate users” but make it available to anyone who can pay the charges. A Google internet search for “Bankruptcy Records” or “Copies of Bankruptcy Records” will yield hundreds of companies offering to provide anyone, sight unseen, with full and complete bankruptcy files and records for a monetary fee.

**SECOND CAUSE OF ACTION: VIOLATION OF THE STANDARD OF CARE
SET OUT BY THE GRAMM-LEACH-BLILEY ACT**

19. The Gramm-Leach-Bliley Act, Chapter 94, concerns privacy and provides, in material part, that “each financial institution has an affirmative and continuing obligation to respect the privacy of its customers and protect the security and confidentiality of those customers’ nonpublic personal information.” 15 U.S.C. § 6891(a)(2006). This subtitle was enacted to prohibit the disclosure of nonpublic personal information.

20. The defendant is a financial institution engaged in financial activities with consumers and is subject to the Act.

21. Plaintiff recognizes that the Act does not provide a private right of action for an individual.

22. Plaintiff alleges that the Act establishes the appropriate standard of care for the protection, security and confidentiality of the nonpublic personal information and private data of customers of the defendant.

23. The defendant failed to comply with its own privacy policy as required by 15 U.S.C. § 6803.

24. The defendant is liable in tort to the plaintiff for actual damages, future damages, credit monitoring and identity theft monitoring fees, attorney fees and costs for violation of the standards and standard of care set out by the Act.

**THIRD CAUSE OF ACTION: CONTEMPT OF COURT, VIOLATION OF
FEDERAL DISTRICT COURT AND BANKRUPTCY COURT ORDERS AND
FEDERAL RULE OF BANKRUPTCY PROCEDURE 9037**

25. The defendant has violated the E-Government Act of 2002, the policies and orders of The United States Bankruptcy Courts for the Western District of North Carolina and Local Bankruptcy Court Rules for this district by failing to redact or delete the private data, sensitive and nonpublic information of the plaintiff.

26. These rules provided in part that personal identifiers, sensitive information and data were prohibited and were not to be stated in pleadings or other court-filed documents, including exhibits.

27. Federal Rule of Bankruptcy Procedure 9037 provides that an individual's social-security number, taxpayer identification number, birth date, the name of a minor, or a financial-account number must be redacted in electronic or paper filings with the court:

28. By displaying the plaintiff's private information in public court filings the defendant has violated Rule 9037 causing the plaintiff actual damages.

29. Under 11 U.S.C. § 105, the Court has the inherent ability to enforce the Court's orders, rules, and to prevent an abuse of process.

30. The Court has the authority under 11 U.S.C. § 107(c) to protect an individual to the extent that the Court finds that the disclosure of personal information creates an undue risk of identity theft or other unlawful injury to the individual or individual's property.

31. The Court should sanction the defendant and award the plaintiff attorney fees and expenses pursuant to 11 U.S.C. § 105(a).

**FOURTH CAUSE OF ACTION:
INVASION OF PRIVACY AND INFLICTION OF EMOTIONAL DISTRESS**

32. Defendant intentionally and negligently interfered with the solitude, seclusion and private concerns or affairs of the plaintiff, by disclosing the sensitive and personal nonpublic information to the public at large.

33. Defendant intentionally and negligently caused harm to plaintiff's mental and emotional well being by invading and intruding upon plaintiff's right to privacy.

34. The Defendant's grossly careless conduct unlawfully caused plaintiff to suffer actual damages. Defendant's conduct was intentional, reckless and willful and plaintiff is entitled to recover exemplary damages in an amount to be set by the trier of fact.

35. Plaintiff is entitled to damages for mental and emotional anguish and distress caused by the defendant's wanton actions.

36. As a result of the foregoing indifferent acts, the defendant is liable to the plaintiff for actual damages, punitive damages, legal fees, costs, credit monitoring expenses, identity theft monitoring fees and suit money.

**FIFTH CAUSE OF ACTION : VIOLATION OF THE NORTH CAROLINA
FINANCIAL PRIVACY ACT N.C.G.S. § 53B ET. SEQ.**

37. The allegations in paragraphs 1 through 36 of this complaint are realleged and incorporated herein by this reference.

38. The Plaintiff is a "Customer" as that term is defined by Chapter 53B-2(1) of the N.C.G.S. in that he "transacted business with a financial institution or has used the services

offered by a financial institution.”

39. The Defendant is a "Financial institution" as that term is defined by Chapter 53B-2(2) of the N.C.G.S. in that it is “a banking corporation, trust company, savings and loan association, credit union, or other entity principally engaged in the business of lending money or receiving or soliciting money on deposit.

40. The Defendant disclosed the Plaintiff’s "Financial record" as that term is defined by Chapter 53B-2(3) of the N.C.G.S. in that the Plaintiff’s social security number, credit card account number and birth date constitute “an original of, a copy of, or information derived from, a record held by a financial institution pertaining to a customer's relationship with the financial institution and identified with or identifiable with the customer.”

41. The United States Bankruptcy Court is a “Government Authority” as that term is defined by Chapter 53B-2(4) in that it is an “agency or department of the State or of any of its political subdivisions, including any officer, employee, or agent thereof.”

42. Chapter 53B of the N.C.G.S. states that “It is the policy of this State that financial records should be treated as confidential and that no financial institution may provide to any government authority and no government authority may have access to any financial records except in accordance with the provisions of this Chapter.

43. Defendant has willfully and intentionally violated the provisions of Chapter 53B otherwise known as the North Carolina Financial Privacy Act by failing to redact, withdraw or remove personal information of the Plaintiff from the public records of the United States Bankruptcy Court.

44. Defendant is liable to the Plaintiff in the sum of \$1,000.00, plus actual and

punitive damages pursuant to N.C.G.S. § 53B-10(a).

WHEREFORE, the plaintiff prays for the following relief for all causes of action:

- A. A finding that the defendant is in civil contempt for violating the established policies, rules and orders of the courts in establishing privacy standards;
- B. Grant an order of injunctive relief to permanently remove, restrict or disable the claim within the ECF and PACER system so that it is inaccessible to any additional members of the general public;
- C. Grant sanctions, actual damages, expenses, costs, and suit money against the defendant and award punitive damages to the plaintiff in order to prevent future conduct of this kind;
- D. Award attorney's fees, expenses and suit money under § 107 and § 105 of the Bankruptcy Code;
- E. Award the plaintiff a sum of money to cover the cost of monthly credit monitoring and identity theft monitoring for a period of time equal to the plaintiff's actuarial lifetime;
- F. Award the Plaintiff the sum of \$1,000.00 for its violation of North Carolina Financial Privacy Act N.C.G.S. § 53B et. seq.
- G. Strike the defendant's proof of claim as filed;
- H. Disallow the Proof of Claim; (INCLUDE ONLY IF YOU INSERTED AN OBJECTION TO CLAIM IN #15)
- I. That the plaintiff have such other and further relief as the Court may deem just

and proper.

Dated this the _____ day of _____, 2010.

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**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME(S):

**CHAPTER 13 NO.
OUR FILE NO.**

ADDRESS:

SSN:

DEBTOR(S)

Adv. Proc. No. 08- _____

Plaintiffs,

versus

Defendant.

**Complaint Seeking Damages in Core Adversary Proceeding for
Violation of Privacy**

Introduction

1. This is an action filed by the Plaintiffs to recover actual and punitive damages, statutory damages, sanctions, attorney fees and costs for the Defendant's willful and negligent actions that constitute invasion of the Plaintiffs' privacy, contempt of court pursuant to 11 U.S.C. § 105, violations of the Gramm-Leach Bliley Act as codified in 15 U.S.C. § 6801, et seq., violations of North Carolina State Law, violations of local bankruptcy rules and Court Orders and Defendant's breach of its duty to protect private customer information.

2. This action is also filed to enforce the Order of Confirmation duly entered in this Chapter 13 case and to enforce and to implement other Bankruptcy Code provisions and Rules related thereto.

Jurisdiction and Venue

3. Jurisdiction is conferred on this Court pursuant to the provisions of Section 1334 of Title 28 of the United States Code in that this proceeding arises in and is related to the above-captioned Chapter 13 case under Title 11 and concerns property of the Debtors in that case.

4. This Court has both personal and subject matter jurisdiction to hear this case pursuant to Section 1334 of Title 28 of the United States Code, Section 157(b)(2) of Title 28 of the United States Code, and pursuant to the Order entered by the Judges of the United States District Court for the Western District of North Carolina on July 30, 1984 (the Referral Order), which Order was entered in accordance with the Bankruptcy Amendments and Federal Judgeship Act of 1984.

5. This Court has supplemental jurisdiction to hear all state law claims pursuant to Section 1367 of Title 28 of the United States Code.

6. This matter is primarily a core proceeding and therefore the Bankruptcy Court has jurisdiction to enter a final order. However, in the event this case is determined to be a non-core proceeding then and in that event the Plaintiff consents to the entry of a final order by the Bankruptcy Judge.

7. Venue lies in this District pursuant to Section 1391(b) of Title 28 of the United States Code.

Parties

8. The Plaintiffs in this case were and are debtors under Chapter 13 of Title 11 of the United States Code in case number _____ which case is presently pending before this court. The Plaintiffs are hereinafter referred to as the Plaintiffs or the debtors.

9. The Defendant, _____ is a corporation organized and existing under the laws of the State of _____ with its principal place of business located at _____.

Factual Allegations

10. The Chapter 13 case of the Plaintiffs was commenced by the filing of a voluntary petition with the Clerk of this Court on _____.

11. The 341(a) meeting of creditors was held in Shelby, North Carolina on _____.

12. The Chapter 13 plan of the Plaintiffs was subsequently confirmed by order of this Court dated _____.

13. The Chapter 13 plan as confirmed included an unsecured debt to Defendant in the amount of \$_____ for the male debtor's credit card purchases.

14. Defendant subsequently filed a proof of claim in the amount of _____.

15. Defendant's claim is currently identified on the Court's Claims Register as claim number _____. Defendant's claim is an ECF public document available to anyone who wishes to view the document. Electronic Case Filing is achieved via Public Access to Court Electronic Records (PACER) and by other systems and third-party providers.

16. Defendant's claim listed, without redaction, the male debtor's first name, middle initial and last name in combination with his full Social Security number, the credit card account number and his birth date.

17. The Defendant's claim is a public record document and the male debtor's Social Security number, credit card account number and birth date are personal and non-public information. Consequently, all of this private information has been published to all users and parties who have access to PACER and to the CM-ECF electronic case filing system employed by the United States Bankruptcy Court for the Western District of North Carolina.

18. Upon learning of this disclosure of the male debtor's personal and non-public information the office of the attorney for the debtors filed a motion disable the offending document from public view on the ECF system and also sent a letter to Defendant at the address listed in the proof of claim. This letter notified Defendant of the public disclosure of the Plaintiff's information and requested the immediate redaction or withdrawal of the information within ten

(10) days.

19. On _____ Defendant amended its claim to remove the disclosure of the Plaintiff's birth date and credit card account number, but failed to redact or remove the male debtor's Social Security number.

20. Again the office of the attorney for the debtors sent a letter to Defendant at the address listed in the proof of claim. The letter again notified Defendant of the public disclosure of the Plaintiff's information and requested the immediate redaction or withdrawal of the information within ten (10) days.

21. Despite the multiple requests to redact or withdraw the Plaintiff's private, non-public information, the Defendant has failed to do so and the Plaintiff's private, non-public information has remained on the public record.

22. At all times relevant herein, the Defendant alleges to maintain a "Privacy Policy" with respect to its past and present customers as follows:

- A. "We have policies and procedures in place to protect non-public personal information about our customers;
- B. We maintain physical, electronic and procedural measures to protect non-public, personal information;
- C. We do not share non-public, personal information about our customers with anyone, except as permitted by law or for which you have provided consent."

23. The male debtor has never consented to the release of his private, non-public information into the public record or to any third party.

24. As a result of the Defendant's actions, the Plaintiffs have suffered anxiety and mental anguish.

25. As a result of the Defendant's actions, the Plaintiffs have suffered and continue to suffer from an invasion of privacy and are exposed to an increased likelihood that the male debtor's identity will be stolen and their credit further damaged.

FIRST CAUSE OF ACTION
(Violation of Gramm-Leach Bliley Act,
15 U.S.C. Subchapter 1, § 6801-6809)

26. The allegations in paragraphs 1 through 25 of this complaint are realleged and incorporated herein by this reference.

27. The Gramm-Leach Bliley Act was enacted to "prohibit the disclosure of private, non-public information," finding that it is the "policy of Congress that each financial institution has an affirmative and continuing obligation to respect the privacy of its customers and to protect the security and confidentiality of those customers' non-public personal information." 15 U.S.C. 6801.

28. A financial institution means "any institution the business of which is engaging in financial activities." 15 U.S.C. § 1609(3)(A).

29. Defendant is in the business of engaging in financial activities by making credit card loans to customers and is therefore a "financial institution."

30. Defendant failed to provide any opt out provision as required by 15 U.S.C. § 6802.

31. Defendant disclosed non-public personal information by releasing the debtors' Social Security number, the credit card account number and his birth date in a public records forum.

32. Defendant continued to disclose non-public personal information by filing an amended document which failed to redact, withdraw or remove the male debtor's social security number, despite numerous requests from the office of the attorney for the debtors to do so.

33. As a result of Defendant's direct violation of the Gramm-Leach Bliley Act, the Plaintiffs have suffered an increased exposure to identity theft and therefore Defendant is liable to Plaintiffs for damages, potential future damages, future credit monitoring, attorneys' fees, sanctions and costs.

SECOND CAUSE OF ACTION (Contempt of Court Pursuant to U.S.C. § 105)

34. The allegations in paragraphs 1 through 33 of this complaint are realleged and incorporated herein by this reference.

35. Defendant's failure to redact or withdraw the Plaintiff's personal information constitutes an act in contempt of court pursuant to 11 U.S.C. § 105.

36. Pursuant to 11 U.S.C. § 107(c), the Bankruptcy Court has the authority to protect an individual to the extent that the court finds that disclosure of personal information creates an undue risk of identity theft or other unlawful injury to the individual or individual's property. The Plaintiffs allege that this Section of the Bankruptcy Code creates statutory rights that debtors in bankruptcy can enforce.

37. The court may protect such individuals by issuing sanctions and awarding damages for contempt of court pursuant to 11 U.S.C. § 105.

THIRD CAUSE OF ACTION (Violation of the North Carolina Financial Privacy Act N.C.G.S. § 53B et. seq.)

38. The allegations in paragraphs 1 through 37 of this complaint are realleged and incorporated herein by this reference.

39. The male debtor is a "Customer" as that term is defined by Chapter 53B-2(1) of the N.C.G.S. in that he "transacted business with a financial institution or has used the services offered by a financial institution."

40. The Defendant is a "Financial institution" as that term is defined by Chapter 53B-2(2) of the N.C.G.S. in that it is "a banking corporation, trust company, savings and loan association, credit union, or other entity principally engaged in the business of lending money or receiving or soliciting money on deposit.

41. The Defendant disclosed the male debtor's "Financial record" as that term is defined by Chapter 53B-2(3) of the N.C.G.S. in that the male debtor's social security number, credit card account number and birth date constitute "an original of, a copy of, or information derived from, a record held by a financial institution pertaining to a customer's relationship with the financial institution and identified with or identifiable with the customer."

42. The United States Bankruptcy Court is a "Government Authority" as that term is defined by Chapter 53B-2(4) in that it is an "agency or department of the State or of any of its political subdivisions, including any officer, employee, or agent thereof."

43. Chapter 53B of the N.C.G.S. states that "It is the policy of this State that financial records should be treated as confidential and that no financial institution may provide to any government authority and no government authority may have access to any financial records except in accordance with the provisions of this Chapter.

44. Defendant has willfully and intentionally violated the provisions of Chapter 53B otherwise known as the North Carolina Financial Privacy Act by failing to redact, withdraw or remove personal information of the male debtor from the public records of the United States Bankruptcy Court.

45. Defendant is liable to the Plaintiffs in the sum of \$1,000.00, plus actual and punitive damages pursuant to N.C.G.S. § 53B-10(a).

**FOURTH CAUSE OF ACTION
(Violation of the Identity Theft Protection Act
N.C.G.S. § 75-60 et seq.)**

46. The allegations in paragraphs 1 through 45 of this complaint are realleged and incorporated herein by this reference.

47. N.C.G.S. § 75-60 et seq. is known as the "Identity Theft Protection Act."

48. N.C.G.S. § 75-61(1) defines "Business" as, "A sole proprietorship, partnership, corporation, association, or other group, however organized and whether or not organized to operate at a profit. The term includes a financial institution organized, chartered, or holding a license or authorization certificate under the laws of this State, any other state, the United States, or any other country, or the parent or the subsidiary of any such financial institution. Business shall not include any government or governmental subdivision or agency.

49. Defendant is a business as defined in this Chapter.

50. N.C.G.S. § 75-61(10) defines "Personal information" as, "A person's first name or first initial and last name in combination with identifying information as defined in G.S. 14-113.20(b). Personal information does not include publicly available directories containing information an individual has voluntarily consented to have publicly disseminated or listed, including name, address, and telephone number, and does not include information made lawfully available to the general public from federal, state, or local government records."

51. The personal information disclosed by the Defendant as alleged herein is "Personal Information" as defined by this chapter.

52. N.C.G.S. § 75-61 (14) defines "Security breach" as, "An incident of unauthorized access to and acquisition of unencrypted and un-redacted records or data containing personal information where illegal use of the personal information has occurred or is reasonably likely to occur or that creates a material risk of harm to a consumer."

53. The acts of Defendant as alleged herein constitute a "Security breach" as defined by this chapter.

54. The acts of Defendant as alleged herein constitute a violation of N.C.G.S. § 75-62(a)(1), which states that a business may not "Intentionally communicate or otherwise make available to the general public an individual's social security number."

55. N.C.G.S. § 75-66(b) defines "Person" as, "Any individual, partnership, corporation, trust, estate, cooperative, association, government, or governmental subdivision or agency, or other entity."

56. According to N.C.G.S. § 75-66(b), Plaintiffs and Defendant are "Persons" for purposes of Section 75-66.

57. N.C.G.S. § 75-66(a) states:

"It shall be a violation of this section for any person to knowingly broadcast or publish to the public on radio, television, cable television, in a writing of any kind, or on the Internet, the personal information of another with actual knowledge that the person whose personal information is disclosed has previously objected to any such disclosure."

58. Section 75-66(c) defines "personal information" to include a "person's first name or first initial and last name in combination with any of the following information:

- (1) Social security or employer taxpayer identification numbers.
- (2) Drivers license, State identification card, or passport numbers.
- (3) Checking account numbers.
- (4) Savings account numbers.
- (5) Credit card numbers.
- (6) Debit card numbers.
- (7) Personal Identification (PIN) Code as defined in G.S. 14-113.8(6).
- (8) Digital signatures.
- (9) Any other numbers or information that can be used to access a person's confidential financial sources.
- (10) Biometric data.
- (11) Fingerprints.
- (12) Passwords.

59. Defendant's filing of a proof of claim knowingly containing a combination of the male debtor's name with his social security number, credit card account number and birth date constitutes a violation of this section.

60. Defendant's filing of an amended proof of claim knowingly containing a combination of the male debtor's name and social security number constitutes a violation of this section.

61. The Defendant's failure to redact, remove or withdraw the personal information after proper notice constitutes a violation of this section.

62. N.C.G.S. § 75-66(e) states that, "Any person whose property or person is injured by reason of a violation of this section may sue for civil damages pursuant to the provisions of G.S. 1-539.2C, which makes Defendant liable to the Plaintiffs for the sum of no less than \$500.00 and up to \$5,000.00, or three times their actual damages, whichever is greater, plus their reasonable legal fees.

FIFTH CAUSE OF ACTION
(Violation of Local Bankruptcy Rules, Bankruptcy Court Orders and Policy:
Failure to Redact Non-Public Information)

63. The allegations in paragraphs 1 through 62 of this complaint are realleged and incorporated herein by this reference.

64. On the homepage of the United States Bankruptcy Court for the Western Division of North Carolina website, there is a link to Local Rules and Administrative Orders.

65. These Local Rules and Administrative Orders describe the Western District of North Carolina's policy that certain personal identifiers must be at least partially redacted from the case file or pleading when filed with the court.

66. By filing non-public information of the male debtor, the Defendant has violated this Court's policies, putting the Plaintiffs at risk and causing damage by making publicly available the male debtor's financial and personal information.

67. Under 11 U.S.C. § 105, the Court has the inherent ability to enforce the Court's Orders and Rules and to prevent an abuse of process.

SIXTH CAUSE OF ACTION (Invasion of Privacy)

68. The allegations in paragraphs 1 through 67 of this complaint are realleged and incorporated herein by this reference.

69. One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person and (b) is not of a legitimate concern to the public.

70. Congress, through the Gramm-Leach Bliley Act, the North Carolina Legislature and our local courts take the issue of non-public information seriously. Individual Social Security Numbers, credit card account numbers and birth dates provide no use and are not a legitimate concern of the public.

71. Defendant intentionally and/or negligently interfered, physically or otherwise, with the solitude, seclusion and/or private concerns or affairs of the Plaintiffs by disclosing the male debtor's personal non-public information.

72. Defendant intentionally and/or negligently caused harm to Plaintiff's emotional well-being by engaging in this highly offensive conduct thereby invading and intruding upon Plaintiffs' right to privacy.

SEVENTH CAUSE OF ACTION (Breach of Duty to Protect Customer Information)

73. The allegations in paragraphs 1 through 72 of this complaint are realleged and incorporated herein by this reference.

74. As a custodian of Plaintiff's personal, non-public information the Defendant had a duty to protect the Plaintiff's personal, non-public information from disclosure to a third party and the public at large.

75. The Defendant also had a duty to protect the Plaintiff's personal and non-public information pursuant to Rule 9037 of the Federal Rules of Bankruptcy Procedure. This Rule specifically limits the personal identifiers that may be used in any paper or electronic filing and that list makes it a violation for any party to disclose the personal information disclosed by the Defendant in this case.

76. The Defendant acknowledges this duty in its privacy policy as set forth in paragraph 22 above. The duty to protect personal, non-public information is recognized by United States Congress by the enactment of 15 U.S.C. 6801 et seq., and by the State of North Carolina's enactment of the Financial Privacy Act and the Identity Theft Protection Act.

77. As a result of Defendant's breach of this duty to protect consumer information, the Plaintiffs have suffered actual and possible future damages and emotional distress.

WHEREFORE, the Plaintiffs having set forth their claims for relief against the Defendant respectfully pray of the Court as follows:

- A. That the Plaintiffs have and recover against the Defendant a sum to be determined by the Court in the form of compensatory damages, actual damages, punitive damages, sanctions, attorney fees and costs for its violation of the provisions of the Bankruptcy Code and Federal Law and for knowingly exposing the Plaintiffs to risk of identity theft and invading the Plaintiffs' right to privacy;
- B. That the Plaintiffs have and recover against the Defendant a sum to be determined by the Court in the form of actual damages, punitive damages, sanctions, attorney fees and costs for its violations of North Carolina State laws;
- C. That this Court sanction the Defendant and award punitive damages to the Plaintiffs in order to prevent future conduct of the kind engaged in by the Defendant;
- D. That this Court find the Defendant liable for civil contempt by violating the established policies and orders of the Court in establishing privacy standards;
- E. That this Court grant an order of injunctive relief, permanently removing the claim and its non-public information from the public record and that the underlying debt to the Defendant be forever canceled and discharged;
- F. That this Court award costs and damages to the Chapter 13 Trustee for increased administrative burden and costs;
- G. That this Court award attorney fees and costs to the attorney for the Plaintiffs to be paid by the Defendant; and
- H. That the Plaintiffs have such other and further relief as the Court may deem just and proper.

Date this the _____ day of _____, 2008.

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Article 2A.

Identity Theft Protection Act.

§ 75-60. Title.

This Article shall be known and may be cited as the "Identity Theft Protection Act".
(2005-414, s. 1.)

§ 75-61. Definitions.

The following definitions apply in this Article:

- (1) "Business". – A sole proprietorship, partnership, corporation, association, or other group, however organized and whether or not organized to operate at a profit. The term includes a financial institution organized, chartered, or holding a license or authorization certificate under the laws of this State, any other state, the United States, or any other country, or the parent or the subsidiary of any such financial institution. Business shall not include any government or governmental subdivision or agency.
- (2) "Consumer". – An individual.
- (3) "Consumer report" or "credit report". – Any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's creditworthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for any of the following:
 - a. Credit to be used primarily for personal, family, or household purposes.
 - b. Employment purposes.
 - c. Any other purpose authorized under 15 U.S.C. § 1681(b).
- (4) "Consumer reporting agency". – Any person who, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties.
- (5) "Credit card". – Has the same meaning as in section 103 of the Truth in Lending Act (15 U.S.C. § 160, et seq.).
- (6) "Debit card". – Any card or device issued by a financial institution to a consumer for use in initiating an electronic fund transfer from the account holding assets of the consumer at such financial institution, for the purpose of transferring money between accounts or obtaining money, property, labor, or services.
- (7) "Disposal" includes the following:

- a. The discarding or abandonment of records containing personal information.
 - b. The sale, donation, discarding, or transfer of any medium, including computer equipment or computer media, containing records of personal information, or other nonpaper media upon which records of personal information are stored, or other equipment for nonpaper storage of information.
- (8) "Encryption". – The use of an algorithmic process to transform data into a form in which the data is rendered unreadable or unusable without use of a confidential process or key.
 - (9) "Person". – Any individual, partnership, corporation, trust, estate, cooperative, association, government, or governmental subdivision or agency, or other entity.
 - (10) "Personal information". – A person's first name or first initial and last name in combination with identifying information as defined in G.S. 14-113.20(b). Personal information does not include publicly available directories containing information an individual has voluntarily consented to have publicly disseminated or listed, including name, address, and telephone number, and does not include information made lawfully available to the general public from federal, state, or local government records.
 - (11) "Proper identification". – Information generally deemed sufficient to identify a person. If a person is unable to reasonably identify himself or herself with the information described above, a consumer reporting agency may require additional information concerning the consumer's employment and personal or family history in order to verify the consumer's identity.
 - (12) "Records". – Any material on which written, drawn, spoken, visual, or electromagnetic information is recorded or preserved, regardless of physical form or characteristics.
 - (13) "Redaction". – The rendering of data so that it is unreadable or is truncated so that no more than the last four digits of the identification number is accessible as part of the data.
 - (14) "Security breach". – An incident of unauthorized access to and acquisition of unencrypted and unredacted records or data containing personal information where illegal use of the personal information has occurred or is reasonably likely to occur or that creates a material risk of harm to a consumer. Any incident of unauthorized access to and acquisition of encrypted records or data containing personal information along with the confidential process or key shall constitute a security breach. Good faith acquisition of personal information by an employee or agent of the business for a legitimate purpose is not a security breach, provided that the personal information is not used for a purpose other

than a lawful purpose of the business and is not subject to further unauthorized disclosure.

- (15) "Security freeze". – Notice placed in a credit report, at the request of the consumer and subject to certain exceptions, that prohibits the consumer reporting agency from releasing all or any part of the consumer's credit report or any information derived from it without the express authorization of the consumer. (2005-414, s. 1.)

§ 75-62. Social security number protection.

(a) Except as provided in subsection (b) of this section, a business may not do any of the following:

- (1) Intentionally communicate or otherwise make available to the general public an individual's social security number.
- (2) Intentionally print or imbed an individual's social security number on any card required for the individual to access products or services provided by the person or entity.
- (3) Require an individual to transmit his or her social security number over the Internet, unless the connection is secure or the social security number is encrypted.
- (4) Require an individual to use his or her social security number to access an Internet Web site, unless a password or unique personal identification number or other authentication device is also required to access the Internet Web site.
- (5) Print an individual's social security number on any materials that are mailed to the individual, unless state or federal law requires the social security number to be on the document to be mailed.
- (6) Sell, lease, loan, trade, rent, or otherwise intentionally disclose an individual's social security number to a third party without written consent to the disclosure from the individual, when the party making the disclosure knows or in the exercise of reasonable diligence would have reason to believe that the third party lacks a legitimate purpose for obtaining the individual's social security number.

(b) Subsection (a) of this section shall not apply in the following instances:

- (1) When a social security number is included in an application or in documents related to an enrollment process, or to establish, amend, or terminate an account, contract, or policy; or to confirm the accuracy of the social security number for the purpose of obtaining a credit report pursuant to 15 U.S.C. § 1681(b)(2). A social security number that is permitted to be mailed under this section may not be printed, in whole or in part, on a postcard or other mailer not requiring an envelope, or visible on the envelope or without the envelope having been opened.
- (2) To the collection, use, or release of a social security number for internal verification or administrative purposes.

- (3) To the opening of an account or the provision of or payment for a product or service authorized by an individual.
 - (4) To the collection, use, or release of a social security number to investigate or prevent fraud, conduct background checks, conduct social or scientific research, collect a debt, obtain a credit report from or furnish data to a consumer reporting agency pursuant to the Fair Credit Reporting Act, 15 U.S.C. § 1681, et seq., undertake a permissible purpose enumerated under Gramm Leach Bliley, 12 C.F.R. § 216.13-15, or locate an individual who is missing, a lost relative, or due a benefit, such as a pension, insurance, or unclaimed property benefit.
 - (5) To a business acting pursuant to a court order, warrant, subpoena, or when otherwise required by law.
 - (6) To a business providing the social security number to a federal, state, or local government entity, including a law enforcement agency, court, or their agents or assigns.
 - (7) To a social security number that has been redacted.
- (c) A business covered by this section shall make reasonable efforts to cooperate, through systems testing and other means, to ensure that the requirements of this Article are implemented.
- (d) A violation of this section is a violation of G.S. 75-1.1. (2005-414, s. 1.)

§ 75-63. Security freeze.

- (a) A consumer may place a security freeze on the consumer's credit report by making a request in writing by certified mail to a consumer reporting agency. A security freeze shall prohibit, subject to exceptions in subsection (l) of this section, the consumer reporting agency from releasing the consumer's credit report or any information from it without the express authorization of the consumer. When a security freeze is in place, a consumer reporting agency may not release the consumer's credit report or information to a third party without prior express authorization from the consumer. This subsection does not prevent a consumer reporting agency from advising a third party that a security freeze is in effect with respect to the consumer's credit report.
- (b) A consumer reporting agency shall place a security freeze on a consumer's credit report no later than five business days after receiving a written request from the consumer.
- (c) The consumer reporting agency shall send a written confirmation of the security freeze to the consumer within 10 business days of placing the freeze and at the same time shall provide the consumer with a unique personal identification number or password, other than the consumer's social security number, to be used by the consumer when providing authorization for the release of the consumer's credit report for a specific period of time.
- (d) If the consumer wishes to allow the consumer's credit report to be accessed for a specific period of time while a freeze is in place, the consumer shall contact the

consumer reporting agency, request that the freeze be temporarily lifted, and provide all of the following:

- (1) Proper identification.
- (2) The unique personal identification number or password provided by the consumer reporting agency pursuant to subsection (c) of this section.
- (3) The proper information regarding the time period for which the report shall be available to users of the credit report.

(e) A consumer reporting agency may develop procedures involving the use of telephone, fax, the Internet, or other electronic media to receive and process a request from a consumer to temporarily lift a freeze on a credit report pursuant to subsection (d) of this section in an expedited manner.

(f) A consumer reporting agency that receives a request from a consumer to temporarily lift a freeze on a credit report pursuant to subsection (d) of this section shall comply with the request no later than three business days after receiving the request.

(g) A consumer reporting agency shall remove or temporarily lift a freeze placed on a consumer's credit report only in the following cases:

- (1) Upon the consumer's request, pursuant to subsections (d) or (j) of this section.
- (2) If the consumer's credit report was frozen due to a material misrepresentation of fact by the consumer. If a consumer reporting agency intends to remove a freeze upon a consumer's credit report pursuant to this subdivision, the consumer reporting agency shall notify the consumer in writing prior to removing the freeze on the consumer's credit report.

(h) If a third party requests access to a consumer credit report on which a security freeze is in effect and this request is in connection with an application for credit or any other use and the consumer does not allow the consumer's credit report to be accessed for that specific period of time, the third party may treat the application as incomplete.

(i) If a consumer requests a security freeze pursuant to this section, the consumer reporting agency shall disclose to the consumer the process of placing and temporarily lifting a security freeze and the process for allowing access to information from the consumer's credit report for a specific period of time while the security freeze is in place.

(j) A security freeze shall remain in place until the consumer requests that the security freeze be removed. A consumer reporting agency shall remove a security freeze within three business days of receiving a request for removal from the consumer, who provides all of the following:

- (1) Proper identification.
- (2) The unique personal identification number or password provided by the consumer reporting agency pursuant to subsection (c) of this section.

(k) A consumer reporting agency shall require proper identification of the person making a request to place or remove a security freeze.

(l) The provisions of this section do not apply to the use of a consumer credit report by any of the following:

- (1) A person, or the person's subsidiary, affiliate, agent, subcontractor, or assignee with whom the consumer has, or prior to assignment had, an account, contract, or debtor-creditor relationship for the purposes of reviewing the active account or collecting the financial obligation owing for the account, contract, or debt.
- (2) A subsidiary, affiliate, agent, assignee, or prospective assignee of a person to whom access has been granted under subsection (d) of this section for purposes of facilitating the extension of credit or other permissible use.
- (3) Any person acting pursuant to a court order, warrant, or subpoena.
- (4) A state or local agency, or its agents or assigns, which administers a program for establishing and enforcing child support obligations.
- (5) A state or local agency, or its agents or assigns, acting to investigate fraud, including Medicaid fraud, or acting to investigate or collect delinquent taxes or assessments, including interest and penalties, unpaid court orders, or to fulfill any of its other statutory responsibilities.
- (6) A federal, state, or local governmental entity, including law enforcement agency, court, or their agent or assigns.
- (7) A person for the purposes of prescreening as defined by the Fair Credit Reporting Act, 15 U.S.C. § 1681, et seq.
- (8) Any person for the sole purpose of providing for a credit file monitoring subscription service to which the consumer has subscribed.
- (9) A consumer reporting agency for the purpose of providing a consumer with a copy of the consumer's credit report upon the consumer's request.
- (10) Any depository financial institution for checking, savings, and investment accounts.
- (11) Any property and casualty insurance company for use in setting or adjusting a rate, adjusting a claim, or underwriting for property and casualty insurance purposes.

(m) If a security freeze is in place, a consumer reporting agency shall not change any of the following official information in a credit report without sending a written confirmation of the change to the consumer within 30 days of the change being posted to the consumer's file: name, date of birth, social security number, and address. Written confirmation is not required for technical modifications of a consumer's official information, including name and street abbreviations, complete spellings, or transposition of numbers or letters. In the case of an address change, the written confirmation shall be sent to both the new address and the former address.

(n) The following persons are not required to place in a credit report a security freeze pursuant to this section provided, however, that any person that is not required to place a security freeze on a credit report under the provisions of subdivision (3) of this subsection shall be subject to any security freeze placed on a credit report by another consumer reporting agency from which it obtains information:

- (1) A check services or fraud prevention services company, which reports on incidents of fraud or issues authorizations for the purpose of approving or processing negotiable instruments, electronic fund transfers, or similar methods of payment.
- (2) A deposit account information service company, which issues reports regarding account closures due to fraud, substantial overdrafts, ATM abuse, or other similar negative information regarding a consumer to inquiring banks or other financial institutions for use only in reviewing a consumer request for a deposit account at the inquiring bank or financial institution.
- (3) A consumer reporting agency that does all of the following:
 - a. Acts only to resell credit information by assembling and merging information contained in a database of one or more credit reporting agencies.
 - b. Does not maintain a permanent database of credit information from which new credit reports are produced.

(o) **(See Editor's note for effective date)** This section does not prevent a consumer reporting agency from charging a fee of no more than ten dollars (\$10.00) to a consumer for each freeze, removal of the freeze, or temporary lifting of the freeze for a period of time, regarding access to a consumer credit report, except that a consumer reporting agency may not charge any fee to any of the following:

- (1) A victim of identity theft who has submitted a copy of a valid investigative or incident report or complaint with a law enforcement agency about the unlawful use of the victim's identifying information by another person.
- (2) A veteran who has received notification from the United States Department of Veterans Affairs indicating that the veteran's information is, or may be, included in the information involved in the Department of Veterans Affairs' data breach, first announced on May 22, 2006; provided that the application for a freeze includes the notification and proof of status as a veteran as defined in this subdivision. As used in this subsection, the term "veteran" means a veteran, as defined in G.S. 126-81, a member of the armed forces of the United States, as defined in G.S. 165-20, or a member of the North Carolina National Guard.
- (3) Persons who are the authorized agents of, or receive benefits from the State or federal government based on a relationship to, a veteran who would or could qualify under subdivision (2) of this subsection.

(o) **(See Editor's note for effective date)** This section does not prevent a consumer reporting agency from charging a fee of no more than ten dollars (\$10.00) to a consumer for each freeze, removal of the freeze, or temporary lifting of the freeze for a period of time, regarding access to a consumer credit report, except that a consumer reporting agency may not charge any fee to a victim of identity theft who has submitted a

copy of a valid investigative or incident report or complaint with a law enforcement agency about the unlawful use of the victim's identifying information by another person.

(p) At any time that a consumer is required to receive a summary of rights required under section 609 of the federal Fair Credit Reporting Act, the following notice shall be included:

"North Carolina Consumers Have the Right to Obtain a Security Freeze.

You have a right to place a "security freeze" on your credit report pursuant to North Carolina law. The security freeze will prohibit a consumer reporting agency from releasing any information in your credit report without your express authorization. A security freeze must be requested in writing by certified mail.

The security freeze is designed to prevent credit, loans, and services from being approved in your name without your consent. However, you should be aware that using a security freeze to take control over who gains access to the personal and financial information in your credit report may delay, interfere with, or prohibit the timely approval of any subsequent request or application you make regarding new loans, credit, mortgage, insurance, rental housing, employment, investment, license, cellular phone, utilities, digital signature, Internet credit card transactions, or other services, including an extension of credit at point of sale.

The freeze will be placed within five business days. When you place a security freeze on your credit report, within 10 business days, you will be provided a personal identification number or a password to use when you want to remove or lift temporarily the security freeze.

A freeze does not apply when you have an existing account relationship and a copy of your report is requested by your existing creditor or its agents or affiliates for certain types of account review, collection, fraud control, or similar activities.

You should plan ahead and lift a freeze if you are actively seeking credit or services as a security freeze may slow your applications, as mentioned above.

You can remove a freeze or authorize temporary access for a specific period of time by contacting the consumer reporting agency and providing all of the following:

- (1) Your personal identification number or password,
- (2) Proper identification to verify your identity, and
- (3) Proper information regarding the period of time you want your report available to users of the credit report.

A consumer reporting agency that receives a request from you to temporarily lift a freeze on a credit report shall comply with the request no later than three business days after receiving the request. A consumer reporting agency may charge you up to ten dollars (\$10.00) for each time you freeze, remove the freeze, or temporarily lift the freeze for a period of time, except a consumer reporting agency may not charge any amount to a victim of identify theft who has submitted a copy of a valid investigative or incident report or complaint with a law enforcement agency about the unlawful use of the victim's identifying information by another person.

You have a right to bring a civil action against someone who violates your rights under the credit reporting laws. The action can be brought against a consumer reporting agency or a user of your credit report."

(q) A violation of this section is a violation of G.S. 75-1.1. (2005-414, s. 1; 2006-158, s. 1.)

§ 75-64. Destruction of personal information records.

(a) Any business that conducts business in North Carolina and any business that maintains or otherwise possesses personal information of a resident of North Carolina must take reasonable measures to protect against unauthorized access to or use of the information in connection with or after its disposal.

(b) The reasonable measures must include:

- (1) Implementing and monitoring compliance with policies and procedures that require the burning, pulverizing, or shredding of papers containing personal information so that information cannot be practicably read or reconstructed.
- (2) Implementing and monitoring compliance with policies and procedures that require the destruction or erasure of electronic media and other nonpaper media containing personal information so that the information cannot practicably be read or reconstructed.
- (3) Describing procedures relating to the adequate destruction or proper disposal of personal records as official policy in the writings of the business entity.

(c) A business may, after due diligence, enter into a written contract with, and monitor compliance by, another party engaged in the business of record destruction to destroy personal information in a manner consistent with this section. Due diligence should ordinarily include one or more of the following:

- (1) Reviewing an independent audit of the disposal business's operations or its compliance with this statute or its equivalent.
- (2) Obtaining information about the disposal business from several references or other reliable sources and requiring that the disposal business be certified by a recognized trade association or similar third party with a reputation for high standards of quality review.
- (3) Reviewing and evaluating the disposal business's information security policies or procedures or taking other appropriate measures to determine the competency and integrity of the disposal business.

(d) A disposal business that conducts business in North Carolina or disposes of personal information of residents of North Carolina must take all reasonable measures to dispose of records containing personal information by implementing and monitoring compliance with policies and procedures that protect against unauthorized access to or use of personal information during or after the collection and transportation and disposing of such information.

(e) This section does not apply to any of the following:

- (1) Any bank or financial institution that is subject to and in compliance with the privacy and security provision of the Gramm Leach Bliley Act, 15 U.S.C. § 6801, et seq., as amended.
- (2) Any health insurer or health care facility that is subject to and in compliance with the standards for privacy of individually identifiable health information and the security standards for the protection of electronic health information of the Health Insurance Portability and Accountability Act of 1996.
- (3) Any consumer reporting agency that is subject to and in compliance with the Federal Credit Reporting Act, 15 U.S.C. § 1681, et seq., as amended.

(f) A violation of this section is a violation of G.S. 75-1.1, but any damages assessed against a business because of the acts or omissions of its nonmanagerial employees shall not be trebled as provided in G.S. 75-16 unless the business was negligent in the training, supervision, or monitoring of those employees. No private right of action may be brought by an individual for a violation of this section unless such individual is injured as a result of the violation. (2005-414, s. 1.)

§ 75-65. Protection from security breaches.

(a) Any business that owns or licenses personal information of residents of North Carolina or any business that conducts business in North Carolina that owns or licenses personal information in any form (whether computerized, paper, or otherwise) shall provide notice to the affected person that there has been a security breach following discovery or notification of the breach. The disclosure notification shall be made without unreasonable delay, consistent with the legitimate needs of law enforcement, as provided in subsection (c) of this section, and consistent with any measures necessary to determine sufficient contact information, determine the scope of the breach and restore the reasonable integrity, security, and confidentiality of the data system. For the purposes of this section, personal information shall not include electronic identification numbers, electronic mail names or addresses, Internet account numbers, Internet identification names, parent's legal surname prior to marriage, or a password unless this information would permit access to a person's financial account or resources.

(b) Any business that maintains or possesses records or data containing personal information of residents of North Carolina that the business does not own or license, or any business that conducts business in North Carolina that maintains or possesses records or data containing personal information that the business does not own or license shall notify the owner or licensee of the information of any security breach immediately following discovery of the breach, consistent with the legitimate needs of law enforcement as provided in subsection (c) of this section.

(c) The notice required by this section shall be delayed if a law enforcement agency informs the business that notification may impede a criminal investigation or jeopardize national or homeland security, provided that such request is made in writing or the business documents such request contemporaneously in writing, including the name

of the law enforcement officer making the request and the officer's law enforcement agency engaged in the investigation. The notice required by this section shall be provided without unreasonable delay after the law enforcement agency communicates to the business its determination that notice will no longer impede the investigation or jeopardize national or homeland security.

(d) The notice shall be clear and conspicuous. The notice shall include a description of the following:

- (1) The incident in general terms.
- (2) The type of personal information that was subject to the unauthorized access and acquisition.
- (3) The general acts of the business to protect the personal information from further unauthorized access.
- (4) A telephone number that the person may call for further information and assistance, if one exists.
- (5) Advice that directs the person to remain vigilant by reviewing account statements and monitoring free credit reports.

(e) For purposes of this section, notice to affected persons may be provided by one of the following methods:

- (1) Written notice.
- (2) Electronic notice, for those persons for whom it has a valid e-mail address and who have agreed to receive communications electronically if the notice provided is consistent with the provisions regarding electronic records and signatures for notices legally required to be in writing set forth in 15 U.S.C. § 7001.
- (3) Telephonic notice provided that contact is made directly with the affected persons.
- (4) Substitute notice, if the business demonstrates that the cost of providing notice would exceed two hundred fifty thousand dollars (\$250,000) or that the affected class of subject persons to be notified exceeds 500,000, or if the business does not have sufficient contact information or consent to satisfy subdivisions (1), (2), or (3) of this subsection, for only those affected persons without sufficient contact information or consent, or if the business is unable to identify particular affected persons, for only those unidentifiable affected persons. Substitute notice shall consist of all the following:
 - a. E-mail notice when the business has an electronic mail address for the subject persons.
 - b. Conspicuous posting of the notice on the Web site page of the business, if one is maintained.
 - c. Notification to major statewide media.

(f) In the event a business provides notice to more than 1,000 persons at one time pursuant to this section, the business shall notify, without unreasonable delay, the Consumer Protection Division of the Attorney General's Office and all consumer

reporting agencies that compile and maintain files on consumers on a nationwide basis, as defined in 15 U.S.C. § 1681a(p), of the timing, distribution, and content of the notice.

(g) Any waiver of the provisions of this Article is contrary to public policy and is void and unenforceable.

(h) A financial institution that is subject to and in compliance with the Federal Interagency Guidance Response Programs for Unauthorized Access to Consumer Information and Customer Notice, issued on March 7, 2005, by the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, and the Office of Thrift Supervision, and any revisions, additions, or substitutions relating to said interagency guidance, shall be deemed to be in compliance with this section.

(i) A violation of this section is a violation of G.S. 75-1.1. No private right of action may be brought by an individual for a violation of this section unless such individual is injured as a result of the violation.

(j) Causes of action arising under this Article may not be assigned. (2005-414, s. 1.)

§ 75-66. Publication of personal information.

(a) It shall be a violation of this section for any person to knowingly broadcast or publish to the public on radio, television, cable television, in a writing of any kind, or on the Internet, the personal information of another with actual knowledge that the person whose personal information is disclosed has previously objected to any such disclosure.

(b) As used in this section, "person" means any individual, partnership, corporation, trust, estate, cooperative, association, or other entity, but does not include any:

- (1) Government, government subdivision or agency.
- (2) Entity subject to federal requirements pursuant to the Health Insurance Portability and Accountability Act (HIPAA).

(c) As used in this section, the phrase "personal information" includes a person's first name or first initial and last name in combination with any of the following information:

- (1) Social security or employer taxpayer identification numbers.
- (2) Drivers license, State identification card, or passport numbers.
- (3) Checking account numbers.
- (4) Savings account numbers.
- (5) Credit card numbers.
- (6) Debit card numbers.
- (7) Personal Identification (PIN) Code as defined in G.S. 14-113.8(6).
- (8) Digital signatures.
- (9) Any other numbers or information that can be used to access a person's financial resources.
- (10) Biometric data.
- (11) Fingerprints.

- (12) Passwords.
- (d) Nothing in this section shall:
 - (1) Limit the requirements or obligations under any other section of this Article, including, but not limited to, G.S. 75-62 and G.S. 75-65.
 - (2) Apply to the collection, use, or release of personal information for a purpose permitted, authorized, or required by any federal, state, or local law, regulation, or ordinance.
- (e) Any person whose property or person is injured by reason of a violation of this section may sue for civil damages pursuant to the provisions of G.S. 1-539.2C. (2007-534, s. 2.)

§ 75-67. Reserved for future codification purposes.

§ 75-68. Reserved for future codification purposes.

§ 75-69. Reserved for future codification purposes.

§ 75-70. Reserved for future codification purposes.

§ 75-71. Reserved for future codification purposes.

§ 75-72. Reserved for future codification purposes.

§ 75-73. Reserved for future codification purposes.

§ 75-74. Reserved for future codification purposes.

§ 75-75. Reserved for future codification purposes.

§ 75-76. Reserved for future codification purposes.

§ 75-77. Reserved for future codification purposes.

§ 75-78. Reserved for future codification purposes.

§ 75-79. Reserved for future codification purposes.



LEXSEE

JOSEPH R. MICARE, Plaintiff, -against- FOSTER & GARBUS, Defendant.

00-CV-0092 (LEK)(DRH)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF
NEW YORK

132 F. Supp. 2d 77; 2001 U.S. Dist. LEXIS 1978

February 21, 2001, Decided
February 21, 2001, Filed

COUNSEL: For JOSEPH R. MICARE, plaintiff: Andrew F. Capoccia, Office of Andrew F. Capoccia, Albany, NY.

For FORSTER & GARBUS, defendant: Thomas B. Grunfeld, Forster, Garbus Law Firm, Farmingdale, NY.

JUDGES: LAWRENCE E. KAHN, United States District Judge.

OPINION BY: LAWRENCE E. KAHN

OPINION

[*79] MEMORANDUM-DECISION AND ORDER

Presently before the Court is Defendant's motion to dismiss and for fees, costs, and sanctions. For the reasons set forth below, Defendant's motion is granted in part and denied in part.

I. BACKGROUND

Plaintiff alleges that, on or about February 23, 1999, the Law Office of Andrew F. Capoccia, L.L.C. (now Daly, Cilingiryan, Murphy, Sinnott & Cappoccia Law Centers, L.L.C.) notified Defendant's client, First Select Corporation ("FSC"), that it had been retained to represent Plaintiff with respect to Plaintiff's debt with FSC. According to Plaintiff, this notification advised FSC to close the account and to forward all future communications to the Law Office of Andrew F. Capoccia and not to contact Plaintiff directly.

On August 16, 1999, FSC forwarded Plaintiff's file to Defendant via electronic mail for collection purposes. Defendant contends [*2] that, despite an established

procedure for doing so, the file did not indicate that Plaintiff was represented by an attorney. Defendant subsequently sent a demand letter directly to Plaintiff that same day. Moreover, on October 19, 2000, Defendant received a facsimile from FSC indicating that a settlement with Plaintiff as pending and that, as a result of the pending settlement, Plaintiff was required to make a reduced payment in satisfaction of his debt by November 13, 1999. This communication also did not indicate that Plaintiff was represented by an attorney.

On October 21, 1999, Plaintiff paid off his account with FSC pursuant to a settlement agreement. On December 14, 1999, having failed in efforts to receive confirmation of the results of the settlement effort, Defendant mailed another demand letter to Plaintiff. On December 28, 1999, Defendant received confirmation that FSC was paid in full and closed Plaintiff's file.

Plaintiff commenced the present action on January 14, 2000 alleging violations of the Fair Debt Collection Practice Act ("FDCPA"), 15 U.S.C. § 1692, which prohibits debt collectors from engaging in abusive, deceptive, and unfair collection [*3] practices. Specifically, Plaintiff alleges three causes of action pursuant to §§ 1692c(a)(2), 1692c(c), and 1692e of the FDCPA, respectively.

II. ANALYSIS

A. Motion to Dismiss

[HN1] A motion to dismiss pursuant to *Federal Rule of Civil Procedure 12(b)(6)*, for "failure to state a claim upon which relief can be granted," must be denied "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim [that] would entitle

him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957). In assessing the sufficiency of a pleading, "all factual allegations in the complaint must be taken as true," *LaBounty v. Adler*, 933 F.2d 121, 123 (2d Cir. 1991), and all reasonable inferences must be construed in favor of the plaintiff, *Scheuer v. Rhodes*, 416 U.S. 232, 236, 40 L. Ed. 2d 90, 94 S. Ct. 1683 (1974); see also *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096, 1099 (2d Cir. 1988) (applying the principle of construing inferences in favor of plaintiff).

[HN2] Consideration is limited to the factual allegations in [the] complaint, which are accepted as true, [**4] to documents attached to the complaint as an exhibit or incorporated in it by reference, to matters of which judicial notice may be taken, or to documents either in plaintiffs' possession or of which plaintiffs had knowledge and relied on in bringing suit.

Brass v. American Film Technologies, Inc., 987 F.2d 142, 150 (2d Cir. 1993). [*80]

[HN3] The Rules do not require the plaintiff to set out in detail the facts upon which the claim is based, but only that a defendant be given "fair notice of what the . . . claim is and the grounds upon which it rests." *Conley*, 355 U.S. at 45-46. Individual allegations, however, that are so baldly conclusory that they fail to give notice of the basic events and circumstances of which the plaintiff complains are meaningless as a practical matter and, as a matter of law, insufficient to state a claim. See *Barr v. Abrams*, 810 F.2d 358, 363 (2d Cir. 1987).

B. 1692c(a)(2)

Plaintiff's first claim for relief relies on [HN4] § 1692c(a)(2), which provides in relevant part:

(a) Without the prior consent of the consumer given directly to the debt collector or the express permission of a court of [**5] competent jurisdiction, a debt collector may not communicate with a consumer in connection with the collection of any debt ... (2) if the debt collector knows the consumer is represented by an attorney with respect to such debt and has knowledge of, or can readily ascertain, such attorney's name and address

15 U.S.C. § 1692c(a)(2). [HN5] Courts have construed the "knowledge" component of 1692c(a)(2) to require that a debt collector possess "actual knowledge" that the debtor was represented by an attorney. See, e.g., *Burger v. Risk Mgmt. Alternatives, Inc.*, 94 F. Supp. 2d 291, 293 (N.D.N.Y. 2000); *Countryman v. Solomon and Solomon*, 2000 U.S. Dist. LEXIS 1397, No. 99- CV-1548, 2000 WL 156837, at *2 (N.D.N.Y. Feb. 8, 2000); *Filsinger v. Upton, Cohen & Slamowitz*, 2000 U.S. Dist. LEXIS 1824, No. 99- CV-1393, 2000 WL 198223, at *2 (N.D.N.Y. Feb. 18, 2000); *Hubbard v. National Bond and Collection Assocs., Inc.*, 126 B.R. 422, 426 (D. Del. 1991) (citing cases). Moreover, "a 'creditor's knowledge that the consumer has an attorney is not automatically imputed to the debt collector.'" *Burger*, 94 F. Supp. 2d at 293 (quoting *Hubbard*, 126 B.R. at 427 [**6] (quoting FTC Statements of General Policy or Interpretation Staff Commentary on the Fair Debt Collection Practices Act, 53 Fed. Reg. 50,097, 50,104 (Dec. 13, 1988) ("FTC Commentary"))); *Degonzague v. Weiss, Neuren, & Neuren*, 89 F. Supp. 2d 282, 284 (N.D.N.Y. 2000).

Notwithstanding this general principle, this Court has recognized that a strict reading of these requirements would allow creditors and debt collectors to maintain practices which would "blatantly circumvent the intent of the FDCPA." *Powers v. Professional Credit Servs., Inc.*, 107 F. Supp. 2d 166, 168 (N.D.N.Y. 2000). In *Powers*, this Court imputed knowledge to the debt collector when, at the time the debtor's file was transferred, the creditor knew that he was represented by an attorney. See *id.* The Court reasoned that permitting creditors and debt collectors to engage in such limited disclosure as existed in that case "would utterly eviscerate the protections afforded debtors by the FDCPA." *Id.*

For example, a debt collector wishing to defeat the purposes of the act could establish a practice of not seeking out information regarding the debtor's representation by [**7] counsel. Whenever a creditor discovered that a debtor was represented by counsel, it could transfer the file to a debt collector with such a practice and allow them to contact the debtors directly without fear of liability under the FDCPA. Therefore, under those circumstances, knowledge will be imputed to the debt collector. However, where the debt collector has a procedure in place by which it asks creditors whether the debtor is represented by counsel and the creditor withholds the information, either mistakenly or intentionally, the court cannot fairly impute the creditor's knowledge to the innocent debt collector.

Although the FTC Commentary states that knowledge will not "automatically" be imputed to the debt collector, it does not state that such knowledge cannot be imputed. Thus, imputing knowledge to the [**81] debt collector when it does not inquire whether the debtor is

represented by counsel gives full meaning both to the FTC Commentary and to the protections afforded by the FDCPA.

In this case, Defendant claims that it had a long-standing procedure in place for creditors to indicate at the time of the file transfer whether the debtor was represented by counsel. Indeed, it claims [**8] that the procedure had been followed on countless other occasions by the creditor in this case, FSC, and with Plaintiff's attorneys in this case, the Law Office of Andrew F. Capoccia. However, Defendant's argument is one more properly brought pursuant to Rule 56 in the event that discovery establishes that there is no material factual dispute as to the procedure established and followed by Defendants.¹

1 Defendant may also be able to establish that it is protected by § 1692k(c)'s "bona fide error" defense, which provides that "[HN6] a debt collector may not be held liable under this subchapter if the debt collector shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error." 15 U.S.C. § 1692k(c). This defense, however, is also appropriately brought on summary judgment.

At this time, the Court holds that Plaintiff's complaint states a claim for [**9] which relief may be granted, in that it alleges that Defendant knew that the plaintiff was represented by counsel. *See Burger*, 94 F. Supp. 2d at 294. It cannot be said that Plaintiff can prove no set of facts which would entitle him to relief. Accordingly, the Court denies Defendant's motion to dismiss as to Plaintiff's first claim for relief.

C. 1692c(c)

Section 1692c(c) of the FDCPA states, in pertinent part:

[HN7] If a consumer notifies a debt collector in writing that the consumer refuses to pay a debt or that the consumer wishes the debt collector to cease further communication with the consumer, the debt collector shall not communicate further with the consumer with respect to such debt

15 U.S.C. § 1692c(c). The plain language of the statute requires a written communication directly to the debt collector. Accordingly, in order [HN8] to prevail on a claim pursuant to § 1692c(c), a plaintiff must establish

that he notified the defendant debt collector in writing that he refused to pay the debt or that communications should cease. *See O'Connor v. Check Rite*, 973 F. Supp. 1010, 1017 (D. Colo. 1997). [**10]

Here, Plaintiff's complaint alleges that Defendant violated § 1692c(c) because it contacted Plaintiff by mail after FSC, Defendant's client, had been notified in writing that Plaintiff wished FSC to cease further communication with Plaintiff. Plaintiff does not allege that he ever communicated with Defendant regarding the debt or that he ever requested that Defendant not communicate with him. To the contrary, the only alleged communication was with FSC. Therefore, Plaintiff's complaint fails to state a claim upon which relief may be granted under § 1692c(c) and the Court grants Defendant's motion to dismiss as to Plaintiff's second claim for relief.

D. 1692e

Plaintiff's third claim for relief relies on § 1692e of the FDCPA. [HN9] Section 1692e generally forbids the use of "any false, deceptive, or misleading representation or means in connection with the collection of a debt." 15 U.S.C. § 1692e.

Plaintiff alleges that the second demand letter sent to Plaintiff by Defendant, seeking payment of a debt which had already been paid in full pursuant to a settlement agreement, was false and misleading in violation of § 1692e. Defendant contends, however, [**11] that it made an unintentional error and argues that § 1692e requires that a defendant make a knowing misrepresentation before a violation occurs.

[*82] The Court, however, cannot agree with Defendant's reading of the statute. [HN10] The Second Circuit has held that the FDCPA is a strict liability statute. *See Russell v. Equifax A.R.S.*, 74 F.3d 30, 33 (2d Cir. 1996); *Bentley v. Great Lakes Collection Bureau*, 6 F.3d 60, 63 (2d Cir. 1993). "The degree of a defendant's culpability may only be considered in computing damages." *Bentley*, 6 F.3d at 63.

Defendant's rely on a decision by the Sixth Circuit applying § 1692k(c)'s "bona fide error" defense to protect a defendant from liability where the defendant made what was "at most a clerical error" when it had procedures in place "reasonably adopted to avoid any such error." *Smith v. Transworld Systems, Inc.*, 953 F.2d 1025, 1031 (6th Cir. 1992). However, because § 1692e "imposes strict liability on any debt collector that fails to comply with the [FDCPA's] provisions, knowledge or intent is only a factor in the liability stage of the proceedings and need not be pled to state a prima [**12] facie case." *Kaplan v. Assetcare, Inc.*, 88 F. Supp. 2d 1355, 1362 (S.D. Fla. 2000). Accordingly, as discussed above in Part II.A., Defendant's "bona fide error" defense

is more appropriately brought on summary judgment. Therefore, the Court denies Defendant's motion to dismiss as to Plaintiff's third claim for relief.

E. 1692k(a)(3)

Defendant moves for sanctions pursuant to *section 1692k(a)(3)* of the FDCPA, which provides in relevant part:

[HN11] On a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment, the court may award to the defendant attorney's fees reasonable in relation to the work expended and costs.

15 U.S.C. § 1692k(a)(3). However, "[HN12] given the necessity of determining that an action was brought in bad faith and for the purpose of harassment, such a finding cannot be made until the merits of the case are determined." *Boyce v. Computer Credit, Inc.*, 1997 U.S. Dist. LEXIS 14879, *3, No. C-3-96-148, 1997 WL 661856, at *1 (S.D. Ohio Sept. 3, 1997) (citing *Villarreal v. Snow*, 1997 U.S. Dist. LEXIS 2852, No. 95- C-2484,

1997 WL 116801, at *3 (N.D. Ill. 1997)). Accordingly, Defendant's [**13] motion is denied as premature. However, in the event further discovery reveals that Plaintiff's claim is brought in bad faith, Defendant will be entitled to the relief sought.

III. CONCLUSION

Accordingly, it is

ORDERED that Defendant's motion to dismiss is GRANTED as to Plaintiff's second cause of action and DENIED in all other respects;

ORDERED that Plaintiff's second claim for relief be DISMISSED;

ORDERED that Defendant's motion for sanctions is DENIED without prejudice to refile; and it is further

ORDERED that the clerk serve a copy of this order on all parties by regular mail.

IT IS SO ORDERED.

LAWRENCE E. KAHN

United States District Judge

DATED: February 21, 2001

Albany, New York

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF MISSISSIPPI**

IN RE:

WILLIE A. DIXON,

CASE NO. 07-50578-NPO

DEBTOR.

CHAPTER 13

WILLIE A. DIXON

PLAINTIFF

V.

ADV. PROC. NO. 09-05009-NPO

BAY FINANCIAL, INC.

DEFENDANT

**MEMORANDUM OPINION DENYING MOTION TO DISMISS OR,
IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT**

On October 15, 2009, this matter came on for hearing (the “Hearing”) on the Motion to Dismiss or in the Alternative for Summary Judgment (the “Motion”) (Adv. Dkt. No. 17) and the Memorandum in Support of Motion to Dismiss or in the Alternative for Summary Judgment (the “Brief”) (Adv. Dkt. No. 18), both filed by William P. Wessler on behalf of Bay Financial, Inc. (“Bay Financial”), and the Memorandum in Opposition to Defendant’s Motion to Dismiss or Alternatively for Summary Judgment (the “Response”) (Adv. Dkt. No. 20), filed by Patrick A. Sheehan on behalf of Willie A. Dixon (the “Debtor”) in this adversary proceeding (the “Adversary”). Having considered the pleadings and arguments of counsel, and being fully advised in the premises, the Court finds that the Motion is not well-taken and should be denied as set forth herein. Specifically, the Court finds as follows:¹

¹ The following constitutes the findings of fact and conclusions of law of the Court pursuant to Federal Rule of Bankruptcy Procedure (“Bankruptcy Rule”) 7052.

Jurisdiction

This Court has jurisdiction over the parties and the subject matter of this proceeding pursuant to 28 U.S.C. § 1334. This is a core proceeding pursuant to 28 U.S.C. § 157 (b)(2)(A). Notice of the Hearing was proper under the circumstances.

Factual Allegations

According to the Complaint for Injunctive Relief, Damages, and Other Relief (the “Adversary Complaint”) (Adv. Dkt. No. 1), the Debtor makes the following allegations:² The Debtor filed a voluntary Chapter 13 petition and notice of the filing was sent to Bay Financial. Bay Financial lent money to the Debtor and filed a proof of claim which displayed the Debtor’s social security number, date of birth, and financial account numbers, in violation of federal statute and Bankruptcy Rule 9037, thus exposing the Debtor, intentionally or negligently, to identity theft.

The Adversary Complaint sets forth four (4) counts as follows:

- (A) The first count seeks injunctive relief to remove the proof of claim from public access;
- (B) The second count alleges violation of the Gramm-Leach-Bliley Act, 15 U.S.C. §§ 6801-6809;
- (C) The third count alleges contempt of court and violation of the Uniform Local Rules for the United States Bankruptcy Courts for the Northern and Southern District of Mississippi, Bankruptcy Rule 9037 and Civil Rule 5.2; and,
- (D) The fourth count alleges invasion of privacy under Mississippi state law.

² In considering the Motion pursuant to Federal Rule of Civil Procedure (“Civil Rule”) 12(b)(6), the Court must “liberally construe the [Debtor’s] complaint in favor of the [Debtor as the non-moving party] and assume the truth of all pleaded facts.” Oliver v. Scott, 276 F.3d 736, 740 (5th Cir. 2002). Civil Rule 12(b)(6) is made applicable pursuant to Bankruptcy Rule 7012.

Issue

Bay Financial's Motion addresses only the first three claims set forth in the Adversary Complaint and asserts that the action should be dismissed because "there is no private right of action for damages for the violation alleged in the complaint." *See* Motion, ¶ 2.

Standard of Review

A. Standard of Review for Motion to Dismiss

In considering a motion under Civil Rule 12(b)(6), made applicable pursuant to Bankruptcy Rule 7012, the "court accepts all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff." Martin K. Eby Constr. Co. v. Dallas Area Rapid Transit, 369 F.3d 464, 467 (5th Cir. 2004). To overcome a 12(b)(6) motion, the Debtor must plead "enough facts to state a claim to relief that is plausible on its face." Blackstock v. Sedgwick Claims Mgmt. Servs., Inc., 2009 WL 2754761, at * 1 (N.D. Miss. Aug. 26, 2009) (*citing* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L.Ed. 2d 929 (2007); *accord* Ashcroft v. Iqbal, – U.S. –, 129 S. Ct. 1937, 1948-51, 173 L.Ed. 2d 868 (2009)). "Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all allegations in the complaint are true (even if doubtful in fact)." *Id.* (*citing* Twombly, 550 U.S. at 555) (internal citations and footnote omitted). "Conversely, 'when the allegations in a complaint, however true, could not raise a claim of entitlement to relief, this basic deficiency should be exposed at the point of minimum expenditure of time and money by the parties and the court.'" *Id.* (*quoting* Cuvillier v. Taylor, 503 F.3d 397, 401 (5th Cir. 2007)).

B. Standard of Review for Motion for Summary Judgment

Civil Rule 56, made applicable to bankruptcy proceedings pursuant to Bankruptcy Rule 7056, states that summary judgment is properly granted only when, viewing the evidence in the light most favorable to the nonmoving party, the pleadings, depositions, answers to interrogatories, and admissions, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). An issue is genuine if “there is sufficient evidence favoring the nonmoving party for a fact finder to find for that party,” and material if it would “affect the outcome of the lawsuit under the governing substantive law.” Phillips Oil Co. v. OKC Corp., 812 F.2d 265, 272-73 (5th Cir. 1987). Civil Rule 56(e) further provides, in relevant part:

When a motion for summary judgment is properly made and supported as provided in this rule, an opposing party may not rest upon the mere allegations or denials of the adverse party’s pleading, but the adverse party’s response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.

Fed. R. Civ. P. 56(e).

Thus, the moving party bears the initial responsibility of informing the Court of the basis for its motion, and of identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact. Celotex, 477 U.S. at 323, 106 S.Ct. at 2552-53. Once the moving party has made its required showing, the nonmovant must go beyond the pleadings and by its own affidavits or by depositions, answers to interrogatories, and admissions on file designate specific facts showing a genuine issue for trial. Celotex, 477 U.S. at 324, 106 S.Ct. at 2553. In any event, “[t]he movant has the burden of establishing the absence of a genuine issue of material fact

and, unless he has done so, the court may not grant the motion, regardless of whether any response was filed.” Hibernia Nat’l Bank v. Administracion Central Sociedad Anonima, 776 F.2d 1277, 1279 (5th Cir. 1985); *see also* Medlock v. Commission for Lawyer Discipline, 24 S.W.3d 865, 870 (C.A. Tex. 2000).

Discussion and Analysis

Bay Financial argues that the Debtor has no private right of action under the statutes or rules relied upon by the Debtor as a basis for this action. *See* Brief, p. 1. The Court need not address that assertion, however, because the Court may use its equitable powers under § 105(a) to enforce Bankruptcy Rule 9037 and Civil Rule 5.2. *See* §105(a); In re Sanchez, 372 B.R. at 309-12. Section 105(a) states:

The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

§ 105(a).

The Court has authority under § 105(a) to issue sanctions pursuant to its civil contempt power. In Placid Ref. Co. v. Terrebonne Fuel & Lube, Inc. (In re Terrebonne Fuel & Lube, Inc.), 108 F.3d 609, 613 (5th Cir. 1997), the Fifth Circuit held that, “[t]he language of [§ 105] is unambiguous. Reading it under its plain meaning, we conclude that a bankruptcy court can issue any order, including a civil contempt order, necessary or appropriate to carry out the provisions of the bankruptcy code.” *See also* In re Harris, 297 B.R. 61, 70 (Bankr. N.D. Miss. 2003)(“[Section] 105 provides a bankruptcy court with statutory contempt powers, in addition to whatever inherent contempt powers the court may have.”).

The Fifth Circuit also has held that, “[j]udicial sanctions in civil contempt proceedings may, in a proper case, be employed for either or both of two purposes: to coerce the defendant into compliance with the court’s order, and to compensate the complainant for losses sustained.” American Airlines, Inc. v. Allied Pilots Ass’n, 228 F.3d 574, 585 (5th Cir. 2000)(*quoting* United States v. United Mine Workers of America, 330 U.S. 258, 303-04, 67 S.Ct. 677, 91 L.Ed. 884 (1947)).

A bankruptcy court in Tennessee held that, “[a]ppropriate fines for civil contempt generally include the parties’ actual damages incurred and reasonable attorney’s fees.” French v. American Gen. Fin. Svcs., (In re French), 401 B.R. 295, 314 (Bankr. E.D. Tenn. 2009)(*quoting* Braun v. Champion Credit Union (In re Braun), 152 B.R. 466, 474 (N.D. Ohio 1993)). The French court went on to hold that “remedies are within the discretion of the court, and the party seeking contempt ‘must put on credible evidence showing the amount of the loss sustained.’” Id. (*quoting* Distad v. United States (In re Distad), 392 B.R. 482, 487 (Bankr. D. Utah 2008)).

It is undisputed that Bay Financial violated Bankruptcy Rule 9037 and Civil Rule 5.2 by filing a proof of claim that included personal identifiers of the Debtor. The Debtor has, therefore, pled sufficient facts to withstand the Motion to Dismiss. This Court has the authority pursuant to § 105(a) to remedy the violation of Bankruptcy Rule 9037 and Civil Rule 5.2. Just as the Court may grant injunctive relief to remedy a violation of Bankruptcy Rule 9037 and Civil Rule 5.2 as it has by entering the Order Restricting Public Access to Proof of Claim and Allowing Substitution of Redacted Claim (Dkt. No. 64), so too may it compensate the Debtor for losses sustained as a result of Bay Financial’s violation if those losses are proven by credible evidence.

In this case, a genuine issue of material fact exists as to whether the Debtor has suffered a loss as a result of Bay Financial's public disclosure of personal identifiers. While the deposition excerpt attached to Bay Financial's Brief demonstrates that the Debtor has not suffered the types of damages covered by the questions in the deposition, the deposition excerpt is not dispositive on the issue of whether the Debtor has suffered any compensatory loss as a result of Bay Financial's actions. The Court also notes that it has the discretion to deny motions for summary judgment and allow parties to proceed to trial so that the record might be more fully developed for the trier of fact. Kunin v. Feofonov, 69 F.3d 59, 62 (5th Cir. 1995); Black v. J.I. Case Co., 22 F.3d 568, 572 (5th Cir. 1994); Veillon v. Exploration Services, Inc., 876 F.2d 1197, 1200 (5th Cir. 1989).

Conclusion

For the reasons stated herein, the Court finds that Bay Financial's Motion should be denied. A separate order consistent with this Memorandum Opinion will be entered by the Court in accordance with Bankruptcy Rules 7054 and 9021.



Neil P. Olack
United States Bankruptcy Judge
Dated: February 5, 2010

Q - HAMP

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME:

**Chapter 13 No.
Our File No.**

ADDRESS:

SSN:

Debtor.

PLAINTIFF,

Adv. Proc. No. 10- _____

versus

BAC HOME LOANS SERVICING COMPANY, LP

DEFENDANT.

**COMPLAINT
(HAMP, ECOA and UDAP)**

COMES NOW the Plaintiff, _____ (hereinafter the "Plaintiff") by counsel, and for his complaint against the Defendant, alleges as follows:

INTRODUCTION

1. This is a case arising from Defendant's misrepresentations, violation of the Federal Equal Credit Opportunity Act ("ECOA") 15 U.S.C. § 1691, *et seq* and the North Carolina Unfair and Deceptive Act and Practices Laws, G.S. Section 75-50 *et seq*, and North Carolina Common Law. ECOA regulates what a creditor must do when it receives a consumer's application for credit. Most importantly for this action, it requires that, within thirty days of receiving an application for credit, the creditor must notify the applicant of its action on the application. And if the creditor takes an adverse action against a consumer, it must provide written notice of the adverse action and an accurate statement of the reasons for the denial.

2. In this case, Defendant, BAC HOME LOANS SERVICING COMPANY, LP, a subsidiary of BANK OF AMERICA, N.A. a mortgage loan servicing company, received Plaintiff's application for a loan modification under the Treasury's Making Home Affordable Modification Program (hereafter HAMP). Plaintiff's application also requested consideration for any refinancing options that were available. Though Defendant received Plaintiff's completed application and all required supporting financial documentation, Defendant, in violation of ECOA, unreasonably failed to provide Plaintiff with notice of its adverse action taken on Plaintiff's application within thirty days of receiving his completed application. Indeed, Defendant sent notification of its final decision more than seven months after receiving

Plaintiff's initial application. During the same time period, Defendant also made representations to Plaintiff that his loan modification application would be approved when it knew or had reason to know that his application had been denied. Plaintiff relied on these representations and forwent opportunities to secure alternative financing at a time when he was most qualified to obtain such financing. Finally, in addition to its misrepresentations and violations of ECOA, Defendant communicated with Plaintiff, a debtor, when it knew or had reason to know that he was represented by an attorney, in violation of UDAP.

3 As a result of Defendant's misconduct and failure to act, Plaintiff has incurred damages and faces a substantially greater risk of losing his home to foreclosure.

JURISDICTION

4. This court has subject-matter jurisdiction pursuant to 28 U.S.C. § 1331, since this action arises under the Constitution and laws of the United States, specifically ECOA, 15 U.S.C. § 1691e(f). The Court has supplemental jurisdiction over the state law claims pursuant to 28 U.S.C. § 1367 in that they arise from and form part of the same case and controversy.

5. Venue is proper in this district pursuant to 28 U.S.C. 1391(b) inasmuch as the unlawful practices are alleged to have been committed in this district, Defendant regularly conducts business in this district, and the named Plaintiff resides in this district.

PARTIES

6. Plaintiff is a citizen and resident of Cleveland County, NC residing at _____.

7. Defendant, BAC HOME LOANS SERVICING COMPANY, LP (hereafter BAC) is a subsidiary of Bank of America, N.A., and is located at 4500 Park Granada, Calabasas, California 91302. At all times relevant hereto it was a "creditor" as governed and defined by ECOA, 15 U.S.C. § 1691(a)-(e).

FACTS

A. The Making Home Affordable Modification Program

8. In 2009, the national housing foreclosure crisis exploded, with approximately 2.2 million foreclosure actions started last year alone. Responding to the growing crisis, the Obama administration enacted the Homeowner Affordability and Stability Plan (HASP) designed to help 9 million homeowners restructure or refinance their mortgages to avoid foreclosure. As part of this plan, the U.S. Department of the Treasury ("Treasury") announced the Making Home Affordable Modification Program ("HAMP"). The Making Home Affordable Modification Program establishes a standardized and streamlined process for servicers to follow in evaluating and conducting modifications of existing mortgages, and also provides meaningful incentives to servicers, investors and borrowers to encourage loan modifications. The framework for the implementation and the protocol for HAMP have been outlined in a series of directives issued by the Treasury, Fannie Mae and Freddie Mac.

9. To participate in the Making Home Affordable Modification Program, companies that service mortgages ("loan servicers") not owned by Government-Sponsored Enterprises such

as Fannie Mae and Freddie Mac (“non-GSE loans”) must enter into a contract (the “HAMP Contract”) with Fannie Mae, as financial agent of the United States and agree to comply with the terms of the HAMP Contract, the program directives and all other program documentation issued by the program.

10. However, for all loans owned by Government Sponsored Enterprises (“GSE loans”) HAMP participation is mandatory regardless of whether the company servicing the loan has executed a contract with Fannie Mae.

11. Plaintiff has a GSE loan that is owned by Freddie Mac.

12. Under Freddie Mac servicing guidelines, only borrowers who meet certain eligibility requirements will be offered a modification of their existing mortgage. (Freddie Mac *Single-Family Seller/Servicer Guide*, C.65.1: Overview). Freddie Mac guidance for implementation of HAMP can be found on its website at <http://www.freddiemac.com/sell/guide/>.

13. To be considered eligible for a loan modification, the loan must meet the following characteristics:

- a. the current monthly mortgage payment (which includes payment toward principal, interest, taxes, insurance and association dues (PITIA)) must exceed 31% of the homeowner’s monthly gross income;
- b. the mortgage must relate to the homeowner’s primary residence
- c. the loan must have been originated before January 1, 2009
- d. the amount owed on the first mortgage must be equal to or less than \$729,750;
- e. the homeowner must be experiencing “hardship” in paying their mortgage; and
- f. The homeowner may be either current or delinquent on the mortgage. However, if the borrower is less than 60 days delinquent, the borrower must first be determined to be in imminent default in order to be eligible for HAMP. (Freddie Mac *Single-Family Seller/Servicer Guide*, C.65.1: Overview).

14. Additionally, if the homeowner is current or less than 31 days delinquent, the servicer must first evaluate the borrower for refinancing options before considering them for a HAMP modification. (Freddie Mac *Single-Family Seller/Servicer Guide*, C.65.4: Overview).

15. If the homeowner meets the initial eligibility requirements listed above and does not qualify for refinancing, the loan servicer is required to perform a “net present value test” to determine whether it would be more profitable for it to modify the loan than to foreclose. The net present value test calculates this result by comparing the net present value of the loan after it is modified with the net present value of the loan in foreclosure. (Freddie Mac *Single-Family Seller/Servicer Guide*, C.65.6: Underwriting the Borrower).

16. If the “net present value test” reflects a higher net present value in the modification scenario, the loan servicer is required to modify the loan. (Freddie Mac *Single-Family Seller/Servicer Guide*, C.65.6: Underwriting the Borrower).

17. To be considered for HAMP, a homeowner must first submit the following documents to their loan servicer:

- a. Request for a Modification and Hardship Affidavit Form (RMA);
- b. IRS 4506-T Form; and
- c. Evidence of income (Freddie Mac *Single-Family Seller/Servicer Guide*, C.65.5: Underwriting the Borrower).

18. However, prior to March 1st, servicers were permitted to use their own intake forms in place of the documents listed above. (Freddie Mac *Single-Family Seller/Servicer* 2009-28 Bulletin).

19. Within 30 calendar days following receipt of an Initial Application Package or complete verification documents, the loan servicer is required to complete its verification and evaluate the homeowner’s eligibility for HAMP and, if the homeowner is qualified, send the borrower a Trial Period Plan Notice (TPP) and place the borrower in a Trial Period Plan. (Freddie Mac *Single-Family Seller/Servicer Guide*, C.65.5.1: Acknowledgment of Initial Package and verification of eligibility).

20. If the homeowner is placed in a Trial Period Plan, the homeowner’s original debt obligation is deferred. (Freddie Mac *Single-Family Seller/Servicer Guide*, C.65.7: Modification Process).

21. Upon successful completion of the Trial Period, the homeowner is then eligible for permanent modification of their loan. (Freddie Mac *Single-Family Seller/Servicer Guide*, C.65.7: Modification Process).

22. For borrowers who are not approved for a Trial Period Plan or modification agreement, servicers are required to send a borrower notice providing the primary reason or reasons for the non-approval and should clearly state that the borrower was considered for but is not eligible for HAMP. The servicer must describe other Freddie Mac home retention workout options for which the borrower may be eligible in the borrower notice. The borrower notice must identify the steps the borrower must take in order to be considered for the workout options identified. If the servicer has already approved the borrower for another workout option, information necessary to participate in or complete the workout option should be included. The Borrower Notice must also comply with all applicable laws and regulations, including the Equal Credit Opportunity Act and Regulation B when applicable to the transaction. (Freddie Mac *Single-Family Seller/Servicer Guide*, C.65.12: Disclosures and Communications with Borrowers).

Plaintiff’s HAMP Application and Defendant BAC’s Contradictory and Unreasonably Delayed Response

23. Plaintiff is a homeowner who did everything right. He had good credit and an excellent mortgage payment history with Defendant.

24. In the beginning of February 2009, Plaintiff learned that his employer of 13 years would be unable to give its employees any raises or bonuses. He also learned that his health insurance deductible would be more than doubling and would be providing him with less coverage. This news, unfortunately, came around the same time period that Plaintiff also had to fund major unforeseeable expenditures for his car, appliances and home.

25. Realizing that the loss of income would jeopardize his ability to pay his mortgage, Plaintiff decided to be proactive about his financial situation.

26. Beginning in or around February 2009, Plaintiff began an effort to obtain a HAMP modification through Defendant, the servicer of his loan. Plaintiff was a good candidate for a loan modification because, although he did not get paid as much as he had previously, he still received sufficient income to make some sort of payment on his loan, albeit a moderately reduced payment.

27. Over the course of several months, Plaintiff attempted to contact Defendant through its customer service representatives and provided them with documentation of his financial information and evidence of his income. Specifically:

a. Plaintiff spoke with one of Defendant's customer service representatives on February 3, 2009 on the telephone and was advised by this representative that a loan officer would be contacting him soon.

b. On March 25, 2009, Plaintiff again telephoned Defendant and spoke with a representative who told him that a loan officer would contact him soon.

c. On May 7, 2009, Plaintiff contacted Defendant and spoke with a representative who provided him with a new telephone number to request assistance. Plaintiff contacted that number and a customer representative of Defendant obtained his contact information and advised him that he would be hearing from her soon.

d. On May 26, 2009, Plaintiff called Defendant and spoke with a representative who advised him that Defendant was implementing a new plan that could provide him with assistance and that he would follow up with Plaintiff once he obtained all of the details.

e. On July 13, 2009, Plaintiff called Defendant again and spoke with a new representative and explained to her that he had been requesting assistance since February. The representative transferred him to another representative who took his contact information and told him that she would contact him soon.

28. Unfortunately, no representative of Defendant ever returned Plaintiff's phone calls.

29. Frustrated with his fruitless attempts at obtaining assistance on his own, Plaintiff sought out the services of an attorney who would negotiate with the lender on the homeowner's behalf.

30. Plaintiff, through counsel, applied for a HAMP loan modification and for consideration for refinancing with Defendant on December 14, 2009. As part of his application for help, Plaintiff provided Defendant with information and documentation related to his financial circumstances.

31. On December 16, 2009, Defendant, through electronic mail, advised Plaintiff's counsel that Plaintiff needed to resubmit his application and financial documentation because Defendant had appointed a new loan negotiator to handle his case.

32. On December 17, 2009, Plaintiff, through counsel, resubmitted his application through electronic mail and included all of the requested documentation relating to his income and financial circumstance.

33. On December 17, 2009, Defendant, through electronic mail, confirmed the receipt of Plaintiff's HAMP application and financial documentation.

34. On January 20, 2010, Plaintiff, through counsel, contacted Defendant through electronic mail to request a status on his HAMP application. Defendant replied that Plaintiff's application was currently under review for a loan modification.

35. On February 12, 2010, Plaintiff, through counsel contacted Defendant, again, through electronic mail to request a status on his HAMP application. Defendant replied that there was no decision made on the application and that it would escalate Plaintiff's case for expedited assistance.

36. On February 25, 2010, Plaintiff, through counsel contacted Defendant through electronic mail to request a status on his application. Defendant responded that a broker's price opinion (BPO) had been ordered for the property and that once received, Defendant would have everything it needed to make a determination on his application. Defendant also requested that Plaintiff submit updated pay stubs reflecting his current income.

37. On February 26, 2010, Plaintiff, through counsel, electronically submitted to Defendant his most recent pay stubs for the pay period covering December to the end of February 2010.

38. On March 9, 2010, Plaintiff, through counsel, again, requested the status of his application. Defendant replied that there had been changes to the HAMP program and that his case fell within the group affected by the changes. Defendant did not state why the changes caused a delay nor did anyone provide Plaintiff with any indication as to when he would receive a decision.

39. On March 22, 2010, Plaintiff, through counsel, again contacted Defendant through electronic mail to request the status of his HAMP application. Defendant responded that

it was reviewing client's application for the HAMP program but that no documents had yet been generated.

40. On April 06, 2010, Plaintiff, through counsel, once again contacted Defendant through electronic mail to inquire of the status on his HAMP application. On the same day, Defendant replied that there was still no decision on his application.

41. On May 11, 2010, Plaintiff checked Defendant's online web service and discovered that his loan modification had been approved. (Defendant provides online banking services where its customers can perform a variety of functions, i.e. view balance and transaction information for linked accounts.) Defendant's website stated that Plaintiff's loan modification had been approved and that a negotiator would be getting in contact with him by June 29, 2010.

42. On June 15, 2010, Plaintiff, through counsel, contacted Defendant through electronic mail regarding the status of the application because he had not yet heard from a loan negotiator or received anything from Defendant concerning the loan modification. Defendant replied that there was no recent activity documented on Plaintiff's application.

43. On June 26th, 2010, Plaintiff, through counsel, contacted Defendant through telephone and spoke with a representative regarding the status of his application. Defendant's agent advised Plaintiff's counsel that the loan modification had been approved and that Plaintiff should receive something within the next 30 days.

44. On July 30, 2010, contrary to all prior communications, Plaintiff received a letter from Defendant stating that his request for a modification had been denied. There was no explanation for this changed decision, no explanation for the denial of credit and the denial completely ignored the several months of statements that the modification had been approved. The letter also failed to state whether Plaintiff was considered for any refinancing as he requested.

45. The above-alleged conduct of Defendant in handling Plaintiff's HAMP application was malicious, willful, grossly negligent and/or with reckless disregard for the rights and interests of Plaintiff. Defendant had everything it needed to make a decision on his application on or before December 17th, 2009. However, it failed to provide Plaintiff with its final decision until more than seven months later, meanwhile providing a litany of incorrect and misleading information, including several statements that the loan modification had been granted.

46. Relying on Defendant's statements, Plaintiff depleted half of his savings in an attempt to stay current and continued trying to pay his mortgage. The result is that Plaintiff is now behind in his mortgage payments and without a HAMP modification or refinancing. Had Defendant not misled Plaintiff as to the status of his application and notified him of its denial within the 30 day required time period, Plaintiff could have promptly corrected any misinformation that may have led to the denial or obtained alternative refinancing of his mortgage at a time when he was most qualified for refinancing. The value of Plaintiff's property has now substantially decreased and his ability to obtain alternative refinancing is less likely, which places him at a greater risk of losing his home to foreclosure.

CAUSES OF ACTION

A. First Claim – Violation of the Equal Credit Opportunity Act (15 U.S.C. § 1691(d))

47. Plaintiff reiterates and incorporates every allegation above as if set forth herein in full.

48. Plaintiff is an “applicant” as governed by ECOA, 15 U.S.C. §1691a(b).

49. Defendant was a “creditor” as governed and defined by ECOA, 15 U.S.C. § 1691(a)(e) at all times relevant hereto.

50. 15 U.S.C. § 1691(d)(1) provides that “within thirty days...after receipt of a completed application for credit, a creditor shall notify the applicant of its action on the application.” 15 U.S.C. §1691 (d)(1).

51. The accompanying Regulation B, issued by the Board of Governors of the Federal Reserve System pursuant to ECOA, further provides: “A creditor shall notify an applicant of action taken within: (i) 30 days after receiving a completed application concerning the creditor’s approval of, counteroffer to, or adverse action on the application.” 12 C.F.R. § 202.9(a)(1)(i).

52. Additionally, 15 U.S.C. §1691(d)(2) requires “that each applicant against whom “adverse action” is taken shall be entitled to a statement of reasons for such action from the creditor.” 15 U.S.C. §1691(d)(2).

53. 15 U.S.C. §1691 (d)(6) defines “adverse action” as a denial or revocation of “credit”, a change in the terms of an existing credit arrangement, or a refusal to grant credit in substantially the amount or on substantially the terms requested. 15 U.S.C. §1691 (d)(6)

54. The term “credit” means the right granted by a debtor to defer payment of a debt or to incur debts and defer its payment...and defer payment thereof. 15 U.S.C. § 1691a(d); 12 C.F.R. §202.2(j).

55. Plaintiff’s application for a loan modification, and in the alternative refinancing, under the Making Home Affordable Program was an application for “credit” as defined by 15 U.S.C. § 1691a(d) and 12 C.F.R. §202.2(j).

56. Plaintiff provided Defendant with a complete application for credit on December 17, 2009.

57. Defendant failed to evaluate and make a determination on Plaintiff’s application within 30 calendar days of receiving Plaintiff’s completed application as required by HAMP directives.

58. Instead, Defendant grossly exceeded the time frame required by that of the HAMP directives and took approximately seven months to evaluate and communicate its decision to Plaintiff.

59. In failing to evaluate Plaintiff's application for credit in the time period required by the HAMP directives, Defendant effectively denied him credit, and thereby took "adverse action" –as defined by ECOA –on Plaintiff's application.

60. Plaintiff did not receive written notice from Defendant of the adverse action taken on his application until July 30, 2010, approximately seven months from the date that he applied for credit.

61. Additionally, Defendant's July 30, 2010 written notification was not in compliance with the notification requirements set forth in ECOA, 15 U.S.C. §1691(d)(2), as the notification failed to provide Plaintiff with a specific statement of reasons for the adverse action taken.

62. The above failure of Defendant to notify Plaintiff of the adverse action taken on his application within thirty days from receipt of his completed application for credit as mandated by 15 U.S.C. §1691(d)(1), §1691(d)(2) and 12 C.F.R. §202.9(a)(1)(i) was a substantive violation of ECOA.

63. As a result of the above ECOA violation, Plaintiff has suffered substantial actual damages in the following:

- a. the loss of his rights to explain or quickly rectify and address any errors or problems in his application for credit;
- b. the loss of the credit itself; and
- c. frustration, anger, humiliation, fear, embarrassment and other emotional and mental anguish.

64. As a result of the above alleged ECOA violations, Defendant is liable to Plaintiff for his actual damages pursuant to 15 U.S.C. §1691(e)(a), for punitive damages of \$10,000.00 against Defendant pursuant to 15 U.S.C. § 1691e(b) and for attorneys fees and costs pursuant to 15 U.S.C. § 1691(e)(d) and 12 C.F.R. §202.16(b).

65. Plaintiff is also entitled to equitable relief against Defendant and asks this Court to:

- a. Enter an Order declaring that Defendant's conduct is a violation of ECOA, insofar as it failed to provide notice to Plaintiff of its action on his completed application for credit within thirty days from receipt of Plaintiff's application for credit; and
- b. Require delivery of ECOA Compliant notices in all future instances.

B. Second Claim –Negligent Misrepresentation

66. Plaintiff reiterates and incorporates every allegation above as if set forth herein in full.

67. As part of its practice to continuously string along and mislead Plaintiff, Defendant engaged in actions and made representations which it knew or should have known were false, with the express purpose of having Plaintiff rely upon such actions and representations to his detriment.

68. Specifically, Defendant communicated to Plaintiff through his online account and through its telephone representatives that his application had been approved.

69. The statements made by Defendant were false. The facts were that Plaintiff's loan modification application had not been approved at the time these statements were made.

70. When Defendant made these statements to Plaintiff, Defendant knew its statements were false, or made these statements without knowing whether the statement was true or false, and without regard to whether the statement was true or false. Defendant made these statements intending for Plaintiff to rely on them, so that it could continue collecting late fees and payments from Plaintiff.

71. In reliance on Defendant's statements, Plaintiff continued trying to pay the monthly amount due, including late fees, believing that he would soon obtain a reduction in his monthly payments. Had Plaintiff known of the facts, he would have attempted to refinance his loan with another lender since at that point the value of his property had only slightly decreased.

72. As a direct result of Defendant's actions and misrepresentations as described above, Plaintiff has suffered harm and is threatened with additional harm from Defendant's misrepresentations. By making payments during and after Defendant had made its representations that the loan modification had been approved, Plaintiff lost a significant amount of his savings in an attempt to stay current on his loan and forewent other remedies that might have been pursued to restructure his debt, such as refinancing his home.

73. As a result of Defendant's misrepresentations, Defendant is liable to Plaintiff for its compensatory damages, interest, costs, attorneys' fees and any such other relief this Court deems just and proper.

74. Plaintiff reserves the right to amend this complaint to add a prayer for punitive damages upon a showing by evidence in the record providing a basis for recovery of such damages.

C. Third Claim –Promissory Estoppel

75. Plaintiff reiterates and incorporates every allegation above as if set forth herein in full.

76. Defendant made representations to Plaintiff that if he completed a loan modification application and provided the supporting financial documentation, and it was approved, that he would receive a loan modification.

77. Plaintiff did submit a loan modification application and provided the supporting financial documentation, and it was approved. Plaintiff relied upon that approval to his detriment

in that he did not pursue any alternative sources of financing. Given Defendant's statements and the government's involvement of Defendant's administration of HAMP, reliance was reasonable.

78. Despite Plaintiff's reasonable reliance Defendant reneged on its approval without explanation or reason and subsequently reversed its position and denied the application.

79. Defendant's actions caused Plaintiff to lose his opportunity to fund other strategies to deal with his financial situation and to avoid going into foreclosure.

80. As a result of Defendant's actions, Plaintiff is entitled to equitable relief under the doctrine of promissory estoppel and asks this Court to prohibit Defendant from reneging on its approval of Plaintiff's application and grant to Plaintiff the modification that Defendant originally approved.

D. Fourth Claim – Violation of North Carolina Unfair and Deceptive Acts and Practices

81. Plaintiff reiterates and incorporates every allegation above as if set forth herein in full.

82. The Plaintiff is a "consumer" as that term is defined by Article 2 of Chapter 75 of the North Carolina General Statutes.

83. The Plaintiff's relationship with the Defendant arose out of a "consumer debt" as that term is defined in Article 2 of Chapter 75 of the North Carolina General Statutes.

84. The Defendant is and was a "debt collector" as that term is defined by applicable provisions of Article 2 of Chapter 75 of the North Carolina General Statutes.

85. Under the provision of Section 58-70-115 of the North Carolina General Statutes the Defendant was and is prohibited from collecting or attempting to collect a "debt by use of any unconscionable means, including: (3) communicating with a consumer whenever the collection agency has been notified by the consumer's attorney that he represents said consumer."

86. Defendant has violated and continues to violate NCUDAP in that it has communicated and continues to communicate with Plaintiff, a debtor, knowing that he is represented by an attorney with respect to such debt and it has knowledge of, and can readily ascertain, such attorney's name and address and contact information.

87. Specifically, Defendant:

a. was notified on December 11, 2009 and again on December 14, 2009 that Plaintiff was represented by an attorney with respect to the mortgage debt and his HAMP application;

b. Defendant was aware of the representation and had communicated with Plaintiff's counsel on several occasions about the debt;

c. Despite this knowledge, Defendant, attempted and did communicate with Plaintiff about this debt on June 25, 2010, July 23, 2010, September 2, 2010, and again on September 20, 2010;

d. Plaintiff's counsel did not consent to such communication and nor did Plaintiff initiate the alleged communication.

88. As a result of Defendant's actions and violations described above, Plaintiff has been damaged. Said injuries include but are not limited to the following:

a. significant stress and emotional distress;

b. loss of a favorable decision on his loan modification application; and

c. loss of opportunities to negotiate and pursue other refinancing or loss mitigation strategies.

89. As a result, the Defendant is liable for statutory damages in the sum of no less than \$4,000.00 for violation of N.C.G.S. Section 75-50, et seq. and the payment of legal fees and expenses.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for judgment against the Defendant, for his actual, liquidated, punitive and statutory damages, for equitable relief; for reasonable attorneys' fees and pre-judgment and post-judgment interest; for the costs of litigation; and for such other and further relief as the Court deems just and appropriate.

JURY TRIAL DEMANDED

Plaintiff demands a trial by jury on all issues so triable.

Date this the _____ day of _____, 2010.

O. Max Gardner III
Law Offices of O. Max Gardner III, P.C.
Attorney for the Plaintiff
N.C. State Bar No. 6164
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Shelby, NC 28151-1000
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**IN THE UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

Mary Public,

Debtor.

**CASE NO.
OUR FILE NO.**

Mary Public,

Plaintiff,

ADV. PROC. NO.

vs.

**METLIFE BANK, N.A., d/b/a
METLIFE HOME LOANS,
a national banking association;
TRANSNATION TITLE AND
ESCROW, INC., d/b/a FIDELITY
NATIONAL TITLE COMPANY, a foreign corporation;
and GORILLA CAPITAL OF ADA
COUNTY 8, LLC, a limited
liability company,**

Defendants.

**PLAINTIFFS FIRST SET OF INTERROGATORIES AND REQUEST FOR
PRODUCTION OF DOCUMENTS TO DEFENDANT METLIFE BANK, N.A.**

The plaintiffs, by and through their attorney, and pursuant to Rules 33 and 34 of the Federal Rules of Civil Procedure, propound the following Interrogatories and Requests for Production of Documents to defendant METLIFE BANK, N.A., d/b/a METLIFE HOME LOANS, to be answered within thirty (30) days from the date of service hereof.

FIRST SET OF INTERROGATORIES

In answering these Interrogatories YOU are required by law to furnish all information that is available to YOU or subject to YOUR reasonable inquiry, including information in the possession of your attorneys, accountants, advisors or other persons directly or indirectly employed by or connected with you or your attorneys and anyone else otherwise subject to your control.

In answering these Interrogatories, YOU must make a diligent search of all YOUR records, files, documents, and materials in your possession or available to you or your representatives. If an Interrogatory has subparts, answer each part separately and in full and do not limit your answer to the Interrogatory as a whole. If an Interrogatory cannot be answered in full, answer to the fullest extent possible, specify the reason for your inability to answer the remainder, and state whatever information and knowledge you have regarding the unanswered portion. With respect to each Interrogatory, in addition to supplying the information requested and IDENTIFYing all the specific documents referred to, IDENTIFY and DESCRIBE all documents to which YOU refer in preparing YOUR answers. These Interrogatories are continuing and the answers thereto must be supplemented to the maximum extent authorized by law and Rule 26(e), Federal Rules of Civil Procedure.

DEFINITIONS: Unless otherwise indicated, the following definitions apply to all of these Interrogatories:

(a) DOCUMENT means any material whatsoever which contains information recorded through the use of letters, numbers or their equivalent, whether recorded by photographic or any other means of recording, **including electronically stored information** (which shall be produced on compact disk(s) in the manner most universally retrievable and labeled with the name of the computer programs and software used to initially create the

electronic information and to copy the electronic information to disk), and also including without limitation all letters or other correspondence, memoranda, notes, reports, minutes, or other writings, accounts, books and ledgers, invoices, receipts, photographs, photonegatives, tape recordings, computer printouts, records, and any other form of data compilation. DOCUMENT also means any duplicates, copies or facsimiles of originals, summaries of DOCUMENTs, and substitutes for DOCUMENTs. In each instance wherein you are asked to IDENTIFY or DESCRIBE a DOCUMENT, your answer or response should include but not be limited to the following:

1. The IDENTITY of the custodian of the DOCUMENT; and
2. The date of the making of the document and the IDENTITY of each PERSON whose testimony could be used to authenticate such document and lay the foundation for its introduction into evidence.

(b) COMMUNICATION means any act of communicating whatsoever, including but not limited to the transmittal or conveyance of any message containing information. In each instance wherein you are asked to IDENTIFY or DESCRIBE a COMMUNICATION, your answer or response should include but not be limited to the following:

1. The IDENTITY of each PERSON who participated in the preparation, making, or receiving of the COMMUNICATION;
2. The method of making or receiving the COMMUNICATION, e.g., in person conversation, telephone conversation, telephonically recorded voice message, U.S. mail, courier delivery, electronic mail.
3. The time and date of the initiation of the COMMUNICATION; and
4. The complete content and substance of the COMMUNICATION.

(c) KNOWLEDGE includes first hand knowledge as well as information derived from any source whatsoever, including but not limited to hearsay sources.

(d) PERSON shall mean and include a natural person or legal entity and its partners, directors, officers, agents or employees. In each instance wherein you are asked to IDENTIFY a person or state the IDENTITY of a PERSON, state with respect to each such person her or his full name, occupation at the relevant time, job title at the relevant time, employer at the relevant time, business address at the relevant time (or, if none, last known residence address), current business address (or, if not known, last known residence address), and current business telephone number (or, if not known, last known telephone number).

(e) YOU means, and YOUR refers to, all of METLIFE BANK, N.A., and METLIFE HOME LOANS, their counsel, consultants, experts, investigators, agents, employees, officers, authorized representatives, or any other persons acting on their behalf.

(f) HOME means the real property, improved with a single family house and other improvements, situated in _____ and described as _____.

(g) ACCOUNT means all accounts maintained or previously maintained by YOU concerning either plaintiff, _____ or _____, and/or the HOME, including but not limited to that account designated by Metlife Home Loans account number _____ and any previous or later account number designations associated with Metlife Home Loans account number _____.

(h) MODIFICATION means all acts, omissions, and other activities or absence of activities by YOU, the plaintiffs, or any other PERSON associated in any way with modification or proposed modification of any of the plaintiffs' obligations secured by the HOME or associated in any way with the ACCOUNT.

(i) SALE means that certain alleged trustee=s sale of the HOME on or about March

12, 2010, and all acts, omissions, and other activities or absence of activities by YOU, the plaintiffs, or any other PERSON associated in any way with trustee's sale of the HOME, whether occurring or failing to occur before or after the alleged trustee's sale.

INTERROGATORY NO. 1: *Identify yourself and preparers.* IDENTIFY each PERSON who prepared or helped prepare YOUR answers and responses to any of these Interrogatories or any of the Requests for Production of Documents, below.

INTERROGATORY NO. 2: *Communications with plaintiffs.* IDENTIFY each COMMUNICATION that YOU made to or received from either plaintiff.

INTERROGATORY NO. 3: *Communications with others associated with plaintiffs.* IDENTIFY each COMMUNICATION that YOU made to or received from any PERSON acting on behalf of, representing, relaying information for, or otherwise associated with either plaintiff.

INTERROGATORY NO. 4: *Communications about plaintiffs.* IDENTIFY each COMMUNICATION that YOU made or received concerning either plaintiff, that you have not identified in your answers to Interrogatories Nos. 2 or 3.

INTERROGATORY NO. 5: *Communications about plaintiffs' accounts.* IDENTIFY each COMMUNICATION that YOU made or received concerning the HOME, the ACCOUNT, the MODIFICATION, or the SALE, that you have not identified in your answers to Interrogatories Nos. 2 through 4.

INTERROGATORY NO. 6: *Communications with trustee.* IDENTIFY each COMMUNICATION that YOU made to or received from TRANSNATION TITLE AND ESCROW, INC., d/b/a FIDELITY NATIONAL TITLE COMPANY.

INTERROGATORY NO. 7: *All other communications.* IDENTIFY each COMMUNICATION that YOU made or received concerning either plaintiff, _____ or

_____, the HOME, the ACCOUNT, the MODIFICATION, or the SALE, that you have not identified in your answers to Interrogatories Nos. 1 through 6, including but not limited to COMMUNICATIONS internal within YOU and YOUR consultants, investigators, agents, employees, officers, authorized representatives, or any other persons acting on YOUR behalf.

INTERROGATORY NO. 8: *Activities regarding plaintiffs' accounts.* Describe fully and state the date of each and every act or decision that YOU made concerning either plaintiff, _____ or _____, the HOME, the ACCOUNT, the MODIFICATION, or the SALE.

INTERROGATORY NO. 9: *Home Affordable Modification Program training.* For each PERSON referred to or mentioned in Interrogatories Nos. 1 through 8, or your answers to those Interrogatories, who is or has been a consultant, expert, investigator, agent, employee, officer, or authorized representative of YOU, describe completely the training, guidance, and instructions in any way regarding the Home Affordable Modification Program that was provided to or received by that PERSON.

INTERROGATORY NO. 10: *Servicing of plaintiffs' loan.* Identify precisely when YOU began (and ended, if applicable) servicing the plaintiffs' loan concerning their HOME and describe each agreement, guide, DOCUMENT, or other authority under which YOU have serviced that loan. If YOU have begun or ended servicing the plaintiffs' loan more than once, identify each start and end date and describe the agreements, guides, DOCUMENTs, and other authority under which YOU have serviced the loan for each period.

INTERROGATORY NO. 11: *Recordkeeping systems.* Describe completely each recording or recordkeeping system YOU have used during any period in which YOU have serviced the plaintiffs' loan concerning their HOME, including but not limited to recording and recordkeeping systems used for loan servicing, compliance or administration of the Home

Affordable Modification Program, and compliance with federal, state, local, servicing, and other laws, directives, guidance, and any other requirements.

FIRST SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS

Pursuant to Rule 34, Federal Rules of Civil Procedure, plaintiffs hereby request that defendant METLIFE BANK, N.A., d/b/a METLIFE HOME LOANS, produce and make available for inspection, sampling, testing, and copying all of the following documents and things within the defendant's possession, custody, or control, **including electronically stored information**, at the offices of _____, within thirty (30) days from the date of service hereof.

DEFINITIONS: Defendant incorporates here, by this reference, the definitions previously stated in the Interrogatories above. Unless otherwise indicated, those definitions apply to all of these Requests for Production of Documents.

REQUEST NO. 1: *Documents mentioned or handled while answering Interrogatories.*

All DOCUMENTs referred to in Interrogatories Nos. 1 through No. 11, all DOCUMENTs referred to or identified in YOUR answers and responses to Interrogatories Nos. 1 through 9, and all DOCUMENTs which YOU consulted or referred to while compiling your answers and responses (including any objections) to Interrogatories Nos. 1 through 11.

REQUEST NO. 2: *Notes about communications with plaintiffs.* All notes, including all DOCUMENTs, about or in any way recording any COMMUNICATION that YOU made to or received from either plaintiff, _____ or _____.

REQUEST NO. 3: *Notes about communications with others associated with plaintiffs.* All notes, including all DOCUMENTs, about or in any way recording any COMMUNICATION that YOU made to or received from any PERSON acting on behalf of, representing, relaying

information for, or otherwise associated with either plaintiff.

REQUEST NO. 4: *Notes about plaintiffs.* All notes, including all DOCUMENTS, concerning in their content either plaintiff, _____ or _____, but not produced in response to Requests Nos. 2 or 3, above.

REQUEST NO. 5: *Notes about plaintiffs' accounts.* All notes, including all DOCUMENTS, concerning in their content the ACCOUNT, the HOME, the MODIFICATION, or the SALE, but not produced in response to Requests Nos. 2 through 4, above.

REQUEST NO. 6: *Correspondence with plaintiffs.* All correspondence, sent or received by any means, with either plaintiff, _____ or _____.

REQUEST NO. 7: *Correspondence about plaintiffs or their accounts.* All correspondence, sent or received by any means, with any PERSON, concerning in their content the ACCOUNT, the HOME, the MODIFICATION, or the SALE, but not produced in response to Request No. 6, above.

REQUEST NO. 8: *Activities regarding plaintiffs or their accounts.* All DOCUMENTS recording, reflecting, or concerning any act or decision that YOU made concerning either plaintiff, _____ or _____, the HOME, the ACCOUNT, the MODIFICATION, or the SALE.

REQUEST NO. 9: *Home Affordable Modification Program training, procedures, guidance, and other documents.* All DOCUMENTS created, modified, or used by YOU in guiding or prescribing the activities of YOUR agents, employees, officers, or authorized representatives in implementing or carrying out the Home Affordable Modification Program or its requirements, including but not limited to internal training, procedures, and guidance DOCUMENTS.

REQUEST NO. 10: *Modification/workout training, procedures, guidance, and other documents.* All DOCUMENTS created, modified, or used by YOU in guiding or prescribing the activities of YOUR agents, employees, officers, or authorized representatives in handling or processing requests for modification or workout of obligations, secured by residential real property, that have been owned or serviced by YOU, including but not limited to internal training, procedures, and guidance DOCUMENTS.

REQUEST NO. 11: *Promissory note.* The promissory note associated with the HOME signed by either plaintiff, _____ or _____, and dated on or about August 27, 2007, together with all annotations, endorsements, amendments, and attachments through and including the date YOU sign your answers and responses to these Interrogatories and Requests for Production of Documents.

REQUEST NO. 12: *Agreements with plaintiffs.* All DOCUMENTS evidencing any agreement or contract between YOU and either plaintiff, _____ or _____.

REQUEST NO. 13: *Servicing agreements and related documents.* All DOCUMENTS evidencing YOUR agreement or authority to service or engage in business concerning any loan or obligation of the plaintiffs secured by the HOME, including all servicing guides and other DOCUMENTS modifying, amending, or otherwise concerning YOUR agreement or authority to service any loan or obligation of the plaintiffs secured by the HOME.

REQUEST NO. 14: *Return receipts.* Each and every Return Receipt and other DOCUMENT evidencing delivery of any parcel, piece, DOCUMENT, or thing sent to either plaintiff, _____ or _____, or any occupant of the HOME, whether provided by the United States Postal Service, another courier or delivery service, or any electronic mail service.

REQUEST NO. 15: *Documents supporting your positions.* If YOU now or will later

refer to in support of, or base any of YOUR claims, assertions, or contentions in this case on any DOCUMENT not produced in response to any of the above requests for production, please produce each such DOCUMENT.

Dated this _____ day of _____, 20__.

O. Max Gardner III
Gardner & Gardner PLLC
Attorney for the Debtor/Plaintiff
NC State Bar #6164
P.O. Box 1000, Shelby, NC 28151-1000
(704) 487-0616 / FAX (704) 487-0619
e-mail maxgardner@maxgardner.com

R – FEE SHARING

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME:

Chapter 13 No.

Our File No.

ADDRESS:

SSN:

Debtor.

PLAINTIFF,

Adv. Proc. No. 10- _____

versus

**PROMMIS SOLUTIONS HOLDING CORPORATION,
GREAT HILL PARTNERS, LLC
MORRIS, SCHNEIDER AND PRIOR, now known as
JOHNSON & FREEDMAN,
LENDER PROCESSING SERVICES, INC., and
LPS DEFAULT SOLUTIONS, LLC**

CLASS ACTION COMPLAINT

The plaintiffs individually and on behalf of all other persons similarly situated bring this complaint against the defendants Prommis Solutions Holding Corporation, Morris Schneider and Prior, Johnson and Freedman, and Lender Processing Services, Inc. and LPS Default Solutions, LLC as follows:

I. JURISDICTION AND VENUE

1. This court has jurisdiction over the parties and the subject matter of this proceeding pursuant to 28 U.S.C. §§ 1334, 151 and 157. This is a court proceeding pursuant to 28 U.S.C. § 157(b) as to all claims and causes of action asserted in this complaint.

2. All causes of action are based on the Bankruptcy Code of the United States.

3. Venue is proper in this district pursuant to 28 U.S.C. § 1409.

II. PARTIES

4. Plaintiffs are resident citizens of the State of North Carolina and are debtors in Case No. _____ filed in this Court.

5. The defendant Prommis Solutions Holding Corporation is a publicly traded company with its principal place of business located at 400 Northridge Road Atlanta, Georgia 30350. Throughout the balance of this complaint Prommis Solutions will be referred to simply as "Prommis". This defendants' proposed stock ticker symbol is PRMS. This Defendant may be served with process by serving its CEO, Denis A. Brosnan, Jr. at the address listed above.

6. The defendant Great Hill Partners, LLC is a venture capital company who owns the majority interest in Prommis and who is principally responsible for the purchase of law firms by Prommis. Great Hill Partners, LLC's principal place of business is One Liberty Square Boston, Massachusetts 02109. This Defendant may be served with process by serving one of its Managing partners, who is also a director of Prommis Solutions, Inc., Matthew T. Vettel at the address listed above.

7. The defendant Morris, Schneider and Prior was a law firm based principally in the State of Georgia which is now known as Johnson and Freedman. This Defendant represents to the public that it provides legal services throughout the southeastern United States with respect to bankruptcy and foreclosure services to various national creditors. This defendant is alleged, upon information and belief, to be owned by the defendant Prommis Solutions. Johnson & Freedman's principal place of business is 1587 Northeast Expressway, Atlanta, Georgia 30329. This defendant may be served with process by serving its Senior Managing Partner, Larry W. Johnson, at the address listed above.

8. The defendant Lender Processing Services, Inc. (hereinafter "LPS") is a publicly traded corporation that provides mortgage services to various parties in the mortgage industry. LPS has its principal place of business at 601 Riverside Avenue Jacksonville, Florida 32204. LPS does business in every bankruptcy court in the United States of America by agent or employee including this Court. This company's stock symbol is also LPS. This defendant may be served by delivering service of process to Jeffery S. Carbiener, President and CEO, at the address of this Defendant listed above.

9. The defendant LPS Default Solutions is a wholly owned subsidiary of LPS. LPS Default Solutions has its principal place of business at 601 Riverside Avenue Jacksonville, Florida 32204. LPS Default Solutions provides management of mortgage loans as a subservicer to various national mortgage servicers when a consumer's loan reaches a predetermined state of default under the contracts between LPS Default Solutions and its clients the mortgage servicers as will be more fully set out herein. LPS Default Solutions may be served by serving process upon Jeffery S. Carbiener, President and CEO, at the address of this Defendant listed above.

III. FACTUAL ALLEGATIONS

10. The defendants to this action are creditors' rights law firms and entities with whom these law firms have undisclosed legal fee-splitting arrangements.

11. These undisclosed contractual arrangements result in the illegal splitting of legal fees between these law firms and the unauthorized practice of law by the non-law firm entities.

12. These fee splitting contracts are disguised as "administrative fees, document review "views", document download fees, document execution fees, technology facilitation fees, etc." This language is chosen carefully in an effort to conceal the true nature of the fee splitting relationship.

13. These fees are eventually charged backed to the class members by way of the mortgage servicer remitting request for reimbursement to the investors and these amounts are then added to the corporate advance amounts of the class members mortgage loans.

14. These contractual arrangements are carried out and have been carried out without the knowledge or approval of the Court so that these parties may engage in conduct which allows the defendants to this action to engage in the illegal splitting of legal fees from services performed in the Bankruptcy Court.

15. By virtue of the contractual agreements between the law firms and the non-lawyer defendants in this action Prommis, Great Hill Partners, LPS and LPS Default Solutions are all engaged in an undisclosed and illegal fee splitting scheme which includes the unauthorized practice of law by these parties.

16. None of these agreements have been disclosed to the Bankruptcy Court and none of these fee splitting arrangements have been approved by the Bankruptcy Court.

17. The Plaintiff and the Class allege that these actions violate the Rules, the Code and the Bankruptcy process solely for the unlawful gain of the defendants.

18. Prommis Solutions, according to their regulatory filings, purchased the “non-legal” assets of the law firms Morris, Schneider and Prior who then changed their name to Johnson and Freedman. This law firm regularly appears before this Court.

19. In exchange for this purchase the law firm entered into an exclusive service agreement with Prommis for a period of 20 years.

20. Pursuant to the 20 year exclusive contract between Prommis Solutions and Johnson and Freedman there is a specific contractual relationship for the splitting of legal fees between these Defendants.

21. The defendant Prommis Solutions is not a law firm and is strictly prohibited from engaging in fee splitting with law firms pursuant to well-established rules of ethical conduct.

22. The law firm defendant is a prolific filer of motions and other pleadings before this Court. In all of these filings the law firm defendant fails to disclose to the Court, the Trustee, Debtors and their Counsel the existence of their relationship with these non-law firm entities and the existence of the fee-splitting relationship between the Defendants.

23. The Defendant LPS has a wholly owned subsidiary known as LPS Default Solutions which by its own admission is an industry leader in providing services related to bankruptcy matters to various mortgage servicers throughout the United States.

24. As part of its provision of these services LPS has developed a national network of law firms including the defendant Johnson and Freedman who have executed contracts with LPS which provide that the law firms will split legal fees with LPS for matters referred to the law firms by LPS. These contracts are called network agreements.

25. The parties to these network agreements have also executed confidentiality agreements with the intent to never voluntarily disclose to any court the existence of the contract for the referral for a fee of bankruptcy related matters and other foreclosure related matters.

26. Furthermore the parties intend to never voluntarily disclose the existence and content of these agreements therefore depriving the court, debtors, debtors counsel, and the trustees charged with supervising the bankruptcy system of any knowledge of the existence of the referral for fee relationship between LPS Defaults Services and its network firms such as the defendant Johnson and Freedman.

27. LPS routinely argues in litigation against it or involving it that the disclosure of its “network agreement” will require LPS to disclose trade secrets to its competitors and argues that Court’s should not require the disclosure of these agreements.

28. The real purpose behind LPS’ efforts not to produce its network agreements is to prevent the public disclosure of its illegal fee splitting relationships with the attorneys who have executed network agreements with LPS to protect those attorneys from sanction and to preserve LPS’ cash flow from these arrangements.

29. The effect of these agreements between the Defendants is to create a system which perpetrates a systemic fraud upon the bankruptcy Court and which allows these defendants to harvest fees which are neither reasonable nor lawful and which are undisclosed to the Bankruptcy Court.

30. Further, the illegal fee splitting relationship with the law firms who have executed these network agreements allows LPS to not charge fees to its mortgage servicer clients for the provision of services related to foreclosures and consumer bankruptcy filings. This has allowed LPS to capture the lion’s share of the market for bankruptcy related mortgage services.

31. In exchange for entering into these contracts the network firms are then fed through the fire hose of business referrals provided by LPS. When each network firm that is operating before the Court is disclosed it will become apparent by the number of cases which involve LPS that this illegal contractual arrangement has effectively cornered the market for creditor’s work in the bankruptcy Court.

32. This model has allowed LPS Default to generate billions of dollars in fees since this system was implemented. All of these fees are illegal.

33. As a result of the implementation of these illegal, undisclosed fee splitting regimes between and among the defendants in this action the costs of bankruptcy for debtors is substantially increased through inflated fees and charges to debtors.

34. Additionally, the structure of the contractual arrangements between these parties allows the non-lawyer defendants to engage in the unauthorized practice of law by delegating both legal judgment and legal work to the non-lawyer defendants in violation of law.

35. This results in the interference with the orderly administration of the bankruptcy process because the non-lawyer defendants are motivated solely to generate more fees which are subject to the illegal fee-splitting arrangement in a constant effort to increase revenues.

36. The pressure created by the contractual arrangements for the law firm defendants to perform tasks within limited amounts of time and within the directions provided by the non-lawyer defendants creates an environment where the line between lawyer and vendor evaporates and the lawyer must surrender his judgment and his professional obligations to the steady stream of communiqués emanating from the machine in order to satisfy the firms contractual obligations to its automated masters.

37. Furthermore, the entire contractual arrangements between the law firms and the non-lawyer defendants constitute a fraud on the bankruptcy court as follows:

a. The law firm defendants fail to disclose the existence of the fee-splitting contracts with the non-lawyer defendants;

b. The law firm defendants fail to disclose the sharing of fees in bankruptcy court as required by the Rules of Bankruptcy Procedure.

c. The law firm defendants claim that the fees that are disclosed to the bankruptcy court are “reasonable fees” when the law firm defendants have full knowledge that they have agreed to perform the services for less than the fees which they seek from the Court.

d. The law firm defendants fail to disclose that they have delegated legal services and legal judgment to non-lawyers.

e. The law firm defendants fail to disclose that they are facilitating the unauthorized practice of law.

f. The law firm defendants intentionally misrepresent the fees that they seek are reasonable in order to pay their illegal fee splits with the non-lawyer defendants.

g. The law firm defendants knowingly fail to disclose the existence of these arrangements to the Bankruptcy Court.

38. The class representatives filed for bankruptcy protection under Chapter 13 of the United States Bankruptcy Code in this court in case number _____.

39. The Defendant Johnson & Freedman filed a motion for relief from stay in which it alleged fraudulently that the sum of \$600.00 was a reasonable amount for fees and costs in the case.

40. The affirmative representation in the case was that \$450.00 was a reasonable attorney's fee and \$150.00 was the cost of the bankruptcy court's filing fee for the motion for relief from stay.

41. This defendant affirmatively misrepresented to the court that \$450.00 was a reasonable attorney's fee with full knowledge that this defendant had actually agreed to perform this service for a much lower sum.

42. Based on the terms of the standard agreements that exist between Prommis and Johnson and Freedman the law firm defendant has agreed to pay a portion of these fees to Prommis.

43. Based on the terms of the standard agreements between LPS Default Solutions and the law firm Defendant Johnson and Freedman there exists an agreement to pay \$150 of this fee to LPS at the time that the matter is referred to Johnson and Freedman by LPS.

44. Nevertheless, Johnson and Freedman made the representation to the bankruptcy court that \$450 was a reasonable fee for its services with full knowledge of the existence of these arrangements.

45. Johnson and Freedman made the representation so that the law firm defendant could engage in this fee splitting arrangement with the non-law firm defendants.

46. This defendant affirmatively misrepresented its reasonable fees in this case with full knowledge that it actually had agreed to perform these services for a much smaller fee.

47. These actions were taken with full knowledge of the existence of these agreements between the defendants for the illegal splitting of fees.

48. These actions were taken with full knowledge that the defendants were illegally sharing fees with non-lawyers.

49. These representations were made without disclosing to the court the existence of any fee splitting arrangement pursuant to Rule 2016(a) of the Bankruptcy Code while under a strict duty to so make this disclosure.

50. The actions of this defendant and the other defendants in intentionally concealing these fee splitting agreements from the bankruptcy court constitute violation of the rules of the bankruptcy court and constitute a fraud upon the bankruptcy court.

51. This systemic, recurring and continuing conduct has worked to increase the indebtedness of the class members and to thwart the efficient administration the bankruptcy scheme by imposing undue costs and by engaging in conduct which negatively impacts the efficient administration of the bankruptcy process in violation of law.

52. At all times material hereto the parties were under an obligation pursuant to the applicable rules of bankruptcy court and Rule 9011 the Rules of Bankruptcy Procedure to make filings to the court which were truthful and accurate and which disclose the material facts.

53. Further, these defendants' actions in the administration of these agreements constitute the unauthorized practice of law by both LPS Default Solutions and Prommis Solutions.

54. These parties are both engaged in the unauthorized practice of law in that they exercise control and legal judgment over actions taken by the attorneys in the case and they prepare documents for filing by the attorneys in the case over which the attorneys in the case exercise no independent judgment or control due to the contractual arrangements between the attorneys who are defendants in this action and LPS and Prommis Solutions.

IV. CLASS ACTION ALLEGATIONS

55. The plaintiff brings this action as a class action individually and on behalf of a class which is defined as follows:

All individuals who have filed a bankruptcy petition under any chapter of the Bankruptcy Code in which these defendants filed, or caused to be filed, a proof of claim, a motion for relief from stay or where these defendants sought and received a plan review fee in which these defendants unlawfully and illegally split fees and sought fees which were not disclosed to the bankruptcy court in violation of the bankruptcy code and controlling law. Excluded from the class are any employees, officers or directors of any of the defendants or any of their subsidiaries or affiliates, and any of the legal representatives, heirs, successors and assigns of any such employees, officers or directors.

56. This action may properly be maintained as a class action pursuant to the Bankruptcy Rule 7023 and Rule 23 of the Federal Rules of Civil Procedure.

57. The members of the class are so numerous that joinder of any individual claims is impracticable.

58. The Plaintiffs believe that practically every bankruptcy case wherein the defendants Morris, Schneider and Prior now known as Johnson Freedman has been involved contain claims made such as those described in this complaint where illegal and improper fees were charged to debtors in violation of the bankruptcy code and controlling law.

59. The precise number of class members and their addresses are presently unknown but can be easily obtained from the defendants' files, records and databases.

60. Class members can be notified of the pendency of the action by mail and/or published notice.

61. Common questions of law and fact exist as to all members of the class. These questions predominate over questions affecting individual class members.

62. These common legal and factual questions include but are not limited to:

a. The propriety of defendants' practice of filing requests for the approval of fees where the existence of fee splitting relationships have not been disclosed.

b. The propriety of defendants' practice of requesting attorney's fees without disclosing the existing of fee splitting agreements and seeking an amount of attorney's fees in excess of the amount of fees that the attorneys actually agree to perform the services for.

c. Whether the defendants' practices constitute an abuse of the bankruptcy process.

d. Whether defendants' practices constitute fraud on the court.

e. The nature of any injunctive relief which should be afforded to the class to prevent the continuation of the wrongful conduct of the defendants.

f. Whether the defendants should be required to disgorge the benefits obtained from its wrongful conduct.

g. The nature and amount of civil damages that should be paid.

h. The nature and amount of civil sanctions that should be assessed.

i. That nature and amount of punitive damages that should be assessed.

63. The plaintiffs' claims are typical of the claims of members of the class.

64. The plaintiffs and each member of the class have been charged fees which have been inflated, which are not reasonable, and which are the result of declarations or certifications of the defendants that the fees were proper and reasonable, which were the result of the defendants failure to disclose the nature and existence of its fee splitting contracts and agreements, and which were the result of the authorized practice of law by the defendants.

65. The class representatives and each member of the class have sustained damages resulting from these defendants illegal and fraudulent practices.

66. If the defendants are not enjoined from engaging in these illegal and fraudulent practices in the future additional members of the class will suffer.

67. The plaintiffs are adequate representatives as to class because their interest does not conflict with the interest of the individual members of the class they seek to represent and the plaintiffs have retained counsel who are competent and experienced in complex class action litigation and who have specialized knowledge of the practices of these defendants through their involvement in other litigation involving the same parties or the same conduct.

68. Further, the plaintiffs and counsel intend to prosecute this action vigorously.

69. The interest of the members of the class is fairly and accurately protected by plaintiffs and their counsel.

70. The class action device is superior to any other available means for the fair and efficient adjudication of the claims of plaintiffs in the class.

71. Absent a class action, most members of the class would not only be unaware of these illegal practices but would find the cost of litigating their individual claims to be prohibitive and would not have an effective remedy to vindicate their rights.

72. Because of the size of the individual class members claims few class members could afford to seek legal redress for the wrongs which they have suffered due to the defendants' conduct.

73. Without a class action the class members will continue to suffer harm and the defendants' violation of law will continue to occur and will occur without a remedy.

74. Furthermore, because of the accumulation of these factors class treatment is the only method by which all class members common claims can be economically and expeditiously adjudicated in one proceeding which will preclude the possibility of multiple trials and inconsistent judgments.

FIRST CAUSE OF ACTION

75. Plaintiffs adopt and reallege all prior paragraphs of this complaint as if fully set out herein.

76. The conduct described by the defendants violates the bankruptcy code and rules and constitutes an abuse of the bankruptcy process.

77. The plaintiffs and the class invoke the court's inherent powers and the court's powers under Section 105 of the Bankruptcy Code to address the systemic abuse of the bankruptcy code and its rules.

SECOND CAUSE OF ACTION

78. The plaintiffs adopt and reallege all prior paragraphs as if set out fully herein.

79. The defendants' actions violate the bankruptcy code and rules and constitute a fraud on the bankruptcy court which is being perpetrated on a systemic and continuing basis and which is ongoing resulting in damages to thousands of debtors.

80. The plaintiffs and the class invoke the court's inherent powers and the court's powers under Section 105 of the Bankruptcy Code to address the fraud that has been perpetrated upon the court in this action.

THIRD CAUSE OF ACTION

81. The plaintiffs adopt and reallege all prior paragraphs as if set out fully herein.

82. The plaintiffs and all class members whom they seek to represent are entitled to a civil relief order declaring the defendants' actions and practices described herein violate the bankruptcy code and rules.

83. The plaintiffs and all class members are entitled to a civil relief order declaring the defendants' actions and practices constitute an abuse of the bankruptcy process.

84. The plaintiffs and all class members are entitled to a civil relief order declaring the defendants' actions and practices constitute a fraud on the bankruptcy court.

85. The plaintiffs and all class members are entitled to a civil relief order permanently enjoining the defendants from engaging in said actions and practices in the future with respect to any debtor who is a member of the class described herein.

86. The plaintiffs and all class members are entitled to a civil relief order declaring defendants' actions and practices violate the bankruptcy code.

87. The plaintiffs and all class members whom they seek to represent request that the Court invoke its inherent authority and its powers under Section 105 of the Bankruptcy Code to enter appropriate equitable and declaratory Orders and Judgments designed to remedy the abuses described in the Plaintiffs complaint.

COUNT IV - VIOLATION OF THE AUTOMATIC STAY

88. The plaintiffs adopt and reallege all prior paragraphs as if set out fully herein.

89. The defendants had actual notice of the plaintiffs' petitions under the bankruptcy code.

90. The defendants intended their action whereby they collected undisclosed, unapproved, and illegal fees in violation of the bankruptcy code and controlling law.

91. The defendants' collection of the unauthorized, undisclosed, unapproved, and illegal fees from the plaintiffs in the class constitutes an exercise of control over estate property.

92. The defendants' collection of these fees from estate property were never disclosed to the court nor authorized by the court.

93. The defendants' actions violate the automatic stay as defined at 11 U.S.C. § 362(a).

94. The defendants' actions in collecting the undisclosed, unauthorized unapproved and illegal fees is and was at all times material hereto a willful act.

95. The plaintiffs in the class allege that they have suffered injury as a result of the defendants' violation of the automatic stay and their exercise of control over estate property.

COUNT V - CONTEMPT OF THE BANKRUPTCY CODE

96. The plaintiffs adopt and restate all prior paragraphs as if fully set out herein.

97. The plaintiffs and class request that the Honorable Court invoke its statutory contempt powers as provided for by 11 U.S.C. § 105(a) to remedy the contemptuous action of the defendants.

98. The contemptuous actions of the defendants pertaining to and arising out of the defendants' complete and utter disregard for the orderly and systematic administration of the bankruptcy code and the payment of the valid debts of the debtors which is contemplated by Title 11 of the United States Code.

99. The defendants' contemptuous conduct implicates 11 U.S.C. § 1015(a); 501; 502(a) and (c); 1322(b)(5) and (8) (with respect to Chapter 13 plans); and 1327(a).

100. Among other things, the defendants' contemptuous conduct consists of:

- a. Adding undisclosed, unapproved, and illegal fees;
- b. Charging and collecting undisclosed, unapproved, and illegal fees;
- c. Exercising control over estate property;
- d. Failing to seek bankruptcy court approval for reasonableness of undisclosed fees;
- e. Failing to subject additional fees to the claim review process;
- f. Thwarting the orderly and systematic payment scheme contemplated by the bankruptcy code;
- g. Affirmatively misrepresenting to the court the reasonableness of the fees sought;
- h. Affirmatively failing to disclose to the court the known existence of the fee splitting agreements;
- i. Failing to seek approval of payment of compensation;

j. Failing to disclose agreements to pay compensation;
k. Failing to disclose the existence of agreements which contemplate or implicate the unauthorized practice of law; and

l. Failure to disclose the existence of fee splitting relationships by law firms with non-lawyers.

101. By engaging in the conduct set forth above and by charging and collecting unapproved fees and other amounts, and by exercising control over the fixing, charging, and collecting of fees without benefit of a review by debtors, debtors' counsel, and trustees for the court, these defendants have engaged in conduct which thwarts the fair and efficient administration of the bankruptcy process.

102. This conduct has allowed the defendants to charge and collect unapproved fees without having those fees and charges tested for reasonableness through the mechanisms in place under the bankruptcy code.

103. The actions of the defendants are contemptuous in that they knowingly and willfully violated the various bankruptcy code provisions.

104. The defendants had actual knowledge of their conduct and willfully chose to continue the conduct in violation of the bankruptcy code and the court's authority.

105. The defendants intended these actions for the purpose of being unjustly enriched. The actions of the defendants have injured the plaintiffs in the class and continue to injure the plaintiffs in the class. As a result of this conduct the defendants are liable to the plaintiffs and the class for actual damages, punitive damages, and legal fees.

COUNT VI - CONTEMPT OF FEDERAL RULES OF BANKRUPTCY PROCEDURE

106. The Plaintiffs reallege all prior paragraphs as if set out here in full.

107. The plaintiffs request that this Honorable Court invoke its statutory contempt powers as provided for by 11 U.S.C. § 105(a).

108. The contemptuous action pertains to Rule 2016(a) of the Federal Rules of Bankruptcy Procedure.

109. Specifically, the defendants have never obtained approval for sharing of fees with non-lawyers.

110. The defendants have never disclosed to the court the existence of the fee splitting arrangements.

111. The defendants have represented to the court that their fees were reasonable when the defendants had full knowledge that they agreed to perform legal services for an amount less than the fees they requested from the court.

112. The defendants have never disclosed to the court their arrangement for compensation amongst themselves which is to be paid from fees that the law firm defendants in this case sought from the court.

113. These defendants together, acting in concert, have obtained fees from the bankruptcy estates of the class members to the detriment of the debtors and unsecured creditors by paying themselves unapproved fees in contravention of Rule 2016(a).

114. The defendants by charging and collecting the unapproved, undisclosed, improper and illegal fees are in contempt of Rule 2016(a) of the Federal Rules of Bankruptcy Procedure.

115. The defendants' actions in filing a request for the subject fees and in particular the standard \$450 fee for the "Motion for Relief from Stay" constitute the filing of a false fee petition.

116. The defendants had actual knowledge of the class members' bankruptcy filings at the time of their actions.

117. In fact, it was by virtue of the class members' bankruptcy filings that the defendants were actually able to charge these fees.

118. The defendants intended their actions and engaged in misconduct in collecting these fees with full knowledge of the rules of the bankruptcy procedure including Rule 2016(a).

119. The plaintiffs and the class have been injured as a result of the defendants' contemptuous conduct.

120. As a result of the defendants' contemptuous conduct, the defendants are liable to the plaintiffs and the class for actual damages, punitive damages, and legal fees.

COUNT VII --- BREACH OF THE UNIFORM MORTGAGE COVENANTS

121. The plaintiffs reallege all prior paragraphs as if set out here in full.

122. The defendants' actions in seeking these improper fees are a breach of the uniform mortgage covenants which authorizes the defendants to charge fees which are "reasonable and necessary".

123. The Uniform covenants are in each class members' mortgage and are identical to those published by Fannie Mae and Freddie Mac.

124. As a direct result of the defendants' actions the class members have been injured and damaged.

125. The plaintiffs on behalf of themselves and the class members seek all appropriate damages as a result of this breach of contract.

COUNT VIII ---- UNAUTHORIZED PRACTICE OF LAW

126. The plaintiffs reallege all prior paragraphs as if set out here in full.

127. The actions of the defendants and the agreements between the law firms and the non-law firm defendants reveal that the defendants are engaged in the practice of law.

128. The non-law firm defendants Prommis and LPS Default Solutions, LLC are specifically preparing pleadings and documents which affect an interest in either real estate or contested matters through the preparation of mortgage assignments, chain of title documentation, allonges to promissory notes, affidavits, affidavits of indebtedness and other documents including claims and pleadings in the bankruptcy Court.

129. Because of the terms of the defendants' agreements and because of the duties and rights set out in these agreements various actions and legal judgments usually reserved for lawyers and the legal profession are specifically delegated to the non-lawyer defendants by contract.

130. By virtue of these agreements the law firm defendants are assisting the non-law firm defendants in engaging in the unauthorized practice of law in violation of their ethical duties.

131. As a result of these actions the plaintiffs and the class members have been injured and damaged.

132. The plaintiffs and the class members seek all damages allowed by law as a result of the wrongful actions of the defendants.

COUNT IX-- CIVIL CONSPIRACY

133. The plaintiffs adopt and reallege all prior paragraphs as if set out here in full.

134. The defendants engaged in an unlawful conspiracy to engage in the unauthorized practice of law, to illegally split fees between lawyers and non-lawyers, to violate the bankruptcy code, rules and procedure, to commit fraud on the bankruptcy court, and to breach the class members' mortgage covenants for the purpose of unlawful gain for each of the defendants.

135. As a result of this civil conspiracy, civil wrongs were committed against the plaintiffs and the class members.

136. The motivation for the civil conspiracy was the defendants' appetite for the millions of dollars in fees which they desired to claim by taking advantage of and perverting the bankruptcy process.

137. As a result of the civil conspiracy the plaintiffs and the class members were injured and damaged.

138. The plaintiffs and the class members claim all damages allowed by law.

PRAYER FOR RELIEF

WHEREFORE, the plaintiffs and the class pray this Honorable Court enter judgment against the defendants for the following:

I. The plaintiffs and the class request the court enter an award of compensatory damages which includes a disgorgement of all fees and charges claimed by any of the defendants in any of these matters since the existence of these fee splitting contracts were made.

II. The plaintiffs and the class request the court enter an award of punitive damages which will punish these defendants and deter others who would consider engaging in the behavior herein described given the enormity of the wrongfulness of the defendants' collective actions.

III. The plaintiffs and the class request that the court invoke its inherent power and order a refund or credit of any fees charged and posted to class members accounts or collected from class members in connection with any of the illegally sought fees by any of the defendants plus interest, sanctions, and punitive damages if available pursuant to Section 105 as determined by the court.

IV. The plaintiffs and class members request that the court award all of their attorney's fees and costs in an amount to be determined by the court with an order requiring the defendant to pay reasonable attorney's fees and costs and expenses to the plaintiffs and the class and their counsel for prosecution of this action.

V. The plaintiffs and class members request any other civil relief damages the court deems appropriate.

VI. The plaintiffs and the class request the court enter appropriate declaratory and equitable orders finding that the defendants' conduct is illegal as set out herein and enjoining the defendants' conduct in the future.

VII. The plaintiffs and the class request the court invoke any other relief that is just and proper or necessary pursuant to Section 105 of the Bankruptcy Code or any other provision in equity or law required to remedy the conduct and make the class whole and to prevent the recurrence of the conduct in the future.

VIII. The plaintiffs and the class request any other relief which the court deems appropriate.

This ____ day of _____, 20____.

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ELECTRONIC DISCOVERY

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME:

**CHAPTER 13 CASE NO.
OUR FILE NO.**

ADDRESS:

SSN:

DEBTORS.

Adversary Proc. No. _____

Plaintiffs,

versus

CITIFINANCIAL MORTGAGE COMPANY, INC.

Defendant.

**FIRST INTERROGATORIES AND REQUEST FOR PRODUCTION
OF DOCUMENTS FROM THE PLAINTIFFS TO THE DEFENDANTS**

COME NOW the above-named debtors and Plaintiffs herein, by and through their attorney of record, and herewith serve upon the DEFENDANT(S) in this case the following written interrogatories pursuant to the provisions of Rule 7033 of the Rules of Bankruptcy Procedure and Rule 33 of the Federal Rules of Civil Procedure and the following request for the production and inspection of documents pursuant to Rule 7034 of the Rules of Bankruptcy Procedure and Rule 34 of the Federal Rules of Civil Procedure as provided for and set forth in the foregoing rules. Answers to these Interrogatories and Request for Production of Documents must be furnished within forty-five (45) days of the service of the Summons and Complaint or within thirty (30) days of the service of these Interrogatories, whichever is later.

DEFINITIONS AND INSTRUCTIONS

A. If there is insufficient space after each interrogatory for you to provide a full and complete answer, then you should state your full and complete answer on a separate page, identify the page, and attach the page to your response as a properly identified and marked exhibit thereto.

B. The term "Document" means all writings of any kind, including the originals and all other non-identical copies, whether different from the originals by reason of any notation made on such copies or otherwise, including but not limited to correspondence, memoranda, notes, diaries, desk or other calendars, statistics, letters, telegrams, minutes, business records, personal records, accountants' statements, account statements, contracts, reports, credit reports, studies, checks, statements, receipts, invoices, bills, return checks, summaries, pamphlets, books, inter-office and intra-office communications, notations of any sort of conversations or meetings, telephone call meetings or other communications, written agreements, bulletins, printed matter, computer printouts, teletypes, telefaxes, invoices, worksheets, all drafts, alterations, modifications, changes and amendments of any kind with respect to any of the foregoing, graphic or oral records or representations of any kind (including, without limitation, tapes, cassettes, discs, recordings, electronic mail records, computer memory records such as hard disk drives and master back-up tapes, diskettes, or other devices such as zip drive records).

C. The term "act" as used herein includes acts of every kind and description.

D. The term "identify" or "describe" when used in reference to a "document" means to state:

- a. The type of document (e.g., letter, memorandum, report, electronic mail records, notes, etc.);
- b. The date of the document;
- c. The name of the parties or parties who originated the document, their past or present position with the defendants, their general duties and responsibilities, their current physical location with the company, and their e-mail, telephone number and telephone extension;
- d. The name and address of the current custodian of the document;
- e. The name and current address of each signatory thereon;
- f. The reason, in detail, for the preparation of the document;
- g. The subject or subjects covered by the document;
- h. The names, business addresses and titles of the persons to whom the document writing was directed; and
- i. The name and address and title of each person who originated, read or received the document.

E. The term "identify" as used herein in connection with a "person" or "persons" means to state the names, titles, the present employer of such "person" or "persons," the relationship of such person or persons to any of the defendants, and such person's current business address and business telephone number.

F. The term "identify" as used herein with respect to or in connection with an "act" means to:

- a. Furnish the date and place of the act;
- b. Identify the person acting, the person for whom the act was performed, and the person against whom the act was directed; and
- c. Describe in detail the act.

G. The terms "describe" or "state" as used herein mean:

- a. Describe or state fully by reference to underlying facts rather than by ultimate facts or conclusions of law;
- b. Particularize as to the:
 - i. Time;
 - ii. Date;
 - iii. Manner; and
 - iv. Place.

H. The term "oral communication" as used herein means and includes any face-to-face conversation, meeting, conference, telephone conversation, cell-phone conversation, computer conversation with voice mail, or any one for more of these or related devices.

I. The term "person" or "persons" as used herein means and includes all natural persons, public and private corporations, associates, wholly owned affiliates or subsidiary corporations or any other form of a business association, and any other type of entity and the agents, employees, officers, deputies and representatives thereof.

J. The terms "you" or "your" as used herein shall refer to any one or all of the named defendants and any related or affiliated companies associated in any way therewith.

K. All requests shall be deemed to include any documents made by, held by, or maintained in the files of any predecessor, successor, employee, agent or assignee of either one or all of the defendants.

L. The term "the transaction" or "the transactions" or "account" or "accounts" when used herein without qualification means the transactions and accounts between or among the debtors and the named defendants and all related activities and agents or assigns of either party.

M. The term "accepted servicing practices" with respect to any Mortgage Loan, when used herein means those mortgage servicing practices (including collection procedures) of prudent mortgage banking institutions which service mortgage loans of the same type as such Mortgage Loan in the jurisdiction where the related Mortgaged Property is located, and which are in accordance with FNMA servicing practices and procedures, for MBS pool mortgages, as defined in the FNMA Guidelines including future updates.

N. The term "adjustable rate mortgage loan" when used herein means any Mortgage Loan purchased pursuant to this Agreement as to which the related Mortgage Note contains a provision whereby the Mortgage Interest Rate is adjusted from time to time in accordance with the terms of such Mortgage Note.

O. The term "agreement" when used herein means This Mortgage Loan Purchase and Servicing Agreement and all amendments hereof and supplements hereto.

P. The term "ALTA" when used herein means "The American Land Title Association", its successors and assigns.

Q. The term "appraised value" when used herein with respect to any mortgage loan, means the value of the related Mortgaged Property based upon the lesser of (i) the appraisal made for the originator at the time of origination of the Mortgage Loan and (ii) the purchase price of the Mortgaged Property at the time of origination of the Mortgage Loan, provided, however, that in the case of a Refinanced Mortgage Loan, such value is based solely upon the appraisal made at the time of origination of such Refinanced Mortgage Loan and further provided, however, in the case of a Mortgage Loan originated under the Seller's streamlined documentation program, such value may be based upon a prior appraisal that satisfies the requirements of the Seller's streamlined documentation program.

R. The term "assignment of mortgage" when used herein means an assignment of the Mortgage, notice of transfer or equivalent instrument in recordable form, sufficient under the laws of the jurisdiction wherein the related Mortgaged Property is located to reflect the sale of the Mortgage to the Purchaser.

S. The term "balloon mortgage loan" when used herein means any individual Mortgage Loan purchased pursuant to this Agreement wherein the Mortgage Note matures after seven years requiring a final and accelerated payment of the outstanding principal prior to full amortization.

T. The term "balloon payment" when used herein means a payment of the unamortized principal balance of a Balloon Mortgage Loan in a single payment at the maturity of such Mortgage Loan that is substantially greater than the preceding Monthly Payment.

U. The term "BIF" when used herein means "The Bank Insurance Fund", or any successor thereto.

V. The term "business day" when used herein means any day other than (i) a Saturday or Sunday, or (ii) a day on which banking and savings and loan institutions, in the States of California, Texas or New York or the state in which the Servicer's servicing operations are located, are authorized or obligated by law or executive order to be closed.

W. The term "cash liquidation" when used herein means recovery of all cash proceeds by the Servicer with respect to the termination of any defaulted Mortgage Loan other than a Mortgage Loan which became an REO Property, including all Primary Mortgage Insurance Proceeds, Other Insurance Proceeds, Liquidation Proceeds, Condemnation Proceeds and other payments or recoveries whether made at one time or over a period of time which the Servicer deems to be finally recoverable, in connection with the sale or assignment of such Mortgage Loan, trustee's sale, foreclosure sale or otherwise.

X. The term "CD mortgage loan" when used herein means Any individual Mortgage Loan purchased pursuant to this Agreement which contains a provision whereby the interest rate on such Mortgage Loan is adjusted semi-annually based upon the weekly average yield on certificates of deposit.

Y. The term "closing date" when used herein means the date this Agreement is executed and delivered and the date or dates on which the Purchaser from time to time shall purchase, and the Seller from time to time shall sell, the Mortgage Loans listed on the related Mortgage Loan Schedule with respect to the related Mortgage Loan Package.

Z. The term "condemnation proceeds" when used herein means all awards or settlements in respect of a taking of an entire Mortgaged Property by exercise of the power of eminent domain or condemnation.

AA. The term "consumer personal information" when used herein means any information, including, but not limited to, all personal information about a Mortgagor that is disclosed to any of the Seller, the Servicer or the Purchaser by or on behalf of a Mortgagor.

BB. The term "convertible mortgage loan" when used herein means any individual Adjustable Rate Mortgage Loan purchased pursuant to this Agreement which contains a provision whereby the Mortgagor is permitted to convert the Mortgage Loan to a Fixed Rate Mortgage Loan in accordance with the terms of the related Mortgage Note.

CC. The term "custodial account" when used herein means the separate account or accounts created and maintained pursuant to this Agreement, which shall be entitled "Countrywide Home Loans Servicing LP, in trust for the Purchaser and various Mortgagors, Conventional Mortgage Loans."

DD. The term "custodial agreement" when used herein means the agreement between the Purchaser and the Custodian governing the retention of the Mortgage Files.

EE. The term "custodian" when used herein means the custodian under the Custodial Agreement, or its successor in interest or assigns, or any successor to the Custodian under the Custodial Agreement, as therein provided.

FF. The term "cut-off" date when used herein means the first day of the month in which the related Closing Date occurs.

GG. The term "deleted mortgage loan" when used herein means a Mortgage Loan repurchased or replaced or to be replaced with a Qualified Substitute Mortgage Loan.

HH. The term "determination date" when used herein means the 15th day of the month of the related Remittance Date or if such 15th day is not a Business Day, the Business Day immediately following such 15th day.

II. The term "due date" when used herein means the day of the month on which the Monthly Payment is due on a Mortgage Loan, exclusive of any days of grace.

JJ. The term "due period" when used herein means With respect to each Remittance Date, the period commencing on the second day of the month preceding the month of the Remittance Date and ending on the first day of the month of the Remittance Date.

KK. The term "eligible account" when used herein means An account or accounts (i) maintained with a depository institution the short term debt obligations of which are rated by Standard & Poor's at least A-1+, by Fitch at least F-1, and by Moody's at least P-1 at the time of any deposit therein, (ii) the deposits of which are fully insured by the FDIC, (iii) maintained in a parent, affiliate or subsidiary of the Seller provided that such account satisfies the requirements of (i) or (ii) above or (iv) maintained with a trust account or accounts maintained with a federal or state chartered depository institution or trust company acting in its fiduciary capacity.

LL. The term "equity take-out refinanced mortgage loan" when used herein means A Mortgage Loan used to refinance an existing mortgage loan, the proceeds of which were in excess of the sum of (i) the unpaid principal balance of the existing mortgage loan; and (ii) the lesser of (A) two percent (2%) of the unpaid principal balance of the existing mortgage loan or (B) \$2000.

MM. The term "escrow account" when used herein means the separate trust account or accounts created and maintained pursuant to this Agreement which shall be entitled "Countrywide Home Loans Servicing LP, in trust for the Purchaser and various Mortgagors, Conventional Mortgage Loans."

NN. The term "event of default" when used herein means the amounts constituting ground rents, taxes, assessments, water rates, mortgage insurance premiums, fire and hazard insurance premiums and other payments required to be escrowed by the Mortgagor with the mortgagee pursuant to any Mortgage Loan.

OO. The term "fair market value" when used herein means with respect to any Mortgage Loan, the market value of the related Mortgaged Property as mutually agreed upon by the Servicer and the Purchaser. In the event the Servicer and the Purchaser disagree as to such Fair Market Value, the Servicer shall have the option to select an appraiser from a list of three independent appraisers selected by the Purchaser, each of whom meets the minimum FNMA or FHLMC requisite qualifications for appraisers. Such appraiser shall determine the Fair Market Value of the Mortgaged Property in accordance with the then current guidelines for the Seller's "full documentation program". Such appraisal shall be in a form acceptable to FNMA or FHLMC and shall be conclusive for the purposes of determining the Fair Market Value of the Mortgaged Property. The fee for such appraisal shall be paid by the Servicer, except in the event such fee is incurred in connection with calculating the Termination Fee in which case the Purchaser shall pay the fee for such appraisal.

PP. The term "FDIC" when used herein means the Federal Deposit Insurance Corporation, or any successor thereto.

QQ. The term "FHLMC" when used herein means Freddie Mac, formerly known as The Federal Home Loan Mortgage Corporation, or any successor organization.

RR. The term "fidelity bond" when used herein means a fidelity bond to be maintained by the Servicer pursuant to Subsection 11.12.

SS. The term "FIRREA" when used herein means the Financial Institutions Reform, Recovery, and Enforcement Act of 1989.

TT. The term "Fitch" when used herein means Fitch Investors Services, Inc.

UU. The term "fixed rate mortgage loan" when used herein means any individual Mortgage Loan purchased pursuant to this Agreement wherein the Mortgage Interest Rate set forth in the Mortgage Note is fixed for the term of such Mortgage Loan, including any Balloon Mortgage Loan.

VV. The term "FNMA" when used herein means Fannie Mae, formerly known as The Federal National Mortgage Association, or any successor organization.

WW. The term "FNMA Guidelines" when used herein means the Fannie Mae Sellers' Guide and the Fannie Mae Servicers' Guide and all amendments or additions thereto, including, but not limited to, future updates thereof.

XX. The term "funding deadline" when used herein means with respect to each Closing Date, one o'clock p.m. (1:00 p.m.) New York time, or such other time mutually agreed to by the Purchaser and the Seller.

YY. The term "gross margin" when used herein means with respect to each Adjustable Rate Mortgage Loan, the fixed percentage amount set forth in the related Mortgage Note which amount is added to the Index in accordance with the terms of the related Mortgage Note to determine on each Interest Adjustment Date, the Mortgage Interest Rate for such Adjustable Rate Mortgage Loan.

ZZ. The term "HUD" when used herein means The Department of Housing and Urban Development or any federal agency or office thereof which may from time to time succeed to the functions thereof.

AAA. The term "index" when used herein means with respect to any Adjustable Rate Mortgage Loan, the index identified on the Mortgage Loan Schedule and set forth in the related Mortgage Note for the purpose of calculating the Mortgage Interest Rate thereon.

BBB. The term "information diskette" when used herein means a diskette or electronic file delivered by the Seller to the Purchaser, or an electronic data transfer from the Seller to the Purchaser, in respect of each Mortgage Loan Package which shall contain: (i) the information necessary for the Mortgage Loan Schedule and (ii) the date the last Monthly Payment was actually applied to the unpaid principal balance.

CCC. The term "insurance proceeds" when used herein means with respect to each Mortgage Loan, proceeds of insurance policies insuring the Mortgage Loan or the related Mortgaged Property.

DDD. The term "interest adjustment date" when used herein means with respect to an Adjustable Rate Mortgage Loan, the date on which an adjustment to the Mortgage Interest Rate on a Mortgage Note becomes effective.

EEE. The term "interest only mortgage loan" when used herein means a Mortgage Loan which requires only payments of interest (and not principal) for a period of time specified in the related Mortgage Note.

FFF. The term "late collections" when used herein means with respect to any Mortgage Loan, all amounts received during any Due Period, whether as late payments of Monthly Payments or as Liquidation Proceeds, Condemnation Proceeds, Primary Mortgage Insurance Proceeds, Other Insurance Proceeds, proceeds of any REO Disposition or otherwise, which represent late payments or collections of Monthly Payments due but delinquent for a previous Due Period and not previously recovered.

GGG. The term "lender PMI mortgage loan" when used herein means any individual Mortgage Loan subject to an LPMI Policy.

HHH. The term "LIBOR mortgage loan" when used herein means any individual Mortgage Loan purchased pursuant to this Agreement which contains a provision whereby the interest rate on such Mortgage Loan is adjusted semi-annually or annually based upon the rate per

annum equal to the average of interbank offered rates for six-month or one year, as applicable, U.S. Dollar denominated deposits in the London Market as published in The Wall Street Journal.

III. The term "lifetime mortgage interest rate cap" when used herein means with respect to each Adjustable Rate Mortgage Loan, the absolute maximum Mortgage Interest Rate payable, above which the Mortgage Interest Rate cannot be adjusted.

JJJ. The term "liquidation proceeds" when used herein means amounts, other than Primary Mortgage Insurance Proceeds, Condemnation Proceeds and Other Insurance Proceeds, received by the Servicer in connection with the liquidation of a defaulted Mortgage Loan through trustee's sale, foreclosure sale or otherwise, other than amounts received following the acquisition of an REO Property pursuant to Subsection 11.13.

KKK. The term "Loan-to-Value Ratio or LTV" when used herein means with respect to any Mortgage Loan, the ratio of the outstanding principal amount of the Mortgage Loan as of the date of determination to the Appraised Value of the related Mortgaged Property.

LLL. The term "LPMI Fee" when used herein means with respect to each Lender PMI Mortgage Loan, the portion of the Mortgage Interest Rate as set forth on the related Mortgage Loan Schedule (which shall be payable solely from the interest portion of Monthly Payments, Insurance Proceeds, Condemnation Proceeds or Liquidation Proceeds), which, during such period prior to the required cancellation of the LPMI Policy, shall be used to pay the premium due on the related LPMI Policy.

MMM. The term "LPMI Policy" when used herein means with respect to a Lender PMI Mortgage Loan, a policy of primary mortgage guaranty insurance issued by a Qualified Insurer pursuant to which the related premium is to be paid by the Servicer from payments of interest made by the Mortgagor in an amount as is set forth in the related Mortgage Loan Schedule.

NNN. The term "MERS" when used herein means Mortgage Electronic Registration Systems, Inc., a corporation organized and existing under the laws of the State of Delaware, or any successor thereto.

OOO. The term "MERS Mortgage Loan" when used herein means any Mortgage Loan registered with MERS on the MERS System.

PPP. The term "MERS System" when used herein means the system of recording transfers of mortgages electronically maintained by MERS.

QQQ. The term "MIN" when used herein means the Mortgage Identification Number for any MERS Mortgage Loan.

RRR: The term "MOM Loan" when used herein means any Mortgage Loan as to which MERS is acting as mortgagee, solely as nominee for the originator of such Mortgage Loan and its successors and assigns.

SSS: The term "monthly advance" when used herein means the aggregate of the advances made by the Servicer on any Remittance Date pursuant to Subsection 11.19.

TTT. The term "monthly payment" when used herein means the scheduled monthly payment of principal and interest on a Mortgage Loan.

UUU. The term “Moody’s” when used herein means Moody’s Investors Service, Inc.

VVV. The term “mortgage” when used herein means the mortgage, deed of trust or other instrument securing a Mortgage Note, which creates a first lien on an unsubordinated estate in fee simple in real property securing the Mortgage Note; except that with respect to real property located in the state of Hawaii, the mortgage, deed of trust or other instrument securing the Mortgage Note may secure and create a first lien upon a leasehold estate of the Mortgagor.

WWW. The term “mortgage file” when used herein means with respect to each Mortgage Loan, the documents pertaining thereto specified in Exhibit 5 and any additional documents required to be added to the Mortgage File pursuant to this Agreement.

XXX. The term “mortgage impairment insurance policy” when used herein means a mortgage impairment or blanket hazard insurance policy as required by Subsection 11.11.

YYY. The term “mortgage interest rate” when used herein means the annual rate at which interest accrues on any Mortgage Loan, exclusive of any primary mortgage insurance premium and, with respect to an Adjustable Rate Mortgage Loan, as adjusted from time to time in accordance with the provisions of the related Mortgage Note and in compliance with the related Lifetime Mortgage Interest Rate Cap, Periodic Rate Cap and negative amortization features, if any, of the related Mortgage Note.

ZZZ. The term “mortgage loan” when used herein means an individual Mortgage Loan which is the subject of this Agreement, each Mortgage Loan originally sold and subject to this Agreement being identified on the related Mortgage Loan Schedule, which Mortgage Loan includes without limitation the Mortgage File, the Monthly Payments, Principal Prepayments, Liquidation Proceeds, Condemnation Proceeds, Insurance Proceeds, REO Disposition proceeds, and all other rights, benefits, proceeds and obligations arising from or in connection with such Mortgage Loan.

A1. The term “mortgage loan documents” when used herein means the documents contained in the Mortgage File.

B1. The term “mortgage loan package” when used herein means the pool of Mortgage Loans sold to the Purchaser on the related Closing Date.

C1. The term “mortgage loan remittance rate” when used herein means with respect to each Mortgage Loan, the interest rate payable to the Purchaser on each Remittance Date which shall equal the Mortgage Interest Rate less the Servicing Fee and any pool insurance policy premiums (including, without limitation, LPMI Fees), if applicable.

D1. The term “mortgage loan schedule” when used herein means the schedule of Mortgage Loans to be prepared by the Seller or Purchaser (at Seller’s option) from information contained on an Information Diskette and other information delivered by the Seller to the Purchaser in respect of each Mortgage Loan Package, setting forth the following information with respect to each Mortgage Loan: (1) the Seller’s Mortgage Loan identifying number; (2) the Mortgagor’s name; (3) the street address of the Mortgaged Property including the city, state and zip code; (4) a code indicating whether the Mortgaged Property is the Mortgagor’s primary residence, secondary residence or an investor property; (5) the type of residential units constituting the Mortgaged Property (i.e., detached single family, two-to-four-family, condominium units, etc.); (6) the original months to maturity or

the remaining months to maturity from the Cut-off Date, in any case based on the original amortization schedule and, if different, the maturity expressed in the same manner but based on the actual amortization schedule; (7) the Appraised Value (including the purchase price of the Mortgaged Property, if applicable) of the Mortgaged Property and the Loan-to-Value Ratio at origination; (8) the Mortgage Interest Rate at origination; (9) the date on which the initial Monthly Payment was due on the Mortgage Loan; (10) the stated maturity date; (11) the amount of the Monthly Payment as of the Cut-off Date; (12) the original principal amount of the Mortgage Loan; (13) the principal balance of the Mortgage Loan as of the close of business on the Cut-off Date, after deduction of payments of principal due on or before the Cut-off Date whether or not collected; (14) with respect to an Adjustable Rate Mortgage Loan, the first Interest Adjustment Date after each of the related origination date and related Cut-Off Date; (15) with respect to an Adjustable Rate Mortgage Loan, the Gross Margin; (16) a code indicating the purpose of the loan (i.e., purchase, rate and term refinance, equity take-out refinance); (17) with respect to an Adjustable Rate Mortgage Loan, the Lifetime Mortgage Interest Rate Cap under the terms of the Mortgage Note; (18) with respect to an Adjustable Rate Mortgage Loan other than a NegAm Mortgage Loan, the Periodic Rate Cap; (19) the Servicing Fee Rate; (20) a code indicating the documentation style (i.e., full, alternative, reduced or streamlined); (21) a code indicating whether the Mortgage Loan is Convertible or Non-Convertible; (22) a code indicating whether the Mortgage Loan is a Balloon, Interest Only, LIBOR, NegAm, CD, Fixed, 3/1 ARM, 5/1 ARM, 7/1 ARM, 10/1 ARM or Treasury Mortgage Loan; (23) with respect to a Fixed Rate Mortgage Loan, a code indicating whether the Mortgage Loan contains a temporary "buydown" provision and, if so, the term and type of buydown; (24) the Primary Mortgage Insurance Policy number, if any, which number (or an additional code) shall identify the applicable Primary Mortgage Insurance Policy provider and the coverage amount; (25) with respect to a NegAm Mortgage Loan, the first Payment Adjustment Date; (26) a code indicating whether the Mortgage Loan is a MERS Mortgage Loan and, if so, the corresponding MIN; (27) a code indicating whether the Mortgage Loan is a Lender PMI Mortgage Loan and, in the case of any Lender PMI Mortgage Loan, the LPMI Fee; (28) the Mortgage Interest Rate as of the Cut-off Date; (29) with respect to an Adjustable Rate Mortgage Loan, the related initial Periodic Rate Cap; (30) the date on which the Mortgage Loan was originated; (31) a code indicating whether the Mortgage Loan is subject to a prepayment penalty and if so, the terms of such prepayment penalty; (32) the Mortgagor's credit score at the time of origination of the Mortgage Loan; (33) the paid through date; (34) with respect to each Mortgage Loan originated more than six months prior to the related Closing Date, the number of times in the previous twelve month period preceding the related Closing Date that any Monthly Payment has been received thirty or more days after its Due Date; and (35) any other information to be listed as agreed to between the Seller and the Purchaser. With respect to the Mortgage Loans in the aggregate, the Mortgage Loan Schedule shall set forth the following information, as of the related Cut-off Date: (1) the number of Mortgage Loans; (2) the current principal balance of the Mortgage Loans; and (3) the weighted average Mortgage Interest Rate of the Mortgage Loans. Such schedule may be delivered in magnetic tape or hard copy form.

E1. The term "mortgage note" when used herein means the note or other evidence of the indebtedness of a Mortgagor secured by a Mortgage.

F1. The term "mortgaged property" when used herein means the real property (or leasehold estate, if applicable, in the case of a Mortgage Loan in the state of Hawaii) securing repayment of the debt evidenced by a Mortgage Note.

G1. The term "mortgagor" when used herein means the obligor on a Mortgage Note.

H1. The term “NegAm mortgage loan” when used herein means any individual Mortgage Loan purchased pursuant to this Agreement which permits negative amortization and which contains a provision whereby the interest rate on such Mortgage Loan is adjusted monthly.

I1. The term “negative amortization cap” when used herein means with respect to each NegAm Mortgage Loan, the provision of each Mortgage Note which provides for an absolute maximum percentage of the original principal amount of such Mortgage Loan that the outstanding principal amount of the Mortgage Loan may reach as a result of negative amortization which shall percentage shall not be greater than permitted under applicable state law.

J1. The term “non-convertible mortgage loan” when used herein means any individual Adjustable Rate Mortgage Loan purchased pursuant to this Agreement which does not contain a provision whereby the Mortgagor may convert the Mortgage Loan to a fixed-rate mortgage loan.

K1. The term “nonrecoverable advance” when used herein means any Monthly Advance or Servicing Advance previously made or proposed to be made in respect of a Mortgage Loan which, in the good faith judgment of the Servicer using Accepted Servicing Practices, will not or, in the case of a proposed advance, would not, be ultimately recoverable from related Late Collections, Insurance Proceeds, Other Insurance Proceeds, Liquidation Proceeds or otherwise from such Mortgage Loan.

LI. The term “officer’s certificate” when used herein means a certificate signed by the Chairman of the Board or the Vice Chairman of the Board or a President or a Vice President and by the Treasurer or the Secretary or one of the Assistant Treasurers or Assistant Secretaries of the Seller or the Servicer, as applicable, and delivered to the Purchaser.

M1. The term “opinion of counsel” when used herein means a written opinion of counsel, who may be an employee of the party on behalf of whom the opinion is being given, reasonably acceptable to the Purchaser.

N1. The term “other insurance proceeds” when used herein means proceeds of any title policy, hazard policy, pool policy or other insurance policy covering a Mortgage Loan, other than the Primary Mortgage Insurance Policy, if any, to the extent such proceeds are not to be applied to the restoration of the related Mortgaged Property or released to the Mortgagor in accordance with the procedures that the Servicer would follow in servicing mortgage loans held for its own account.

O1. The term “OTS” when used herein means the Office of Thrift Supervision, its successors and assigns.

P1. The term “pass-through transfer” when used herein means the sale or transfer of some or all of the Mortgage Loans to a trust to be formed as part of a publicly or privately traded pass-through transaction retaining the Seller as “servicer” thereunder.

Q1. The term “payment adjustment date” when used herein means with respect to each Adjustable Rate Mortgage Loan, the date on which an adjustment to the Monthly Payment pursuant to the related Mortgage Note becomes effective.

R1. The term “periodic payment cap” when used herein means with respect to each NegAm Mortgage Loan, the provision of each Mortgage Note which permits limiting any change in the amount of the adjusted Monthly Payment due on any Payment Adjustment

Date to an amount not greater than a certain percentage (set forth in the Mortgage Note) of the amount of the Monthly Payment due on the preceding Due Date. The Periodic Payment Cap for a NegAm Mortgage Loan shall not exceed the limits imposed by applicable state law.

S1. The term “periodic rate cap” when used herein means with respect to each Adjustable Rate Mortgage Loan other than a NegAm Mortgage Loan, the provision of each Mortgage Note which provides for an absolute maximum amount by which the Mortgage Interest Rate therein may increase or decrease on an Interest Adjustment Date above the Mortgage Interest Rate previously in effect, equal to the rate set forth on the Mortgage Loan Schedule per adjustment.

T1. The term “person” when used herein means any individual, corporation, partnership, joint venture, association, joint-stock company, limited liability company, trust, unincorporated organization or government or any agency or political subdivision thereof.

U1. The term “prepayment interest shortfall amount” when used herein means with respect to any Mortgage Loan that was subject to a Principal Prepayment in full or in part during any Due Period, which Principal Prepayment was applied to such Mortgage Loan prior to such Mortgage Loan’s Due Date in such Due Period, the amount of interest (net of the related Servicing Fee) that would have accrued on the amount of such Principal Prepayment during the period commencing on the date as of which such Principal Prepayment was applied to such Mortgage Loan and ending on the day immediately preceding such Due Date, inclusive.

V1. The term “primary mortgage insurance policy” when used herein means a policy of primary mortgage guaranty insurance issued by a Qualified Insurer which conforms in all respects to the description set forth in Subsection 7.02(xxxi) herein.

W1. The term “primary mortgage insurance proceeds” when used herein means proceeds of any Primary Mortgage Insurance Policy.

X1. The term “principal payment” when used herein means any payment or other recovery of principal on a Mortgage Loan which is received in advance of its scheduled Due Date which is not accompanied by an amount of interest representing scheduled interest due on any date or dates in any month or months subsequent to the month of prepayment.

Y1. The term “principal prepayment period” when used herein means as to any Remittance Date, period commencing on the 2nd day of the calendar month preceding the month in which such Remittance Date occurs and ending on the 1st day of the month in which such Remittance Date occurs, both inclusive.

Z1. The term “purchase price” when used herein means the price paid on the related Closing Date by the Purchaser to the Seller in exchange for the Mortgage Loans purchased on such Closing Date as calculated in Section 4 of this Agreement.

A2. The term “purchase price and term letters” when used herein means those certain letter agreements executed on or after the date hereof setting forth the general terms and conditions of each transaction contemplated herein and identifying the loan characteristics of the Mortgage Loans to be purchased from time to time hereunder, by and between the Seller and the Purchaser. All of the individual Purchase Price and Terms Letters shall collectively be referred to as the “Purchase Price and Terms Letter”.

B2. The term “purchaser” when used herein means DLJ Mortgage Capital, Inc. or its successor in interest or any successor to or assignee of the Purchaser under this Agreement as herein provided.

C2. The term “qualified insurer” when used herein means an insurance company duly qualified as such under the laws of the states in which the Mortgaged Properties are located, duly authorized and licensed in such states to transact the applicable insurance business and to write the insurance provided, approved as an insurer by FNMA and FHLMC and whose claims paying ability is rated in one of the two highest rating categories by the Standard & Poor’s or Moody’s with respect to primary mortgage insurance and in one of the two highest rating categories by A.M. Best Company, Inc. with respect to hazard and flood insurance.

D2. The term “qualified substitute mortgage loan” when used herein means a mortgage loan eligible to be substituted by the Seller for a Deleted Mortgage Loan which must, on the date of such substitution, (i) have an unpaid principal balance, after deduction of all scheduled payments due in the month of substitution (or in the case of a substitution of more than one (1) mortgage loan for a Deleted Mortgage Loan, an aggregate principal balance), not in excess of the unpaid principal balance of the Deleted Mortgage Loan (the amount of any shortfall will be deposited in the Custodial Account by the Seller in the month of substitution); (ii) have a Mortgage Interest Rate not less than, and not more than 1% greater than, the Mortgage Interest Rate of the Deleted Mortgage Loan; (iii) have a remaining term to maturity not later than, and not more than one year earlier than, the maturity date of the Deleted Mortgage Loan; (iv) comply with each representation and warranty (respecting individual Mortgage Loans) set forth in Subsection 7.02 hereof; and (v) be the same type of Mortgage Loan as the Deleted Mortgage Loan.

E2. The term “reconstitution agreements” when used herein means the agreement or agreements entered into by the Servicer and the Purchaser and/or certain third parties on the Reconstitution Date or Dates with respect to any or all of the Mortgage Loans serviced hereunder, in connection with a Whole Loan Transfer or a Pass-Through Transfer as set forth in Section 12. Such agreement or agreements shall prescribe the rights and obligations of the Seller in servicing the related Mortgage Loans.

F2. The term “reconstitution date” when used herein means the date or dates on which any or all of the Mortgage Loans serviced under this Agreement shall be removed from this Agreement and reconstituted as part of a Whole Loan Transfer or Pass-Through Transfer pursuant to Section 12 hereof.

G2. The term “record date” when used herein means the close of business of the last Business Day of the month preceding the month of the related Remittance Date.

H2. The term “refinanced mortgage loan” when used herein means a Mortgage Loan which was made to a Mortgagor who owned the Mortgaged Property prior to the origination of such Mortgage Loan and the proceeds of which were used in whole or part to satisfy an existing mortgage.

I2. The term “relief act” when used herein means the Service members Civil Relief Act, or any similar state or local law.

J2. The term “relief act interest shortfall” when used herein means with respect to any Remittance Date, for any Mortgage Loan with respect to which there has been a reduction in the amount of interest collectable thereon for the most recently ended Due Period as a

result of the application of the Relief Act, the amount by which (i) interest collectable on such Mortgage Loan during such Due Period is less than (ii) one month's interest on the Stated Principal Balance of such Mortgage Loan at the related Mortgage Interest Rate before giving effect to the application of the Relief Act.

K2. The term "REMIC" when used herein means a "real estate mortgage investment conduit" within the meaning of Section 860D of the Internal Revenue Code.

L2. The term "remittance date" when used herein means the eighteenth (18th) day of any month, beginning with the First Remittance Date, or if such eighteenth (18th) day is not a Business Day, the first Business Day immediately following.

M2. The term "REO account" when used herein means the account created and maintained pursuant to Subsection 11.13, which account shall be an Eligible Account.

N2. The term "REO disposition" when used herein means the final sale by the Seller of any REO Property.

O2. The term "REO property" when used herein means a Mortgaged Property acquired by the Servicer on behalf of the Purchaser as described in Subsection 11.13.

P2. The term "Repurchase Price" when used herein means with respect to any Mortgage Loan, a price equal to (i) the Stated Principal Balance of the Mortgage Loan plus (ii) interest on such Stated Principal Balance at the Mortgage Loan Remittance Rate from the last date through which interest has been paid and distributed to the Purchaser to the date of repurchase, less amounts received or advanced in respect of such repurchased Mortgage Loan which are being held in the Custodial Account for distribution in the month of repurchase plus (iii) with respect to any Mortgage Loan included in a Pass-Through Transfer, any costs incurred by the related trust in connection with the breach of any predatory and abusive lending law by such Mortgage Loan.

Q2. The term "SAIF" when used herein means the Savings Association Insurance Fund, or any successor thereto.

R2. The term "seller" when used herein means the loan originator or any successor to the Seller under this Agreement as provided herein.

S2. The term "servicer" when used herein means master servicer or primary servicer under the Pooling and Servicing Agreement or any successor to or assignee of the Servicer under this Agreement as provided herein.

T2. The term "servicing advances" when used herein means all customary, reasonable and necessary "out of pocket" costs and expenses incurred in the performance by the Servicer of its servicing obligations, including, but not limited to, the cost of (i) the preservation, restoration and protection of the Mortgaged Property, (ii) any enforcement or judicial proceedings, including foreclosures, (iii) the management and liquidation of the REO Property and (iv) compliance with the obligations under Subsection 11.08.

U2. The term "servicing fee" when used herein means with respect to each Mortgage Loan, the amount of the annual fee the Purchaser shall pay to the Servicer, which shall, for a period of one full month, be equal to one-twelfth of the product of (a) the Servicing Fee Rate and (b) the Stated Principal Balance of such Mortgage Loan. Such fee shall be payable monthly, computed on the basis of the same principal amount and period respecting which any related interest payment on a Mortgage Loan is computed. The obligation of the

Purchaser to pay the Servicing Fee is limited to, and the Servicing Fee is payable solely from, the interest portion of such Monthly Payment collected by the Servicer, or as otherwise provided under Subsection 11.24 hereof. With respect to REO Property, the Servicing Fee shall be payable to the Servicer through REO Disposition in accordance with Subsection 11.13, which Servicing Fee payable in respect of any REO Property shall be based upon the Stated Principal Balance of the related Mortgage Loan at the time of foreclosure, as reduced by any income or proceeds received by Purchaser in respect of such REO Property and applied to reduce the outstanding principal balance of the foreclosed Mortgage Loan.

V2. The term “servicing fee rate” when used herein means with respect to each transaction contemplated herein, the per annum rate set forth as such in the related Purchase Price and Terms Letter.

W2. The term “servicing file” when used herein means with respect to each Mortgage Loan, the documents pertaining to such Mortgage Loan retained by the Servicer, consisting of copies or microfilmed copies, as the case may be, of each of the documents in the Mortgage File and originals of each of the other documents set forth in Exhibit 6 hereto. Such documents may be maintained on microfilm (provided that the Servicer shall deliver to the Purchaser an electronic copy of the Servicing File upon the Purchaser’s request).

X2. The term “servicing officer” when used herein means any officer of the Servicer involved in, or responsible for, the administration and servicing of the Mortgage Loans whose name appears on a list of servicing officers furnished by the Servicer to the Purchaser upon request, as such list may from time to time be amended.

Y2. The term “Standard & Poor’s” when used herein means Standard & Poor’s Ratings Services, a division of the McGraw-Hill Companies, Inc.

Z2. The term “stated principal balance” when used herein means with respect to each Mortgage Loan as of the date of such determination: (i) the unpaid principal balance of the Mortgage Loan as of the Cut-off Date after giving effect to payments of principal due on or before such date, whether or not received, and without giving effect to payments received on or before such date in respect of payments due after such date for application on the scheduled Due Date, minus (ii) all amounts previously distributed to the Purchaser with respect to the related Mortgage Loan representing payments or recoveries of principal or advances in lieu thereof.

A3. The term “termination fee” when used herein means the amount paid to the Servicer by the Purchaser in the event of the Servicer’s termination without cause, as servicer. Such fee shall equal 2% of (a) the then current unpaid principal balance of the Mortgage Loans, and (b) in the case of REO Property, the lesser of (i) 100% of the Stated Principal Balance of the Mortgage Loan encumbering the Mortgaged Property at the time such Mortgaged Property was acquired and became REO Property or (ii) the Fair Market Value of the REO Property at the time of termination.

B3. The term “treasury mortgage loan” when used herein means any individual Adjustable Rate Mortgage Loan purchased pursuant to this Agreement which contains a provision whereby the interest rate on such Mortgage Loan is adjusted annually based upon the weekly average yield on U.S. Treasury securities.

C3. The term “updated loan-to-value ratio” when used herein means with respect to any Mortgage Loan, the outstanding principal balance of such Mortgage Loan as of the date of

determination divided by the Value of the related Mortgaged Property as determined by the appraisal made for the originator at the time of origination of the Mortgage Loan or in the event that an appraisal was made since the origination of the Mortgage Loan then the latest appraisal of the Mortgaged Property. Such appraisal shall (i) be in a form acceptable to FNMA and FHLMC and (ii) meet the then current guidelines for the Seller's so called "full documentation" program.

D3. The term "whole loan agreement" when used herein means any Reconstitution Agreement in respect of a Whole Loan Transfer.

E3. The term "whole loan transfer" when used herein means the sale or transfer by Purchaser of some or all of the Mortgage Loans in a whole loan or participation certificate format pursuant to a Reconstitution Agreement retaining the Servicer as "servicer" thereunder.

INSTRUCTIONS

F3. If the space provided below each interrogatory is not sufficient for your answer, then use additional sheets, numbered consecutively after each such interrogatory, and inserted in the proper order of all copies filed and served. For example, in the case of Interrogatory number 1, any additional sheets for your answers would be numbered as 1-A, 1-B, 1-C, etc.

G3. Each of the following requests for production of documents and interrogatories is intended to be a continuing request to produce and answer. As a result, the Plaintiffs hereby demand that, in the event that at any later date you obtain any additional facts, or form any conclusions, opinions or contentions different from those set forth in your responses herein, then you shall amend your answers to such responses and document production promptly and sufficiently in advance of any trial date, to fully set forth such differences and to produce and documents in connection therewith.

**INTERROGATORIES AND REQUEST
FOR PRODUCTION OF DOCUMENTS**

1. All images of any documents regarding this loan that have been transmitted or saved on the FileNet system.

RESPONSE:

2. All images of any documents regarding this loan that have been transmitted or saved on the iClear system.

RESPONSE:

3. The MassOne PIR1 Summary for all accounts related to this loan.

RESPONSE:

4. Copies of all data used by your Bankruptcy Workstation to prepare, file or store any data used in connection with the bankruptcy case.

RESPONSE:

5. A copy of your written Document Retention Policy.

RESPONSE:

6. A copy of your Mass Disaster Recovery Policy.

RESPONSE:

7. Copies of all transmittals on your VendorScape system related to the servicing of this loan.

RESPONSE:

8. A copy of all of your Investor Guidelines for the servicing of this loan.

RESPONSE:

9. Your written procedures for the preparation and filing of proof of claims in consumer bankruptcy cases.

RESPONSE:

10. All documents related to access rights to your mainframe bankruptcy servicing platform.

RESPONSE:

11. All documents related to your bankruptcy automated tracking system or systems.

RESPONSE:

12. A list of all software applications that you use in connection with your mainframe bankruptcy servicing platform along with a description of each such application.

RESPONSE:

13. All of the investor guidelines for this loan regarding any minimum and/or maximum charges for bankruptcy attorney fees, property inspection fees, broker price opinion fees, statutory expenses, and any other similar fee or charge.

RESPONSE:

14. All property inspection reports and broker price opinion reports including digital photographs.

RESPONSE:

15. A list of all post-petition events that would automatically trigger some type of activity related to a mortgage loan and the related activity.

RESPONSE:

16. A list of the FHA mortgage servicing guidelines.

RESPONSE:

17. Do you follow FHA servicing guidelines for all private investor servicing agreements?

RESPONSE:

18. Premier Asset Servicers or PSA is a company owned by Wells Fargo Home Loans that performs broker price opinions. Produce all documents

related to any such company or affiliated company owned by you that performs similar functions.

RESPONSE:

19. All bills or invoices from First American, Fidelity and Mortgage Security Lenders for property inspections.

RESPONSE:

20. All guidelines that you have in place for any vendor management group that rates the performance of attorneys providing legal services to you.

RESPONSE:

21. The image of the Pooling and Servicing Agreement for this loan from your FileNet or any similar document imaging system.

RESPONSE:

22. All documents related to the requirement for digital photographs for property inspections and the average charge or fee per photograph (normally \$1.25).

RESPONSE:

23. Add monthly investor or EDR reports related to this mortgage loan for the 12 month period before the bankruptcy filing and each month thereafter.

RESPONSE:

24. All report card systems and time-line scoring reports for any attorneys or law firms involved in the servicing of this loan.

RESPONSE:

25. All of the key indicator reports related to the servicing of this loan.

RESPONSE:

26. Produce your client number for this loan.

RESPONSE:

27. Any logs or records of communications to the debtor by date and type of communication.

RESPONSE:

28. Provide a fully itemized statement of the current amount needed to reinstate the mortgage loan.

RESPONSE:

29. All audits of the loan and a detailed description of any and all adjustments, credits or write-offs.

RESPONSE:

30.

Dated this the _____ day of _____, 2008.

A handwritten signature in black ink, appearing to read "O. Max Gardner III", with a stylized flourish at the end.

O. Max Gardner III
Law Offices of O. Max Gardner III
Attorney for Plaintiffs
403 South Washington Street
PO Box 1000
Shelby NC 28151-1000
PH 704.487.0616
maxgardner@maxgardner.com

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

**NAME: BROWNER, JR., JOHNNY CLAUDE
 BROWNER, ANNIE HUNT**

**CHAPTER 13 NO. 05-41427
OUR FILE NO. 11603**

**ADDRESS: 1820 GREEN VALLEY DRIVE
 SHELBY, NC 28152**

SSN: --- -- 6133 & --- -- 7719

Debtors

**JOHNNY CLAUDE BROWNER, JR. and wife,
ANNIE HUNT BROWNER**

Adversary Proc. No. 06-4049

Plaintiffs,

versus

CITIFINANCIAL MORTGAGE COMPANY, INC.

Defendant

**FIRST REQUEST FOR ADMISSIONS OF FACT
FROM THE PLAINTIFFS TO THE DEFENDANT
(POST-DISCHARGE)**

COME NOW the above-named Plaintiffs, by and through their attorney of record, and herewith serve upon the above named Defendant in this case the following request for admissions of fact. This request is being made pursuant to the provisions of Rules 7001 and 7036 of the Rules of Bankruptcy Procedure, Rule 36 of the Federal Rules of Civil Procedure, and Rules 7016-1, 7026-1 and 7030-1 of the Local Bankruptcy Rules for the United States Bankruptcy Court for the Western District of North Carolina, and the Bankruptcy Practice Guide for the United States Bankruptcy Court for the Western District of North Carolina.

The Defendant is requested by way of a proper officer to admit for the purpose of this action only the following facts. Please note that under the provisions of the applicable court rules each and every matter set forth below will be deemed admitted unless, within thirty (30) days after service of this request, the Defendant serves upon the Plaintiffs a written answer or objection addressed to the matter, signed by the Defendant or their attorney.

REQUEST FOR ADMISSIONS

1. Defendant received actual notice of the bankruptcy filing from the Debtor.

RESPONSE:

2. Defendant received actual notice of the bankruptcy filing from the Bankruptcy Noticing Center.

RESPONSE:

3. Defendant received actual notice of the bankruptcy filing from the Chapter 13 Trustee.

RESPONSE:

4. Defendant filed a sworn proof of claim in the Chapter 13 case of the debtors.

RESPONSE:

5. The Chapter 13 plan as confirmed included a debt to Defendant or its predecessor in interest for pre-petition mortgage arrearages.

RESPONSE:

6. The debt was secured by a lien, mortgage or deed of trust on the debtors' residential real estate.

RESPONSE:

7. The Chapter 13 plan as confirmed included a debt to Defendant or its predecessor in interest for the current monthly mortgage payment secured by the debtors' residential real estate.

RESPONSE:

8. Defendant received a copy of the Chapter 13 plan prior to the entry of the Order of Confirmation.

RESPONSE:

9. Defendant received a copy of the Court Order confirming the debtors' Chapter 13 Plan, the "Confirmation Order."

RESPONSE:

10. Defendant did not file any objection to the Chapter 13 plan or to any terms of the plan or to confirmation of the plan.

RESPONSE:

11. Defendant retained an attorney to review and file the proof of claim.

RESPONSE:

12. Defendant retained an attorney to review the Chapter 13 plan.

RESPONSE:

13. Defendant has not filed any motion or application for the court approval of any post petition legal fees in this case.

RESPONSE:

14. Defendant has not filed any motion or application for the court approval of post petition expenses in this case.

RESPONSE:

15. Defendant has not filed any motion or application for approval of any broker price opinion fees in this case.

RESPONSE:

16. Defendant has not filed any motion or application to retain the services of a real estate appraiser in this case.

RESPONSE:

17. Defendant has not filed any motion or application for approval of any inspections of the residential real estate of the Debtors in this case.

RESPONSE:

18. Defendant has not filed any motion or application for approval of the payment of any fees to any third-party (some party other than the Defendant or a lawyer retained by the Defendant) in this case.

RESPONSE:

19. Defendant has paid fees in this case to such a third-party providers of one or more bankruptcy-related services.

RESPONSE:

20. Defendant has paid fees in this case to such a third-party provider or providers for one or more than one mortgage-related services.

RESPONSE:

21. The attorney for Defendant has paid fees in this case to such a third-party provider or providers for one or more than one bankruptcy-related services.

RESPONSE:

22. The fees described in Numbers 19, 20 and 21 include what the third-party providers refer to as document release fees.

RESPONSE:

23. Defendant has deposited funds of the debtor in a "suspense" or other type account used for maintaining unapplied funds.

RESPONSE:

24. The mortgage instruments signed by the debtors do not provide for the use of any "suspense" accounts.

RESPONSE:

25. The mortgage instruments signed by the debtors do provide that payments must first be applied to interest and principal before they are applied to approved legal fees or other expenses.

RESPONSE:

26. Defendant has deposited funds received from the Trustee in a "suspense" or other type of account used for maintenance of unapplied funds.

RESPONSE:

27. The deposit of the Trustee's payments in a "suspense" account results in no application of the money to interest and principal.

RESPONSE:

28. Defendant has used some of the funds placed in either the debtor "suspense" or the Trustee "suspense" accounts to pay one or more of the legal fees or expenses assessed or charged to the mortgage loan of the debtors.

RESPONSE:

29. Defendant has invested the funds held in the "suspense" accounts in certain instruments that have provided an investment return to Defendant in the form of interest.

RESPONSE:

30. Defendant also has invested the monthly payments received from the Debtors in certain instruments that have provided an investment return to Defendant in the form of interest.

RESPONSE:

31. The Defendant refers to the interest earned on these investments as interest earned on the "float."

RESPONSE:

32. Defendant has not applied any of the interest earned on the "suspense" account investments to the loan obligations of the Debtors.

RESPONSE:

33. The Defendant has not applied any of the interest earned on the investment of the monthly payments of the Debtors to the loan obligations of the debtors.

RESPONSE:

34. The loan instruments in this case do not authorize the Defendant to use debtors' money for the purpose of earning investment interest for the Defendant.

RESPONSE:

35. The loan instruments in this case do not authorize the Defendant to use the Trustee's money for the purpose of earning investment interest for the Defendant.

RESPONSE:

36. Defendant has aggregated the legal fees and expenses incurred in this case in an account called a "corporate advance account."

RESPONSE:

37. Defendant, for accounting purposes, treats the "corporate advance account" as a receivable.

RESPONSE:

38. Defendant treats all "receivables" as assets on its accounting records.

RESPONSE:

39. Defendant has pooled and securitized all of its corporate advances with a third-party trustee/investor.

RESPONSE:

40. Defendant has therefore received cash payments on the corporate advances from said third-party trustee/investor.

RESPONSE:

41. As a result of the pooling and securitization of the its corporate advances, the Defendant is no longer the lawful owner of these receivables.

RESPONSE:

42. Defendant has income in the form of payments on the securitization of the "corporate advances."

RESPONSE:

43. Defendant has not applied any of the fees earned on the "corporate advances" as a credit against such advances.

RESPONSE:

44. Defendant did not provide notice to the debtors prior to performing property inspections on their residential real estate.

RESPONSE:

44. Defendant did not provide notice to the debtors prior to performing any type of appraisal of their property.

RESPONSE:

45. Defendant did not file any type of motion with the Court for a Rule 7034 entry upon and inspection of land of the debtors.

RESPONSE:

46. Defendant received a copy of the Trustee's motion for approval of his final report and for entry of the Order of Discharge.

RESPONSE:

47. Defendant retained an attorney to review the Trustee's final report and accounting.

RESPONSE:

48. Defendant reviewed the Trustee's final report and accounting.

RESPONSE:

49. The proof of claim filed by the Defendant was paid in full by the Chapter 13 Trustee.

RESPONSE:

50. Defendant did not file an objection to the Trustee's motion for the entry of final discharge order or to the approval of the final accounting.

RESPONSE:

51. The Court entered an Order declaring the long term debt current and arrears cured.

RESPONSE:

52. Defendant did not file an objection to the said Order.

RESPONSE:

53. Defendant has not filed a motion for relief from said order.

RESPONSE:

54. Defendant did not send debtors any notice of any outstanding legal fees before the entry of the discharge order.

RESPONSE:

55. Defendant did not send debtors any notice of any outstanding property inspection fees before the entry of the discharge order.

RESPONSE:

56. Defendant did not send debtors any notice of any outstanding broker price opinion or appraisal fees before the entry of the discharge order.

RESPONSE:

57. Defendant did not send debtors any notice of any outstanding late fees or similar charges before the entry of the discharge order.

RESPONSE:

58. The debtors Chapter 13 case was completed and an Order of Discharge was entered by the Bankruptcy Court on _____.

RESPONSE:

59. Defendant received a copy of the Order of Discharge entered in this case within 7 days of the date of entry.

RESPONSE:

60. Defendant is the servicer of a "federally related mortgage loan" as that term is defined in Section 2602(1) of Title 12 of the United States Code.

RESPONSE:

61. Debtors caused a Qualified Written Request to be mailed to Defendant on or about _____.

RESPONSE:

62. The Qualified Written Request was received by Defendant on or about _____.

RESPONSE:

63. The Qualified Written Request was not acknowledged within twenty days of receipt.

RESPONSE:

64. Defendant did not provide the information requested in the Qualified Written Request sent on behalf of the Plaintiff within sixty days of receipt.

RESPONSE:

65. Defendant has still not responded to the Qualified Written Request.

RESPONSE:

66. Defendant sent the attached bill, statement or notice to the debtors.

RESPONSE:

67. The attached document (Exhibit A) is a true, complete, accurate and genuine copy of the bill, statement or notice issued to debtors by the Defendant.

RESPONSE:

68. Exhibit A was generated by Defendant in the normal course of business.

RESPONSE:

69. Exhibit A includes the sum of \$_____ in corporate advances and other fees.

RESPONSE:

70. None of the fees or charges identified in number 69 were ever applied for or approved by the Bankruptcy Court.

RESPONSE:

71. Exhibit A states that it is an attempt to collect a debt and that any information secured from the debtors will be used for that purpose.

RESPONSE:

72. Defendant never provided the debtors with notice of the fees and charges identified in number 66 prior to the entry of the Discharge Order.

RESPONSE:

73. Defendant is subject to the provisions of Rule 2016 of the Bankruptcy Rules.

RESPONSE:

74. Defendant based on its review of the plan was aware of the provision regarding the proper application of mortgage payments received from the debtors and the Chapter 13 Trustee.

RESPONSE:

75. Defendant failed to apply such payments in this case as provided for by the Chapter 13 plan.

RESPONSE:

76. The misapplication of the mortgage payments in this case is not consistent with the manner of application required by the terms of the confirmed plan.

RESPONSE:

77. The misapplication of such payments has resulted in more than \$100.00 in additional fees and charges to the debtors.

RESPONSE:

78. The document identified as Exhibit A was a demand to collect a debt from the debtors.

RESPONSE:

79. Exhibit A included the so-called g notice provided for by the Fair Debt Collection Practices Act.

RESPONSE:

80. Defendant stated in Exhibit A that it was in fact a debt collector.

RESPONSE:

81. The Order confirming the plan in this case was never revoked prior to discharge.

RESPONSE:

82. Defendant received all payments required to be received under the confirmed plan.

RESPONSE:

83. Defendant has failed to properly credit all amounts received under the plan.

RESPONSE:

84. Defendant has failed to properly credit all amounts received from the debtors.

RESPONSE:

85. Defendant has applied funds received from the Trustee to fund "corporate advances" prior to applying all of such funds to interest and principal.

RESPONSE:

86. Defendant has applied funds received from the debtors to fund "corporate advances" prior to applying all of such funds to interest and principal.

RESPONSE:

87. To the extent any legal fees incurred by Defendant have been approved by the Bankruptcy Court, Defendant has failed to credit payments received from the Trustee and/or the debtors against such fees.

RESPONSE:

Dated this the 29th day of December 2006.

A handwritten signature in black ink, appearing to read "O. Max Gardner III", with a stylized flourish at the end.

O. Max Gardner III
Law Offices of O. Max Gardner III, P.C.
Attorney for the Plaintiffs
NC State Bar #6164
P.O. Box 1000
Shelby, NC 28151-1000
(704) 487-0616
FAX (888) 870-1647
e-mail: maxgardner@maxgardner.com

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

**NAME: BROWNER, JR., JOHNNY CLAUDE
 BROWNER, ANNIE HUNT**

**CHAPTER 13 NO. 05-41427
OUR FILE NO. 11603**

**ADDRESS: 1820 GREEN VALLEY DRIVE
 SHELBY, NC 28152**

SSN: --- -- 6133 & --- -- 7719

Debtors

**JOHNNY CLAUDE BROWNER, JR. and wife,
ANNIE HUNT BROWNER**

Adversary Proc. No. 06-4049

Plaintiffs,

versus

CITIFINANCIAL MORTGAGE COMPANY, INC.

Defendant

**FIRST REQUEST FOR ADMISSIONS OF FACT
FROM THE PLAINTIFFS TO THE DEFENDANT
(PRE-DISCHARGE)**

COME NOW the above-named Plaintiffs, by and through their attorney of record, and herewith serve upon the above named Defendant in this case the following request for admissions of fact. This request is being made pursuant to the provisions of Rules 7001 and 7036 of the Rules of Bankruptcy Procedure, Rule 36 of the Federal Rules of Civil Procedure, and Rules 7016-1, 7026-1 and 7030-1 of the Local Bankruptcy Rules for the United States Bankruptcy Court for the Western District of North Carolina, and the Bankruptcy Practice Guide for the United States Bankruptcy Court for the Western District of North Carolina.

The Defendant is requested by way of a proper officer to admit for the purpose of this action only the following facts. Please note that under the provisions of the applicable court rules each and every matter set forth below will be deemed admitted unless, within thirty (30) days after service of this request, the Defendant serves upon the Plaintiffs a written answer or objection addressed to the matter, signed by the Defendant or their attorney.

REQUEST FOR ADMISSIONS

1. Defendant received actual notice of the bankruptcy filing from the Debtor.

RESPONSE:

2. Defendant received actual notice of the bankruptcy filing from the Bankruptcy Noticing Center.

RESPONSE:

3. Defendant received actual notice of the bankruptcy filing from the Chapter 13 Trustee.

RESPONSE:

4. Defendant filed a sworn proof of claim in the Chapter 13 case of the debtors.

RESPONSE:

5. The Chapter 13 plan as confirmed included a debt to Defendant or its predecessor in interest for pre-petition mortgage arrearages.

RESPONSE:

6. The debt was secured by a lien, mortgage or deed of trust on the debtors' residential real estate.

RESPONSE:

7. The Chapter 13 plan as confirmed included a debt to Defendant or its predecessor in interest for the current monthly mortgage payment secured by the debtors' residential real estate.

RESPONSE:

8. Defendant received a copy of the Chapter 13 plan prior to the entry of the Order of Confirmation.

RESPONSE:

9. Defendant received a copy of the Court Order confirming the debtors' Chapter 13 Plan, the "Confirmation Order."

RESPONSE:

10. Defendant did not file any objection to the Chapter 13 plan or to any terms of the plan or to confirmation of the plan.

RESPONSE:

11. Defendant retained an attorney to review and file the proof of claim.

RESPONSE:

12. Defendant retained an attorney to review the Chapter 13 plan.

RESPONSE:

13. Defendant has not filed any motion or application for the court approval of any post petition legal fees in this case.

RESPONSE:

14. Defendant has not filed any motion or application for the court approval of post petition expenses in this case.

RESPONSE:

15. Defendant has not filed any motion or application for approval of any broker price opinion fees in this case.

RESPONSE:

16. Defendant has not filed any motion or application to retain the services of a real estate appraiser in this case.

RESPONSE:

17. Defendant has not filed any motion or application for approval of any inspections of the residential real estate of the Debtors in this case.

RESPONSE:

18. Defendant has not filed any motion or application for approval of the payment of any fees to any third-party (some party other than the Defendant or a lawyer retained by the Defendant) in this case.

RESPONSE:

19. Defendant has paid fees in this case to such a third-party providers for one or more bankruptcy-related services.

RESPONSE:

20. Defendant has paid fees in this case to such a third-party provider or providers for one or more than one mortgage-related services.

RESPONSE:

21. The attorney for Defendant has paid fees in this case to such a third-party provider or providers for one or more than one bankruptcy-related services.

RESPONSE:

22. The fees described in Numbers 19, 20 and 21 include what the third-party providers refer to as document release fees.

RESPONSE:

23. Defendant has deposited funds of the debtor in a "suspense" or other type account used for maintaining unapplied funds.

RESPONSE:

24. The mortgage instruments signed by the debtors do not provide for the use of any "suspense" accounts.

RESPONSE:

25. The mortgage instruments signed by the debtors do provide that payments must first be applied to interest and principal before they are applied to approved legal fees or other expenses.

RESPONSE:

26. Defendant has deposited funds received from the Trustee in a "suspense" or other type of account used for maintenance of unapplied funds.

RESPONSE:

27. The deposit of the Trustee's payments in a "suspense" account results in no application of the money to interest and principal.

RESPONSE:

28. Defendant has used some of the funds placed in either the debtor "suspense" or the Trustee "suspense" accounts to pay one or more of the legal fees or expenses assessed or charged to the mortgage loan of the debtors.

RESPONSE:

29. Defendant has invested the funds held in the "suspense" accounts in certain instruments that have provided an investment return to Defendant in the form of interest.

RESPONSE:

30. Defendant also has invested the monthly payments received from the Debtors in certain instruments that have provided an investment return to Defendant in the form of interest.

RESPONSE:

31. The Defendant refers to the interest earned on these investments as interest earned on the "float."

RESPONSE:

32. Defendant has not applied any of the interest earned on the "suspense" account investments to the loan obligations of the Debtors.

RESPONSE:

33. The Defendant has not applied any of the interest earned on the investment of the monthly payments of the Debtors to the loan obligations of the debtors.

RESPONSE:

34. The loan instruments in this case do not authorize the Defendant to use debtors' money for the purpose of earning investment interest for the Defendant.

RESPONSE:

35. The loan instruments in this case do not authorize the Defendant to use the Trustee's money for the purpose of earning investment interest for the Defendant.

RESPONSE:

36. Defendant has aggregated the legal fees and expenses incurred in this case in an account called a "corporate advance account."

RESPONSE:

37. Defendant, for accounting purposes, treats the "corporate advance account" as a receivable.

RESPONSE:

38. Defendant treats all "receivables" as assets on its accounting records.

RESPONSE:

39. Defendant has pooled and securitized all of its corporate advances with a third-party trustee/investor.

RESPONSE:

40. Defendant has therefore received cash payments on the corporate advances from said third-party trustee/investor.

RESPONSE:

41. As a result of the pooling and securitization of its corporate advances, the Defendant is no longer the lawful owner of these receivables.

RESPONSE:

42. Defendant has income in the form of payments on the securitization of the "corporate advances."

RESPONSE:

43. Defendant has not applied any of the fees earned on the "corporate advances" as a credit against such advances.

RESPONSE:

44. Defendant did not provide notice to the debtors prior to performing property inspections on their residential real estate.

RESPONSE:

45. Defendant did not provide notice to the debtors prior to performing any type of appraisal of their property.

RESPONSE:

46. Defendant did not file any type of motion with the Court for a Rule 7034 entry upon and inspection of land of the debtors.

RESPONSE:

47. Defendant is the servicer of a "federally related mortgage loan" as that term is defined in Section 2602(1) of Title 12 of the United States Code.

RESPONSE:

48. Debtors caused a Qualified Written Request to be mailed to Defendant on or about July 15, 2005.

RESPONSE:

49. The Qualified Written Request was received by Defendant on or about July 18, 2005.

RESPONSE:

50. The Qualified Written Request was not acknowledged within twenty days of receipt.

RESPONSE:

51. Defendant did not provide the information requested in the Qualified Written Request sent on behalf of the Plaintiff within sixty days of receipt.

RESPONSE:

52. Defendant has still not responded to the Qualified Written Request.

RESPONSE:

53. Defendant is subject to the provisions of Rule 2016 of the Bankruptcy Rules.

RESPONSE:

54. Defendant based on its review of the plan was aware of the provision regarding the proper application of mortgage payments received from the debtors and the Chapter 13 Trustee.

RESPONSE:

55. Defendant failed to apply such payments in this case as provided for by the Chapter 13 plan.

RESPONSE:

56. The misapplication of the mortgage payments in this case is not consistent with the manner of application required by the terms of the confirmed plan.

RESPONSE:

57. The misapplication of such payments has resulted in more than \$100.00 in additional fees and charges to the debtors.

RESPONSE:

58. Defendant has failed to properly credit all amounts received under the plan.

RESPONSE:

59. Defendant has failed to properly credit all amounts received from the debtors.

RESPONSE:

60. Defendant has applied funds received from the Trustee to fund "corporate advances" prior to applying all of such funds to interest and principal.

RESPONSE:

61. Defendant has applied funds received from the debtors to fund "corporate advances" prior to applying all of such funds to interest and principal.

RESPONSE:

62. To the extent any legal fees incurred by Defendant have been approved by the Bankruptcy Court, Defendant has failed to credit payments received from the Trustee and/or the debtors against such fees.

RESPONSE:

Dated this the 02nd of January 2007.

A handwritten signature in black ink, appearing to read "O. Max Gardner III", with a stylized flourish at the end.

O. Max Gardner III
Law Offices of O. Max Gardner III, P.C.
Attorney for the Plaintiffs
NC State Bar #6164
P.O. Box 1000
Shelby, NC 28151-1000
(704) 487-0616
FAX (888) 870-1647
e-mail: maxgardner@maxgardner.com

Interrogatories and Request to Produce-Electronic Discovery

1. Identify all email systems in use, including but limited to the following:
 - a. List all email software and versions presently and previously used by you and the date of use;
 - b. Identify all hardware that has been used or is currently in use as a server for the email system including its name;
 - c. Identify the specific type of hardware that was used as terminals into the email system (including home PCs, laptops, desktops, cell phones, personal digital assistants, blackberries, etc.) and its current location;
 - d. State how many users there have been on each email system since from the period beginning 60 days before the bankruptcy filing until the date of your response;
 - e. State whether the email is encrypted in any way and list the password for all users;
 - f. Identify all users known to you who have generated email related to the subject matter of this litigation;
 - g. Identify all email known to you (including creation date, recipient(s) and sender) that relate to, reference or are relevant to the subject matter of this litigation.
2. Identify and describe each computer that has been, or is currently, in use by you or your employees (including desktop computers, PDAs, blackberries, portable, laptop, notebook computers, cell phones, etc.), including but not limited to the following:
 - a. Computer type, brand and model number;
 - b. Computers that have been re-formatted had the operating system reinstalled or have been overwritten and identify the date of each event;

- c. The current location of each computer identified in your response to this interrogatory;
- d. The brand and version of all software, including operating system, private and custom-developed applications, commercial applications and shareware for each computer identified;
- e. The communications and connectivity for each computer, including but not limited to terminal-to-mainframe emulation, data download and/or upload capability to mainframe, and computer-to-computer connections via network, modem and/or direct connection;
- f. All computers that have been used to store, receive or general data related to the subject matter of this litigation.

3. As to each computer network, identify the following:

- a. Brand and version number of the network operating system currently or previously in use (including dates of all upgrades);
- b. Quantity and configuration of all network servers and work-stations;
- c. Person(s) (past and present including dates) responsible for the ongoing operations, maintenance, expansion, archiving and upkeep of the network;
- d. Brand name and version number of all applications and other software residing on each network in use, including but not limited to electronic mail and applications.

4. Describe in detail all inter-connectivity between the computer system at your Bankruptcy Default Service Center and the computer system at the office of your attorney involved in this case including a description of the following:

- a. All possible ways in which electronic data is shared between locations;
- b. The method of transmission;
- c. The type(s) of data transferred;

d. The names of all individuals possessing the capability for such transfer, including list and names of authorized outside users of your electronic email system; and

e. The names of all parties responsible for supervising inter-connectivity.

5. Describe in detail all inter-connectivity between the computer system at your Bankruptcy Default Service Center and the computer system at the office of any entity that you have out-sourced any of the mortgage servicing functions involved in this case including a description of the following:

a. All possible ways in which electronic data is shared between locations;

b. The method of transmission;

c. The type(s) of data transferred;

d. The names of all individuals possessing the capability for such transfer, including list and names of authorized outside users of your electronic email system; and

e. The names of all parties responsible for supervising inter-connectivity.

6. As to the data backups performed on all computer systems currently or previously in use, identify the following:

a. All procedures and devices used to back up the software and the data, including but not limited to the name(s) of backup software used, the frequency of the backup process, and type of tape backup drives, including name and version number, type of media (i.e., DLT, 4mm, 8mm, AIT), and state the capacity (bytes) and total amount of information (gigabytes) stored on each tape;

b. Describe the tape or backup rotation and explain how backup data is maintained and state whether the backups are full or incremental (attach a copy of all rotation schedules);

c. State where backup storage media is kept off-site or on-site and include the location of such backup and a description of the process for archiving and retrieving on-site media;

- d. The individual(s) who conducts the backup and the individual who supervises this process;
 - e. Provide a detailed list of all backup sets, regardless of the magnetic media on which the reside, showing current location, custodian, date of backup, a description of backup content and a full inventory of all archives.
7. Identify all extra-routine backups applicable for any servers identified in response to these interrogatories, such as quarterly archival backup, yearly backup, etc., and identify the current location of any such backups.
8. For any server, workstation, laptop, or home PC that has been “wiped clean,” defragmented, or reformatted such that you claim that the information on the hard drive is permanently destroyed, identify the following:
- a. The date on which each drive was wiped, reformatted, or defragmented;
 - b. The method or program used (e.g., WipeDisk, WipeFile, BurnIt, Data Earser, etc.);
 - c. The names of all individuals involved in this process.
9. Identify and attach any all versions of document/data retention policies used by you or any of your agents and affiliates or third-party contractors and identify documents or classes of documents that were subject to scheduled destruction. Attach copies of document destruction inventories/logs/schedules containing documents relevant to this action. Attach a copy of any disaster recovery plan. Also, state:
- a. The date, if any, of the suspension of this policy in toto or any aspect of said policy in response to this litigation;
 - b. A description by topic, creation date, user or bytes of any and all data that has been deleted or in any way destroyed after the commencement of this litigation;
 - c. State whether the deletion or destruction of any data pursuant to said data retention policy occurred through automation or by user action;

d. State whether any company-wide instruction regarding the suspension of said data retention/destruction policy occurred after or related to the commencement of this litigation and if so, identify the individual(s) responsible for enforcing said suspension.

10. Identify any users who had backup systems in their PC's and describe the nature of the backup.

11. Identify the person(s) responsible for maintaining any schedule of redeployment or circulation of existing equipment and describe the system or process for redeployment.

12. Identify any data that has been deleted, physically destroyed, discarded, damages (physically or logically), or overwritten, whether pursuant to a document retention policy or otherwise, since the commencement of this litigation. Specifically, identify those documents that relate to or reference the subject matter of this litigation.

13. Identify any user who has downloaded any files in excess of ten (10) megabytes on any computer identified above since the commencement of this litigation.

14. Identify and describe all backup tapes in your possession including:

a. Types and number of tapes in your possession (such as DLT, AIT, Mammoth, 4mm, 8mm);

b. Capacity (bytes) and total amount of information (gigabytes) stored on each tape;

c. All tapes that have been re-initialized or overwritten since commencement of this litigation and state the date of each said occurrence.

15. Produce all organization charts for all Information Technology or Information Service Departments or Divisions from 1 year before the filing of the Chapter 13 case until the date of your response.

16. Produce all backup tapes containing email and other electronic data related to this case from a period of 1 year before the filing of the Chapter 13 case up to and including the date of your response.

17. Exact copies (i.e., bit-by-bit copies) of all hard drives on the desktop computers, laptop computers, notebook computers, personal digital computers, blackberries, servers, and any other electronic media related to this action from 1 year before the filing of this Chapter 13 case up to and including the date of your responses.
18. Exact copies of all relevant disks, CDs, DVDs and other removable media related to this action from 1 year before the filing of the Chapter 13 case up to and including the date of your responses.
19. For each interrogatory herein, produce all documents which you referred to, relied upon, consulted, reviewed, or used in any way in answering such interrogatory.
20. All documents that contain or otherwise relate to the fact or information that you contend refute, in any way, the allegations contained in the Complaint filed in this case.'
21. All reports, including drafts, submitted to any expert witness or potential expert witness, or expert consultant, retained or consulted by you with respect to the issues raised in this case.
22. State the name and position of every party providing any information included in or referred to in your responses.
22. Attach copies of every document or record that you may seek to introduce into evidence at the trial of this matter.
23. State the name and position and provide a short summary of the anticipated testimony of every witness you may call at the trial of this matter.
24. State the full name and address of every expert or professional consultant you have retained for any purpose in this case.

Additional Discovery re Electronic Evidence:

1. Please describe the configuration of your network, including operating system uses; the number of work stations, laptops and servers; their physical location; and a diagram of how are devices are interconnected.
2. Please describe all software applications that are used, both off the shelf and custom.
3. Please describe all databases used internally by your company and their functions.
4. Please describe how your computer backup systems function including the type of software used (including version), the hardware used (including manufacturer name and models) and how it works, including the tape rotation schedule, what happens when tapes are overwritten, and what data is backed up and from which device.
5. Please identify the location of offsite backup storage and the name of a contact person at all locations.
6. Please describe all security measures that may prevent unauthorized access to the backup media.
7. Please identify all portable media that may contain data relevant to his matter, such as disks, zip disks, CD-ROMs, DVDs, tapes, thumb drives, etc.
8. Please identify the system administrator or administrators and their contact information, as well as this person's supervisor and contact information for such person or persons.
9. Please identify all information technology (IT) personnel who may have worked on or have knowledge or data relevant to this matter.
10. Please describe all of your network authentication procedures.
11. Please describe in detail all related intranets or extranets, their functions, and their security mechanisms.
12. State the number of PDAs in use (if applicable) by manufacturer and model and identify each individual who uses them.
13. Please state the number and location of all company workstations and laptops including manufacturer, model, and class; operating systems; and user names.
14. Please identify all networked digital copiers by manufacturer, model and location.
15. Please state whether any of your employees work from home computers and if so whether a VPN or other form of remote access to the network exists and if so then please describe all authentication and security methods.

16. Please describe the E-mail package used, including the version.
17. Please describe your E-mail server, with manufacturer and model, operating system and mail server software used, and location.
18. Please identify the location of all E-mail storage.
19. Please describe all network activities and events that are routinely logged (e.g., SNMP traps, router logs).
20. Please identify all active intrusion detection systems and configurations.
21. Please identify your internet service provider.
22. Please identify the host of your company's website.
23. Please identify all persons by name and location who hold administrative rights to the mail server.
24. Please describe your company's internet and E-mail use policies.
25. Please describe your monitoring policy regarding employees' computer activity, including what is monitored and by whom and retention period for logs.
26. Please describe all security policies and procedures employed with respect to such monitoring.
27. Please identify your firewall manufacturer, the model you use and its configuration.
28. Please identify your application service provider and the nature of the data held.
29. Please describe your outsourcing policy for IT services, including the name and address of all providers, a description of the services of each provider, and the contact person for each provider.
30. Please explain your security structure including who has access to which applications, drives, etc., and note the distinction, if applicable, between read-only access and read-write access.
31. Please identify the names, log-on IDs, passwords, and E-mail addresses of any individual who may have any knowledge of or relation to this matter.
32. Please describe your encryption programs, including the level of encryption and where and how they are used and identify all decryption keys and pertinent instructions for all decryption procedures.

33. Please identify your PBX manufacturer, the model, and whether it interfaces with your telephone system and carries voice mail.
34. Please describe your retention policy for any voice messaging records.
35. Please describe your retention policy for phone usage records and categories of records retained.
36. Please describe your retention and disposal policies for such records.
37. Please attach a schemata of your network or telephone system.
38. Please identify all company-issued cell phones and pagers and identify each of the units by manufacturer, model, and the name, title and location of the primary user.
39. Please describe any instructions given to any or all employees regarding the need to preserve possible evidence, the date or dates such instructions were given, and copies of all such printed, printable or written instructions.
40. Please list all specific data that has been deleted, and when it was deleted, with respect to any matter or thing relevant to this case.
41. Please describe your disposal policy for data and hardware.
42. Please describe company behavior regarding over-writing of backup tapes and selling, donating, or otherwise disposing of equipment since the filing of this case, and how such behavior might differ from company policy previously in force.
43. Please provide a list of all equipment disposed of since the filing of this case.
44. Please describe all software and/or hardware modifications to any company computers since the filing of this case.
45. Please identify individuals by job title, name, business address, and phone number with respect to responsibilities for enforcing Internet or E-mail usage policies, document retention policies, and employee monitoring.
46. Please identify by dates and details of any computer or computer-related crimes of which the company has been charged.
47. Please identify by the case number, the court, and the date of production, and media in which the evidence was produced for any matters since 1999 in which the company produced electronic evidence. End

MORTGAGE SERVICER DISCOVERY- MORTGAGE SERVICING

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

NAME:

**CHAPTER 13 CASE NO.
OUR FILE NO.**

ADDRESS:

SSN:

DEBTORS.

Adversary Proc. No. _____

Plaintiffs,

versus

Defendant.

**REQUEST FOR PRODUCTION
OF DOCUMENTS FROM THE PLAINTIFFS TO DEFENDANT
(Misapplication of Payments Case with Servicer using MSP)**

COME NOW the above-named Plaintiffs a, by and through their attorney of record, and herewith serve upon the DEFENDANT(S) in this case the following request for the production and inspection of documents pursuant to Rules 9014 and 7034 of the Rules of Bankruptcy Procedure and Rule 34 of the Federal Rules of Civil Procedure as provided for and set forth in the foregoing rules.

DEFINITIONS

- A. The term "act" as used herein includes acts of every kind and description.
- B. The term "Bankruptcy Activity Review" refers to an MSP process offered through the Dynamic Loan Review program that, among other things, provides a Bankruptcy Activity view that displays the bankruptcy history activity for the mortgage loan, including system generated data as well as all manual entries by loan processors using the MSP program.
- C. The term "Borrower Financial Information View" refers to an MSP process offered through Dynamic Loan Review that displays financial information on delinquent borrowers and co-borrowers such as income and expense information, employer, monthly income, net and gross income, loans and other debts and living expenses.
- D. The term "Consumer Advance Activity View" refers to an MSP Process offered through Dynamic Loan Review that can see information on all consumer loan advances; advance reversals and hold activities performed on the account; add, update and delete advances; hold and print receipts; and export all of the data to a .csv or an Excel format.

E. The terms "describe" or "state" as used herein mean:

- a. Describe or state fully by reference to underlying facts rather than by ultimate facts or conclusions of law;
- b. Particularize as to the:
 - i. Time;
 - ii. Date;
 - iii. Manner; and
 - iv. Place.

F. The term "Document" means all writings of any kind, including the originals and all other non-identical copies, whether different from the originals by reason of any notation made on such copies or otherwise, including but not limited to correspondence, memoranda, notes, diaries, desk or other calendars, statistics, letters, telegrams, minutes, business records, personal records, accountants' statements, account statements, contracts, reports, credit reports, studies, checks, statements, receipts, invoices, bills, return checks, summaries, pamphlets, books, inter-office and intra-office communications, notations of any sort of conversations or meetings, telephone call meetings or other communications, written agreements, bulletins, printed matter, computer printouts, teletypes, telefaxes, invoices, worksheets, all drafts, alterations, modifications, changes and amendments of any kind with respect to any of the foregoing, graphic or oral records or representations of any kind (including, without limitation, tapes, cassettes, discs, recordings, electronic mail records, computer memory records such as hard disk drives and master back-up tapes, diskettes, or other devices such as zip drive records).

G. The term "Fee Balance" refers to an MSP Process offered through Dynamic Loan Review and displays all available fee balances on a loan and provides the ability to waive or assess fees.

H. The term "identify" or "describe" when used in reference to a "document" means to state:

- a. The type of document (e.g., letter, memorandum, report, electronic mail records, notes, etc.);
- b. The date of the document;
- c. The name of the parties or parties who originated the document, their past or present position with the respondents, their general duties and responsibilities, their current physical location with the company, and their e-mail, telephone number and telephone extension;
- d. The name and address of the current custodian of the document;
- e. The name and current address of each signatory thereon;
- f. The reason, in detail, for the preparation of the document;
- g. The subject or subjects covered by the document;
- h. The names, business addresses and titles of the persons to whom the document writing was directed; and
- i. The name and address and title of each person who originated, read or received the document.

I. The term "identify" as used herein in connection with a "person" or "persons" means to state the names, titles, the present employer of such "person" or "persons," the relationship of such person or persons to any of the respondents, and such person's current business address and business telephone number.

J. The term "identify" as used herein with respect to or in connection with an "act" means to:

- a. Furnish the date and place of the act;
- b. Identify the person acting, the person for whom the act was performed, and the person against whom the act was directed; and
- c. Describe in detail the act.

K. The term "LPS Default Solutions" (LPSPDS) refers to the entity that provides bankruptcy and foreclosure support services to mortgage servicers.

L. The term "LPS Desktop" refers to the integrated process management and loan processing platform provided to servicers using the services provided by LPSPDS to mortgage servicers.

M. The term "LPS Desktop Process Management" refers to one of the applications in LPS Desktop that automates numerous manual processing steps using business rules provided by mortgage servicers that initiate workflow based upon existing servicer business processes.

N. The term "LPS Desktop Invoice Management" refers to one of the applications in LPS Desktop that employs the NewInvoice software for the uploading, processing and payment of invoices submitted by vendors for services provided to mortgage servicers.

O. The term "LPS Document Management Services" refers to one of the applications in LPS Desktop that provides users with access to a historical data base of loan documents such as mortgage notes, mortgages, deeds of trust, assignments of mortgages and deeds of trust, indorsement of mortgage notes, allonges to mortgage notes and other related documents, all of which have been imaged into a master document bank.

P. The term "LPS Desktop Integration Services" (DIS) refers to a bi-directional XML-based Web service interface that assists in bridging communication gaps between mortgage servicers and their third-party vendors, including law firms, by integrating with the third-party systems so as to eliminate the need for duplicate data entry, and to provide users with increased productivity and accuracy.

Q. The term "MSP" refers to the mortgage accounting software program commonly referred to as Mortgage Servicer Program currently provided and supported by Lender Processing Services (LPS), more specifically described at www.LPSVCS.com.

R. The term "oral communication" as used herein means and includes any face-to-face conversation, meeting, conference, telephone conversation, cell-phone conversation, computer conversation with voice mail, or any one for more of these or related devices.

S. The term "Payment Statics View" refers to an MSP Process offered through Dynamic Loan Review that shows a summary of payments processed; details of the payments processed including the number of payments applied by the user, the date, the loan number, the amount of each payment, the group number, the payment type, the reference type of each payment and the total amount of payments applied.

T. The term "person" or "persons" as used herein means and includes all natural persons, public and private corporations, associates, wholly owned affiliates or subsidiary corporations or any other form of a business association, and any other type of entity and the agents, employees, officers, deputies and representatives thereof.

U. The term "Property Inspection View" refers to an MSP process offered through Dynamic Loan Review that features and displays information about the property associated with the loan, such as the property condition, occupancy status and comments about the property, including estimated value and digital photographs.

V. The term "the transaction" or "the transactions" or "account" or "accounts" when used herein without qualification means the transactions and accounts between or among the Plaintiffs and the named DEFENDANTS and all related activities and agents or assigns of either party.

W. The term "Trial Escrow Analysis View" refers to an MSP Process offered through Dynamic Loan Review that shows information about the individual trial escrow loan analysis, including type, amount, balance and any shortage or overage in the escrow account.

X. The terms "you" or "your" as used herein shall refer to any one or all of the named DEFENDANTS and any related or affiliated companies associated in any way therewith.

INSTRUCTIONS

Each of the following requests for production of documents is intended to be a continuing request to produce and answer. As a result, the Plaintiffs hereby demand that, in the event that at any later date you obtain any additional facts, or form any conclusions, opinions or contentions different from those set forth in your responses herein, then you shall amend your answers to such responses and document production promptly and sufficiently in advance of any trial date, to fully set forth such differences and to produce any documents in connection therewith.

All requests shall be deemed to include any documents made by, held by, or maintained in the files of any predecessor, successor, employee, agent or assignee of either one or all of the respondents.

REQUEST FOR PRODUCTION OF DOCUMENTS

1. All images and documents created, produced or developed using the Affidavit Review Director Script developed for use with Mortgage Servicer Platform (hereinafter "MSP") currently produced and supported by Lender Processing Services (hereinafter "LPS").

RESPONSE:

2. The complete checklist of items that should be looked at as part of the Affidavit Review Director Script process and employed in conjunction with your use of LPS' Desktop Process Management.

RESPONSE:

3. All documents and records that confirm one or more of your employees or agents has completed each task identified in number 2 above.

RESPONSE:

4. All documents and records that identify the name of each employee or agent who completed each task identified in number 2 above.

RESPONSE:

5. All documents and records that document how much time it took the employees or agents to complete each task identified in number 2 above.

RESPONSE:

6. All written, recorded or imaged records regarding how to use the LPS Affidavit Review Director Script.

RESPONSE:

7. A complete list of the suite of Affidavit Review solutions that you use and that have been provided to you by LPS.

RESPONSE:

8. All screen shots of any LPS Affidavit Review Solutions that you have access to through the LPS Desktop PowerCell website.

RESPONSE:

9. Copies of all electronically loaded tax searches conducted by way of LPS Desktop Tax Management module or program.

RESPONSE:

10. All automatic comparisons of tax liens and loan details regarding tax obligations extracted from MSP by LPS Desktop Tax Management.

RESPONSE:

11. Copies of all documents generated by LPS Desktop Tax Management that have identified any delinquent taxes with respect to the subject loan.

RESPONSE:

12. All documents related to the ability of your employees and/or third-party non-employees to review the MSP loan records in this case by way of the LPS system referred to as Dynamic Loan Review.

RESPONSE:

13. All training and operational manuals related to Dynamic Loan Review identified in number 12 above.

RESPONSE:

14. All documents from the Bankruptcy Activity History Review, including system-generated data as well as manual entries by any of your loan processors or any third-party vendors.

RESPONSE:

15. All documents for this loan generated by the Payment Statistics View including a summary of all payments processed.

RESPONSE:

16. All documents related to the number of payments applied to this loan since the bankruptcy filing, the amount of each payment, the loan number assigned to each payment, the group number assigned to each payment, the payment type, the reference type of each payment, the total amount of payments so applied as of the date of your response, and the name of each loan processor or processors for each function identified herein (whether or not such processors are employed by you or by third-party vendors).

RESPONSE:

17. Please produce copies of all Borrower Financial Information in your MSP or LPS Desktop systems for the Debtor(s) in this case.

RESPONSE:

18. Please produce any current data you have in any electronic system related such as MPS or LPS Desktop related to the current income and expenses of the Debtor(s), the current employers of the Debtor(s), the current monthly income (net and gross), loans, other debts, and living expenses of the Debtor(s).

RESPONSE:

19. Please produce all documents from the Property Inspection View or History in any electronic data system such as MSP or LPS Desktop.

RESPONSE:

20. Please produce all documents and records related for the property associated with this loan, including type of property, property condition, occupancy status, current value, and any and all comments by any person or entity about the property.

RESPONSE:

21. Produce copies of all documents from the Fee Balances View in MSP or in LPS Desktop related to the subject loan.

RESPONSE:

22. Produce all documents, records, rules and protocols related to the waiver or assessment of any fees or charges related to the subject loan.

RESPONSE:

23. Produce any of the data or information requested herein that has been exported in a .csv or Excel format and produce such .csv or Excel documents.

RESPONSE:

24. Produce any documents that have been used to filter transactions for the subject loan based on activity types like balance adjustments, corporate advances and default expenses.

RESPONSE:

25. Please produce all documents related to payment statistics, collection notes or system notes, LPS Desktop notes or communiqués, MSP collection notes and comments, open and closed issues generated in LPS Desktop, account history views, and any other comments regarding the subject loan.

RESPONSE:

26. Please produce all documents related to the investor type, category and name assigned to this loan.

RESPONSE:

27. Please produce exact copies of all data that has been captured by the LPS Optical Character Recognition system or any similar process or similar system from any documents or printed records of any type or in any format related to the subject loan.

RESPONSE:

28. Please produce copies of all documents, including checks or payments, generated by LPS Mailroom Services, including the date all mail related to this loan was opened, the date it is electronically time-stamped, the date it was electronically scanned and identified using the LPS Document Management Services.

RESPONSE:

29. Please produce copies of all audit trails of checks or payments on this loan from the LPS Mailroom in Eagan, Minnesota, to the individual LPS Desktop unit of the loan processor assigned to the subject loan account.

RESPONSE:

30. Produce copies of all documents and records for the subject loan generated or produced by the LPS Third Party Corporate Advance Tracking and Recovery Solution, commonly referred to as TPCATR.

RESPONSE:

31. Provide all statistical information and all reconciliation reports related to the corporate advances to any third-party vendor providing any services related to the subject loan.

RESPONSE:

32. Please produce the list of each obligor ID, or alphanumeric code, assigned to each third-party vendor providing any services related to this loan, including the full name and physical address for each such vendor and a description of the services provided by said vendor.

RESPONSE:

33. Please produce copies of all invoices delivered to any obligor identified in number 32.

RESPONSE:

34. Please produce copies of all loan-level disbursements to any obligors or third-party vendors related to the subject loan, including all recoveries and reconciliation reports for such disbursements.

RESPONSE:

35. Please produce copies of all data on the LPS Desktop or MPS Default Reporting Screen for the subject loan, including all Default Reporting Codes and Code Definitions in plain English.

RESPONSE:

36. Please produce copies of all loan-level monthly investor reports since the subject loan became involved in the subject bankruptcy proceeding, including all corporate advances recovered from such investors.

RESPONSE:

37. Please produce a list of all Payee Codes and Code Definitions for any and all fees associated with the subject loan at loan, portfolio and investor level, in addition to Codes at the Debtor or Client level.

RESPONSE:

38. Please produce copies of all LPS Business Intelligence (BI) Reports and Graphs that include any and all data related to the subject loan.

RESPONSE:

39. Please produce all copies of the Automated Bankruptcy Ledger within MSP that displays the application, reversal and distribution activity for loans with a bankruptcy Chapter equal to 07, 11, 12 or 13 for the subject loan.

RESPONSE:

40. Please produce all copies of the Automated Bankruptcy Ledger within MSP that includes any suspense type, such as PP PMT Suspense, and any post-petition payment suspense that has been credited to the loan but not applied and any post-petition payment suspense that has neither been credited nor applied to the loan.

RESPONSE:

41. Please produce all reports and reviews related to the subject loan using LPS' Proactive Risk Management program.

RESPONSE:

42. Please produce a copy of the MSP 12-Month Cumulative Probability of Default Score for the subject loan

RESPONSE:

43. Please produce a copy of the MSP Anticipated Loss Severity Percentage for the subject loan.

RESPONSE:

44. Please produce copies of any and all Broker Price Opinions and Property Inspection Reports that relate to the value of the residential real estate secured by the subject loan or that refer to the physical condition of the property and produce all invoices, checks, statements and vendor charges associated therewith.

RESPONSE:

45. Please produce computer screen shots and/or complete print outs of the following reports for the loan history in this case:

- a. Bankruptcy Activity Review;
- b. Borrower Financial Information View;
- c. Consumer Advance Activity View;
- d. Fee Balance Review;
- e. LPS Desktop Integration Services Report;
- f. Payment Statics View;

- g. Property Inspection View;
- h. Trial Escrow Analysis View.

Dated this the _____ day of _____ 20____.

O. Max Gardner III
MaxGardnerLaw, PLLC
Attorney for Plaintiffs
403 South Washington Street
PO Box 1000
Shelby NC 28151-1000
704.487.0616
maxgardner@maxgardner.com

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN RE:

SSN xxx xx xxxx

SSN xxx xx xxxx

**CASE NO. 08-xxxxx
(Chapter 13)**

Debtors.

Plaintiffs.

vs.

**ADVERSARY
PROCEEDING NO. _____**

Defendants.

**PLAINTIFFS' FIRST REQUEST FOR PRODUCTION OF DOCUMENTS
(Payment processing; basic servicing platform)**

The plaintiffs, _____ and wife, _____ (the "Debtors") pursuant to Federal Rules 26, 33 and 34 of the Federal Rules of Civil Procedure and Rules 7026, 7033 and 7034 of the Rules of Bankruptcy Procedure hereby serve upon the defendant the following Plaintiffs' First Request for Production of Documents. The plaintiffs request that the defendant within 30 days of this request, fully produce the documents requested herein.

**I
DEFINITION OF TERMS**

1. The term "plaintiff" or "plaintiffs" means _____ and wife, _____.

2. The term “debtors” means _____ and wife, _____,
3. The term “borrower” means any person who is obligated on the note, whether the note has one, or more than one obligor.
4. As used in the following Requests the term “borrower’s bankruptcy case” means the case filed under any Chapter of the U.S. Bankruptcy Code in which the borrower is a debtor.
5. The term “_____” means the defendant, _____ its subsidiaries, affiliates, any successors and assigns, and predecessors, and includes every officer, director, partner, agent, employee, attorney, servant, or any other person presently or formerly acting for or on behalf of said entity.
6. The term "document" is used in its customary broad sense to include, by way of illustration only and not by way of limitation, all written or graphic matter of every kind or description, whether printed or reproduced by any process, or written and/or produced by hand, whether final or draft, original or reproduction, whether or not claimed to be privileged or otherwise subject to exclusion from discovery, whether in the actual or constructive possession, custody or control of the defendant, including: letters correspondence, memoranda or transcripts of telephone or personal conversations, microfilm, microfiche, telegrams, books, magazines, newspapers, advertisements, periodicals, bulletins, circulars, brochures, pamphlets, statements, notices, advertising layouts, trade letters, press releases, reports, rules, regulations, directives, teletype or telefax messages, minutes or records of meetings, interoffice communications, financial statements, ledgers, books of account, proposals, prospectuses, offers, invoices, orders, receipts, working papers, desk calendars, appointment books, diaries, routing slips, time sheets, logs, movies, tapes (or visual or audio reproduction), records, drawings, blueprints, sketches, plans, graphs, charts, photographs, shipping papers, purchase orders, phonograph records, phono-records, data processing paper results, data printouts and computations (both in existence and stored in memory components), transcripts of oral statements or testimony, reports and/or summaries of interviews, reports and/or summaries of investigations, opinions or reports of consultants, forecasts, opinions of counsel, court papers and any and all other data compilations or information resources from which information can be obtained or translated, if necessary, through detection devices into reasonably usable form, or material similar to any "document" as used herein. "Document" as used herein also includes the original of any document in whatever form or medium it may exist, and all copies of each such document bearing, on any sheet or side thereof, any marks, including by way of illustration only and not by way of limitation, initials, stamped indicia, any comment or notation, or any character not a part of the original text, or any reproduction thereof.
7. The term "communication" means any contact, oral or written, formal or informal, at any time or place, under any circumstances, in any manner, whereby a statement of any nature is transmitted or transferred, and shall include, without limitation, any documents

containing, constituting reflecting, memorializing, referring or relating to any such contact.

8. The word "or" means and/or and should be read both ways so as to encompass both constructions and calls for documents to be produced responsive to both constructions.

9. The term "representative" refers to any employee, agent, attorney or accountant.

10. The term "person" means natural person, proprietorships, partnerships, groups, corporations, associations, societies, organizations, or government bodies or any other individual or entity.

11. The term "identify" when used in connection with a natural person means to set forth the full name, title, present business address and present business affiliation of said person.

12. The term "identify" when used in connection with a person which is a proprietorship, partnership, corporation, or other organization means to set forth the full name and present business address of that dealership, proprietorship, partnership, corporation, or other organization.

13. The term "identify" when used with reference to a document means to state the date and author (and, if different, the signer or signers), the addresses of the author(s), signer(s), or any individual(s) receiving copies, the type of document (e.g., letter, memorandum, chart), and its present or last known location or custodian.

14. The term "identify" when used with reference to an agreement, contract, understanding or communication means, in addition to Definition 10 above: (a) to state whether it was written or oral, to identify the parties thereto, the place where it was made or occurred, and the date or dates thereof; (b) to identify the parties thereto, the place where it was made or occurred, and the date or dates thereof; (c) to identify the persons who negotiated or had any role in suggesting, framing or drafting the terms of the agreement, contract or understanding or who participated therein; and (d) to state the substance of the communication, agreement, contract or understanding.

15. The term "identify" when used with reference to a meeting, incident, occurrence or conversation means to state its date, place and subjects covered, to identify its participants and to identify all documents reporting upon or otherwise recording or referring to anything that transpired at such meetings.

16. The term "the transaction" or "the transactions" or "account" or "accounts" when used herein without qualifications means the transactions and accounts between and among the Debtors and the named defendants in all related activities and agents or assigns of either party.

17. The terms “loan” and “this loan” refer to the loan that you are servicing or subservicing and on which any plaintiff, consumer borrower, or debtor in the above-captioned proceeding is a borrower. If there is more than one loan, for each loan please prepare a separate set of responses to these Requests.

18. The term “Note” shall refer to the promissory note executed in connection with the Deed of Trust or mortgage in which you allege you are the owner and holder.

19. The term “Deed of Trust” shall refer to the Document filed with the County Record’s Office that secures alleged lien against the Real Property.

20. The term “mortgage” means the mortgage, deed of trust, or other security instrument that your records indicate secures this loan.

21. The Real Property shall refer to the Real Property and improvements located thereon at _____, (the “Real Property”).

22. The term “present” means up to and including the date of your final response to these requests for production of documents.

23. The term “relating to” or “relates to” means regarding, reflecting, discussing, describing, containing, identifying, analyzing, studying, reporting, commenting, evidencing, constituting, revealing, setting forth, considering, recommending, questioning, disputing, contesting, correcting, construing, mentioning, associated with, referring to, alluding to, or pertaining to, in whole or in part.

20. The term “you” or “your” refers to the defendants _____.

24. The singular shall be construed to include the plural, and the plural shall be construed to include the singular.

25. The masculine includes the feminine, and the feminine includes the masculine.

26. The word “and” shall be construed to include the word “or”, and the word “or” shall be construed to include the word “and.”

27. The word “each” shall be construed to include the word “every”, and the word “every” shall be construed to include the word “each”.

28. The word “any” shall be construed to include the word “all”, and the word “all” shall be construed to include the word “any”.

29. The term "Complaint" means the Complaint in the above captioned action.

30. The term “Proof of Claim” means the proof of claim filed in the Debtors’ bankruptcy case on _____ by _____.

II INSTRUCTIONS

1. The time period for which production of documents and thing requested shall be from _____, unless otherwise specified.
2. Each of the following requests is continuing, and in the event that at any later date you obtain or discover any additional document responsive to any request, you shall submit such document promptly.
3. If an objection is made to any request herein, all documents covered by the request not subject to the objection should be produced. Similarly, if an objection is made to production of a document, the portion(s) of that document not subject to objection should be produced with the portion(s) objected to deleted and indicated clearly.
4. Each document is to be produced in its entirety even if only a portion of the document is related to the identified subject matter and without abbreviation, editing, or expurgation and including all appendices, tables, or other attachments. If an appendix, table, or other attachment is not presented with the original but is attached to a copy thereof or is otherwise available, it should be submitted and clearly marked to indicate the document to which it corresponds. With the exception of privileged material, no document or portion thereof should be masked or deleted in any manner. To the extent possible, documents should be produced in the same order and arrangement as in the file form which they are taken.
5. Unless otherwise requested, in lieu of producing original documents, you may produce photocopies, provided that you shall retain the original documents and produce them to the plaintiffs upon request. Further, copies of original documents may be submitted in lieu of originals only if they are true, correct, and complete copies of the original documents, and their submission constitutes a waiver of any claim as to the authenticity of the copy should it be necessary to introduce such copy into evidence in any legal proceeding. Please provide color copies of any document originally produced in color or containing type, writing, or other marks in any color other than black.
6. Documents that may be responsive to more than one request need not be submitted more than once; however, such documents should be so identified.

Requests:

1. Provide a complete life of loan transactional history for this loan beginning with the origination date and ending with the date of production. This document must include all debits, including any restricted or unrestricted corporate advances, and credits of any nature made at any time with respect to the loan, whether or not such transactions

resulted in additions to the outstanding principal balance. If your systems allow users to view or create transaction histories in multiple or customized views, you must provide copies of as many different views as necessary in order to include all information that could be displayed in any view that a user could create. With each view that you provide, please attach a statement setting forth the name, title, and employer of the individual who prepared it, the date of preparation, and the location where prepared.

RESPONSE:

2. For each transaction identified in the life of loan transactional history that you provide in response to the Request above, please provide the date it was posted to or associated with the debtors' account, the amount thereof, the type of charge or debit, the resulting balance due and owing on the borrowers account as well as any attached accounts, suspense accounts, or any other account related to this loan after the transaction. For each transaction, please include all data and records concerning each attached, suspense, or other related account and a brief plain English description of the purpose for each transaction.

RESPONSE:

3. Provide the Key Loan Transaction history for the loan.

RESPONSE:

4. Provide any XLS spreadsheet or other manually-prepared spreadsheet relating to this loan.

RESPONSE:

5. Provide copies of all records of research that has been performed at any time relating to any payment or partial payment received for this loan.

RESPONSE:

6. Provide copies of all electronic mail about, concerning, or referring to the borrower or this loan, together with copies of all attachments to each e-mail message, labeled to clearly identify the e-mail message to which it was attached.

RESPONSE:

7. Provide copies of all collection notes, servicing notes, correspondence and messages incoming and outgoing, and all other documents and other entries relating to this loan in any files or data storage devices or services of any kind.

RESPONSE:

8. Provide copies of all images and records related to this loan entered into or stored in any document imaging or data storage system, workflow or employee performance tracking system, and voice message storage system used by you or any third party that provided services for you or to which you outsource any services.

RESPONSE:

9. For each and every payment, provide documentation of manner of the payment (personal check, money order, cashier's check, bank check, Western Union, PayPal, ACH, other telephone or internet means, or otherwise) including any number or other information in your control that would further identify the payment, including but not limited to the type of payment or type of information, check numbers, money order numbers, etc.

RESPONSE:

10. With respect to each and every method of payment utilized by the borrower or for the borrower's account at any time, provide documentation of your fee schedule, schedule of charges, and company policies regarding the fees charged to the borrower's account for usage of each method of payment.

RESPONSE:

11. Provide a complete and itemized statement of any funds deposited in any suspense account(s) or corporate advance account(s) in relation to this loan, including, but not limited to, the balance in any such account or accounts and the nature, source and date of any and all funds deposited in such account or accounts.

RESPONSE:

12. Provide a complete and itemized statement of the escrow account of the loan, if any, covering the entire life of this loan, including, but not limited to, any receipts or disbursements with respect to real estate property taxes, fire or hazard insurance, flood insurance, mortgage insurance, credit insurance, or any other type of insurance product.

RESPONSE:

13. Provide a complete and itemized statement covering the entire life of this loan of the amounts charged for any forced-placed insurance, the date of the charge, the name of the insurance company, the relation of the insurance company to you or a related company, the amount of compensation you received for each force-placed insurance event, and an itemized statement of any other expenses related thereto.

RESPONSE:

14. Provide a report setting forth any charges for any insurance product or service, financial or credit management product or service, investment product, home appliance or personal property warranty or repair service, other financial service or product that is not a residential mortgage loan, or other ancillary or "add on" product sold to the borrower(s) at any time by you or any other entity in a transaction in which you or an affiliate of you received any payment, compensation, or "thing of value" as that term is used, interpreted, and applied under the Real Estate Settlement Procedures Act ("RESPA").

RESPONSE:

15. With respect to every charge, advance, fee or amount charged to the borrower or to the borrower's account at any time during the entire life of this loan for any property inspection; property preservation service; broker price opinion; appraisal; bankruptcy monitoring or other outsource vendor fee for a bankruptcy-related service; credit report fee; attorney's fee for any type of legal service; and/or any other fee or expense related to this loan for a service ordered, occasioned, performed, or incurred by you or on your behalf as a result of this loan at any time being late, in default, in a loss mitigation process, in foreclosure, in litigation or bankruptcy, or in REO status, provide the following supplemental documentation:

- a) A plain English description of the date, amount, and purpose of the payment;
- b) The name of the entity to which payment was made;

- c) A copy of the contract pursuant to which the party providing the product or service paid for by the payment performed the service of provided the product for you; and
- d) A copy of each inspection, appraisal, or broker price opinion report received by you in connection with each payment made for those purposes;

RESPONSE:

16. Provide an itemization identifying by source, date, and amount any reimbursement payments you received from any party other than the borrower for each charge, advance, fee or amount charged to the borrower or the borrower's account at any time for any purpose.

RESPONSE:

17. Provide a current itemized payoff statement for the loan involved in this case, together with the name, title, and employer of the individual who prepared it and the date upon which and the location at which was prepared. Instruction: you must not cause or allow any payoff statement fee or any other fee or charge to be charged to the borrower in preparing your response.

RESPONSE:

18. To the extent the above-requested current itemized payoff statement does not contain the following information, please provide such information along with or attached to the payoff statement:

- a) The date on which it was prepared and the payoff amount as of that date, including the amount by type of each fee, charge, or other sum included within the payoff amount;
- b) The information reasonably necessary to calculate the payoff amount as of the requested payoff date, including the per diem interest amount; and

- c) The payment cutoff time, if any, the address or place where payment must be made, and any limitation as to the authorized method of payment.

RESPONSE:

19. Provide an itemized statement of the full amount needed to reinstate the loan as of the date of your response.

RESPONSE:

20. Provide a glossary, legend and/or detailed explanation in plain English sufficient to allow for a layman's full understanding of all the data reflected in each and every document provided in response to each of the Requests set forth above, including but not limited to all and accounting and transaction codes, abbreviations, and acronyms displayed or used anywhere therein.

RESPONSE:

21. Provide documents that describe your mortgage serving software platform, including the name of the software program, its owner, and the date you began using that software. If you use the system generally known as MSP, include documents describing any of the following-named components offered by LPS, Inc. that you use, and if any have been customized by or for you, include documentation describing the customized features of each customized component:

Customer CareNet
Data Conversions
Director Scripting
Electronic Loan Interface
Hire Intelligence
IVR – Payoff AutoFax

MAGNIFIDE Web Services
MaxMilion Payments
Passport
PowerCell
PowerView
Screen Pops

LaserCheck
LPS Director
LPS Web Direct
MAGNIFIDE Business Intelligence
MAGNIFIDE MSP
MAGNIFIDE MSP: Escrow Analysis EP
MAGNIFIDE MSP: Third Party CATR

Data Capture Services
Foreclosure Database
Loan Modification Service
LPS Asset Management
LPS Default Solutions
LPS Desktop
LPS Desktop Loss Mitigation

RESPONSE:

22. Provide all operational manuals, user guides, and onscreen help tools used by you, and documentation of business rules applied in your software platform, for generating payoff statements, including but not limited to the business rules, protocols, or operational policies for the treatment of corporate advance accounts, restricted corporate advance accounts, suspense accounts, or any other similar account for purposes of generating payoff statements. Include screen prints displaying all screens available in any on-screen user support tools available to workers involved in these functions.

RESPONSE:

23. Provide all operational manuals, user guides, and onscreen help tools available to any outsource vendors or attorneys that allow them to access any of the account data regarding mortgage loans that you service.

RESPONSE:

24. Provide all documentation of the access rights and related filtering tools that at any time within the past two years have made available to any outsource vendor or other third party to view by web access or other means your data reflecting the status of individual customer mortgage accounts.

RESPONSE:

25. Provide all job descriptions that have been in effect at any time within the past two years for (a) each non-supervisory position responsible for performing payment processing or ordering, receiving, monitoring, or paying for any property inspection; property preservation service; broker price opinion; appraisal; bankruptcy monitoring or other outsource vendor fee for a bankruptcy-related service; credit report fee; attorney's fee for any type of legal service, and (b) each position that has directly supervised each of the positions described in clause (a) above. If any function described in this Request has been performed by any outsource vendor or other third party at any time during the life of this loan, provide documentation of the name, contractual duties, and dates of performance of such duties by the performing party.

RESPONSE:

26. Provide all documentation of each training and user support tool available at workstations and computers used by any employee and other worker responsible for performing payment processing or ordering, receiving, monitoring, or paying for any outsourced service described in the Request immediately above or other third-party service for which corporate advances were made in relation to this loan, including screen prints displaying every screen contained in those training and user support tools.

RESPONSE:

27. Provide all documentation describing either verbally or graphically the ownership, proprietary names, and functionalities of the software systems you use for each of the following purposes.

- a) invoicing, tracking, reporting, and collecting receivables due from third parties arising from corporate advances;
- b) management of suspense accounts and/or movement of funds into and out of suspense accounts;

- c) any function for automated movement of funds;
- d) payment exception processing; and
- e) application of payments for loans in bankruptcy and/or loss mitigation plans.

RESPONSE:

28. Provide documentation describing all of your business rules, software system rules, operational policies, and employee responsibilities relating to the posting of payments, analyzing and posting insufficient or partial payments, and analyzing and posting of payments received from mortgagors whose accounts contain escrow shortages. Include screen prints displaying all screens available in any on-screen user support tools available to workers involved in these functions.

RESPONSE:

29. Provide documentation describing all of your business rules, software system rules, operational policies, and employee responsibilities relating to the movement of funds into and out of suspense accounts and the length of time funds may remain in suspense accounts. Include screen prints displaying all screens available in any on-screen user support tools available to workers involved in these functions.

RESPONSE:

30. Provide documentation describing all of your business rules, software system rules, operational policies, and employee and management responsibilities relating to the submission of claims to investors or master servicers for reimbursement of nonrecoverable advances or other loan-level corporate advances that are expected or deemed not to be recoverable from the related liquidation proceeds, and to the allocating, posting, handling, disbursing, or disposing of funds received in payment of those claims. Include screen prints displaying all screens available in any on-screen user support tools available to workers involved in these functions.

RESPONSE:

31. Provide copies of all requirements relating to making payments that you currently have in effect and have communicated to your mortgage loan borrowers/customers in general, printed on or enclosed with their monthly statements or otherwise communicated to mortgagors. This includes any requirement you communicate to mortgagors in general relating to payments, including but not limited to time of day deadlines for receipt and posting, specified locations for particular types of payments, instructions relating to partial payments, etc. It is not necessary for you to recite payment terms that are contained in mortgagors' mortgage notes or mortgages.

RESPONSE:

32. Please obtain pursuant to your contractual rights as servicer and provide complete copies of all documents relating to this loan in the possession of a third party document custodian or by the document custodial facilities of Fannie Mae or Freddie Mac, including but not limited to the note, all endorsements of and any allonge to the note, the mortgage, and all assignments of the mortgage, recorded or unrecorded. If any document referred to in this Request is currently in your possession, provide a copy if it as well.

RESPONSE:

33. Provide documentation identifying the current holder of the note. If you respond by referring to an entity named in an endorsement or assignment that you have provided pursuant to the Request immediately preceding this Request, you must provide a specific written statement of the name of the entity to which you refer to as being the current holder.

RESPONSE:

34. If the note or this loan is held in, owned by, or has been sold or otherwise transferred to a Fannie Mae or Freddie Mac security or trust, any other trust, Real Estate Mortgage Investment Conduit (REMIC), or other securitization-related entity, provide each of the following, as applicable:

- a) If the loan is serviced for Fannie Mae or Freddie Mac: provide documentation identifying the MBS pool and security that contains this loan, including the investor's loan number, security type, pool number and pool prefix, and the contents of any other data in, or accessible through, the investor reporting and remittance systems that you use which may assist a user in identifying the pool or security that contains this loan, together with a glossary of plain-English explanations of any codes or data definitions used in the documentation that you provide.
- b) If the loan is serviced for an investor other than Fannie Mae or Freddie Mac: provide a complete copy of (a) the related Polling and Servicing Agreement and any other contract between you and the owner of this loan pertaining to your duties as servicer, including all exhibits referred to in those agreement(s) as being attached to the agreement(s), and (b) the prospectus and prospectus supplement for the securities or certificates issued in connection with the securitization of this loan.

RESPONSE:

35. If any documents relating to this loan are in the possession of a document custodian other than Fannie Mae or Freddie Mac, provide a complete copies of the related Custodial Agreement, Master Document Custodial Agreement, and any other contract between you and any document custodian pertaining to custodial services, including all exhibits referred to in those agreement(s) as being attached to the agreement(s).

RESPONSE:

36. Provide copies of all payment records related to the receipt of mortgage payments from the borrower or the Chapter 13 trustee after the date of filing of the borrower's bankruptcy case. If any such payment was placed in any suspense or unapplied funds account at any time, include documentation of the amount and date of each movement of funds into or out of the suspense/ unapplied funds account, and a plain-English description as to how the removed funds were applied.

RESPONSE:

37. Provide an itemized statement showing any and all defaults or arrearages occurring after the date of filing of the borrower's bankruptcy case, including the month in which each default occurred, and the amount of each default.

RESPONSE:

38. Provide copies of all documents included in the initial bankruptcy referral package to the attorney representing you in the borrower's bankruptcy case.

RESPONSE:

39. Provide copies of all contract documents and/or agreements with all attorneys or vendors engaging attorneys on your behalf that have performed services at any time in connection with the borrower's bankruptcy case.

RESPONSE:

40. Provide documentation of any and all guidelines related to the retention of local bankruptcy attorneys by the bankruptcy attorney engaged by you or on your behalf, covering matters such as allowed amounts of fees and expenses and procedures for the approval of, payment of, and accounting for fees and expenses paid to local bankruptcy attorneys.

RESPONSE:

41. Provide copies of all invoices and time and billing records relating to legal services performed for you or on your behalf connection with the borrower's bankruptcy case.

RESPONSE:

42. Provide copies of all documentation and data entries relating to payment of fees for legal services performed for you or on your behalf connection with the borrower's bankruptcy case.

RESPONSE:

43. Provide copies of any documents or data entries related to any fees or charges related to the preparation and filing of the proof of claim filed on your behalf in the borrower's bankruptcy case.

RESPONSE:

44. Provide copies of any documents or data entries related to any fees or charges related to the review of a Chapter 13 Plan in the borrower's bankruptcy case.

RESPONSE:

45. Provide copies of any documents or data entries related to any fees or charges for preparing for or attending the Section 341 creditors' meeting in the borrower's bankruptcy case.

RESPONSE:

46. To the extent not provided in response to a previous Request above, provide a list of the names and addresses of every attorney and law firm that performed any legal services for you or on your behalf connection with the borrower's bankruptcy case, including any national or regional law firm that engages and supervises local attorneys.

RESPONSE:

47. Provide copies of all attorney performance reports for the attorneys who have performed services for you or on your behalf in connection with the borrower's bankruptcy case.

RESPONSE:

48. Provide documentation of all guidelines and benchmarks used for evaluating the performance of attorneys who perform services for you or on your behalf in connection with consumer bankruptcy cases.

RESPONSE:

49. Provide documentation describing the name, ownership, and functionalities of the system or service that you use for tracking the status of bankruptcy cases, or have used for tracking the borrower's bankruptcy case.

RESPONSE:

50. Provide documentation that establishes whether or not any review of the following Schedules filed in borrower's bankruptcy case has been performed on your behalf. Then, to the extent not privileged, provide a copy of the report or the result of the review. Respond separately and specifically as to each of the following:

- a) any review of Schedules A and B;
- b) any review of Schedules D, E and F; and
- c) any review of Schedules 22C and I & J.

RESPONSE:

51. Provide copies of any documents related to any loss mitigation activities for this loan from the date of filing of the borrower's bankruptcy case up to and including the date that you prepare your response.

RESPONSE:

52. Provide copies of all status reports received from your tracking service or, to the extent not privileged, your attorney regarding the status of the borrower's bankruptcy case.

RESPONSE:

53. Provide copies of all cash disbursement requests in this case related to the payment of post-petition legal fees.

RESPONSE:

54. Provide documentation of all rules, guidelines, and company policies related to the amount of the post-petition contractual default that must occur before referring loans in bankruptcy to an attorney for filing a motion for relief from stay.

RESPONSE:

55. Provide copies of any and all guidelines of your company or contained in the applicable servicing agreement or servicing guide related to the amounts of acceptable, allowable or recommended legal fees for any bankruptcy-related legal service, and the procedures for approving and paying such fees.

RESPONSE:

56. Provide copies of any and all guidelines of your company or contained in applicable servicing agreements, servicing guides, or third-party vendor contracts related to the minimum legal services that are to be provided on your behalf in exchange for the legal fees that were paid by you or on your behalf.

RESPONSE:

57. Provide copies of any and all documentation related to the procedures followed by you or on your behalf for Bankruptcy Court approval of legal fees.

RESPONSE:

58. Provide copies of any and all written notices to be provided to the borrower or borrower's counsel with respect to legal fees related to the borrower's bankruptcy case.

RESPONSE:

59. Provide documentation of your processes for preparing internally, or initiating the preparation on your behalf, of (a) proofs of claim and (b) motions for relief from stay in bankruptcy cases. Please include a statement of the full name and address of the party or entity that actually prepared the (a) proof of claim and (b) motion for relief from stay filed in the borrower's bankruptcy case.

RESPONSE:

60. Provide copies of all guidelines, manuals, and policies pertaining to your servicing procedures for mortgage loans involved in bankruptcy cases and that are applicable to the borrower's loan. If the borrower's loan is serviced for Fannie Mae or Freddie Mac it is not necessary in your response to include copies of any portions of the applicable Servicer Guide.

RESPONSE:

61. To the extent not provided in response to a previous Request above, provide all documentation of the access rights and related filtering tools that are available to bankruptcy tracking service vendors and attorneys to view by web access or other means any account data regarding this loan or loans involved in any other consumer bankruptcy case.

RESPONSE:

62. Provide copies of all documents and screen prints of any data and records transmitted to, or used or relied upon by, the person or party that prepared the motion for relief from stay in the borrower's bankruptcy case for purposes of preparation of such motion.

RESPONSE:

63. To the extent not provided in response to a previous Request above, provide a glossary, legend and/or detailed explanation in plain English sufficient to allow for a layman's full understanding of all the data reflected in each and every document provided in response to each of the Requests set forth above, including but not limited to all accounting and transaction codes, abbreviations, and acronyms displayed or used anywhere therein.

RESPONSE:

64. With respect to any affidavit that was attached to or filed with the Bankruptcy Court in connection with the motion for relief from stay filed in the borrower's bankruptcy case, provide:

- a) copies of all documents and screen prints of any data and records used or relied upon by the person who signed the affidavit; and
- b) a statement of the full name and address of the person who signed the affidavit, and the full name and address of that person's employer.

RESPONSE:

65. Provide any documents or notices received from the provider of the mortgage servicing software used in connection with your loans involved in bankruptcy cases related to any problems or common errors regarding the proper application and accounting for payments received from debtors, bankruptcy trustees or other parties.

RESPONSE:

66. Provide copies of all written policies, procedures and guidelines concerning the servicing of loans that are delinquent or in default.

RESPONSE:

67. Provide copies of all written policies, procedures and guidelines concerning the servicing of loans when the respective borrower has filed Ch 7, 11 or 13 under the U.S. Bankruptcy Code.

RESPONSE:

68. Provide copies of all written policies, procedures and guidelines concerning loss mitigation for 1-4 unit residential mortgage loans you service.

RESPONSE:

Dated this the ____ day of _____, 2009.

A handwritten signature in black ink, appearing to read "O. Max Gardner III", with a stylized flourish at the end.

O. Max Gardner III
Gardner & Gardner, PLLC
Attorney for the Plaintiffs
N.C. State Bar No. 6164
P.O. Box 1000
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(704) 487-0616 / FAX (704) 487-0619
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REQUESTS FOR ADMISSION

Instructions

Pursuant to Pennsylvania Rules of Civil Procedure, Defendant demands that Plaintiff, by way of a proper officer, either admit or deny the following enumerated Requests for Admission within (30) days of service hereof. Please note that under the provisions of the applicable court rules each and every matter set forth below will be deemed admitted unless, within thirty (30) days after service of this request, the defendant serves upon the plaintiffs a written answer or objection addressed to the matter, signed by the defendant or their attorney.

Definitions

For the purposes of these Requests:

“PSA” refers to the Pooling and Services Agreement for the CSFB 2005-12 mortgage loan trust, fixed rate securities, as agreed is applicable between counsel for the parties.

The “trust” refers to plaintiff in the above captioned action and as designated in the PSA.

“MERS” refers to Mortgage Electronic Registration Systems, Inc.

“1st Assignment of Mortgage” refers to such assignment document executed by SLM to MERS on September 29, 2005, and attached as Exhibit “A”.

“2nd Assignment of Mortgage” refers to such assignment document allegedly executed by MERS to U.S. Bank on May 22, 2008, and attached as Exhibit “B”.

“The Note” refers to the Note executed by Defendant Pierre Bayas in the above captioned action in favor of SLM Financial on September 29, 2005 and attached hereto as Exhibit “C”.

“The Mortgage loan” refers collectively to the Note and Mortgage executed by Defendant Pierre Bayas in the above captioned action in favor of SLM Financial on September 29, 2005.

“Originator” refers to SLM Financial Corporation as designated in the PSA.

“Seller” refers to the Seller designated in the PSA, DLJ Mortgage Capital, Inc.

“Depositor” refers to Credit Suisse First Boston Mortgage Securities Corp. as designated in the PSA.

“Custodian” refers to LaSalle Bank, National Association as designated in the PSA.

REQUESTS

1. Admit that the PSA established a cut-off date of December 1, 2005 for transfer into the trust of those mortgage loans described in Schedule I annexed to the PSA.
2. Admit that MERS never held a beneficial interest in defendant's Note for the mortgage loan¹.
3. Admit that, when Originator executed to MERS on September 29, 2005, the 1st Assignment of Mortgage attached as Exhibit "A", it did not convey a beneficial interest in the Note to MERS.
4. Admit that when MERS executed to U.S. Bank on May, 2008, the 2nd Assignment of Mortgage attached hereto as Exhibit "B", it did not convey a beneficial interest in the Note to U.S. Bank.

¹ MERS Rule 8, *supra*, Sec. 2 (a)(i) "The Member shall not plead MERS as the note-owner in any foreclosure document; including but not limited to, the foreclosure complaint." See Deposition of R.K. Arnold, CEO, Mers, Inc., Trent v. MERS, USMD Fl. 3:06CV-374 (see Ex. "D" attached to this discovery), N.T. 57-58:

15 Q. Does the mortgage in this case in
16 Exhibit 1 indicate that MERS is entitled to collect
17 money on the underlying debt?
20 THE WITNESS: Yes. I don't -- that is not
21 the case. MERS has the mortgage interest only.
22 The beneficial owner or the servicer are the ones
1 that collect the debt.

Arnold, *supra*, N.T. 82:

11 Q. Is there an assignment of the note to
12 MERS?
13 A. Notes are not assigned.

5. Admit that defendant's mortgage loan is listed in Schedule I of the trust's PSA as a mortgage loan owned by the trust.
6. Admit that defendants' loan was not substituted for another loan originally listed in Schedule I of the PSA.
7. Admit that the Seller financed origination of Defendants' loan with Originator by providing a warehouse line of credit to Originator to do so.
8. Admit that, on or prior to December 1, 2005, Originator had sold or sold all of its interest in defendants' Note and Mortgage.
9. Admit that, on or prior to December 1, 2005, Seller had sold or sold all of its interest in defendants' Note and Mortgage.
10. Admit that, on or prior to December 1, 2005, Depositor had sold or sold all of its interest in defendants' Note and Mortgage
11. Admit that, on or prior to December 1, 2005, Seller and Depositor were required to sell their interest in the Notes and Mortgages for all loans on Schedule I pursuant to the PSA, § 2.01.
12. Admit that, when MERS executed to plaintiff the 2nd Assignment of Mortgage,

MERS had no greater ownership interest in the Mortgage than SLM had when SLM executed to MERS the 1st Assignment of Mortgage.

13. Admit that when MERS executed the 2nd Assignment of Mortgage, MERS no longer had an interest in the mortgage to convey to plaintiff.
14. Admit that the Custodian is in possession the original Note for Defendant's mortgage loan.
15. Admit that the original Note is endorsed in blank by the Originator.
16. Admit that there are no allonges affixed to the original Note.
17. Admit that the aforesaid Note does not contain an endorsement from Seller to Depositor.
18. Admit that the aforesaid Note does not contain an endorsement from Depositor to you.
19. Admit that the aforesaid Note was never transferred from Originator to Seller.
20. Admit that the aforesaid Note was never transferred from Seller to Depositor.

21. Admit that the aforesaid Note was never transferred from Depositor to you.
22. Admit that you do not possess a delivery and an acceptance receipt for the sale of Defendant's Note from Seller to Depositor or another special purpose entity in the chain of assignments and transfers described in the PSA.
23. Admit that you do not possess a delivery and an acceptance receipt for the sale of Defendant's Note from Depositor to you.
24. Admit that you do not possess any document from the Custodian confirming that all of the required transfers of the Mortgage and Note occurred.
25. Admit that you do not possess any document from the Custodian confirming that there is an unbroken chain of transfers from the originator to the sponsor or other special purpose entity, from the sponsor or other special purpose entity to the depositor, and from the depositor to the trust.
26. Admit that when Francis Hallinan, Esquire, executed, as an Assistant Secretary and Vice-President of MERS, Inc., the 2nd Assignment of Mortgage, Francis Hallinan received no salary from MERS as an Assistant Secretary and Vice-President of MERS.
27. Admit that when Francis Hallinan, Esquire, executed, as an Assistant Secretary and

Vice-President of MERS, the 2nd Assignment of Mortgage, Francis Hallinan occupied no offices belonging to MERS.

28. Admit that when Francis Hallinan, Esquire executed, as an Assistant Secretary and Vice-President of MERS, the 2nd Assignment of Mortgage, Francis Hallinan occupied no offices separate from the law offices of Phelan, Hallinan, & Schmieg at 1617 JFK Boulevard, Philadelphia, Pennsylvania.

Special Interrogatory To Requests For Admission

If the Plaintiff responds to any of these Requests for Admission with anything other than an unqualified admission, then Defendant demands, pursuant to the Pennsylvania Rules of Civil Procedure 4005 and 4009.11, that the Plaintiff answer the following special interrogatory and special Request for Production within (30) days of service thereof, for each such request for admission to which an qualified response was made:

1. If Defendants have answered any of the foregoing Requests for Admission with anything other than qualified admissions, then as to each such response, provide the following:
 - a. Identify each and every fact upon which Defendants rely to support their response.
 - b. Identify each and every document upon which Defendants rely to support their response and attach copies of such documents.

Special Request For Production

1. Attach a copy of any document described in the special interrogatory upon which Defendants relied to prepare their answers to the foregoing Requests for Admission.

REQUEST FOR PRODUCTION OF DOCUMENTS

Definitions

As used in these Requests the following terms have the meanings ascribed to them below:

The term “**borrower**” means any person who is obligated on the note, whether the note has one, or more than one obligor.

The terms “**loan**” and “this loan” refer to your loan number <NUMBER> on which <NAME> is a borrower.

The term “**mortgage**” means the mortgage, deed of trust, or other security instrument that your records indicate secures this loan.

The term “**note**” means the promissory note referred to in the mortgage.

The term “**assignment of mortgage**” means any document, either recorded or intended to be in recordable form, that purports on its face to be or effect an assignment of rights in, to, or under the mortgage.

The term “**endorsement**” means any writing, print, or stamp located on the face of the note, an allonge, or other writing attached, fastened, or otherwise fastened to the note that purports to effect a negotiation or other transfer or rights in, to, or under the note.

1. Provide copies of all property preservation or inspection reports prepared since the filing of the Chapter 13 case and within 12 months before the filing date.
2. Provide a statement of the name and address of all companies or individuals providing such property preservation or inspection services.
3. Please state the amount of the fees charged and the fees paid for such property preservation or inspection services.
4. Provide copies of all checks and payment receipts in payment of all such property inspections.
5. Provide copies of all Broker Price Opinions for the subject property since the

petition date.

6. Provide copies of all Broker Price Opinions for 12 months before the petition date.
7. Provide copies of all statements and/or invoices for all such Broker Price Opinions and copies of all checks in payment thereof.
8. Provide a statement of all fees and expenses paid or advanced to the mortgage loan for such Broker Price Opinions since the petition and for 12 months before the petition date.
9. Provide copies of all digital photos on file with respect to the subject property.
10. Provide copies of all digital photos on file for comparable properties.
11. Provide a printout of all data entries for tracking property preservations, property inspections, and Broker Price Opinions for timeliness and for consistency of data.
12. Provide copies of all operational guidelines for your mortgage software programs.
13. Provide copies of all rules and procedures for the electronic ordering of property preservations, property inspections, and Broker Price Opinions.
14. Provide copies of all documents and data related to the electronic payment of invoices for property preservations, property inspections and Broker Price opinions.
15. Provide copies of any documents related to any type of Bankruptcy Inspection and all charges and fees related thereto.
16. Provide copies of all collection notes and other entries in any files related to this mortgage. Also, provide copies of all images related to this file entered in the NewImage Express system or any other similar system or data storage or imaging transfer system.
17. Provide copies of all data entries in any restricted corporate advance accounts or files related to this mortgage.
18. Provide copies of all applications for employment submitted by any Vendor who has performed any services related to this mortgage.
19. Provide copies of all documents related to any legal services provided or rendered with respect to this mortgage since the petition date, including bills, statements and payment invoices, and time and expense records.
20. Provide copies of any statement, invoice, or bill containing the name and address of each and every attorney and/or law firm providing such services.

21. Provide copies of any data regarding the amount of money paid for legal fees and expenses to any attorney and/or law firm, or any other entity, since the petition date including the amount and date of each payment. This question includes any type of document release or document acquisition or document preparation fee. In addition, if any legal fees have been shared between or among lawyers or lawyers and third-party vendors then attach copies of all agreements or written understandings with respect thereto.
22. Provide copies of any transactional history (i.e., showing the date and amount of payment) related to the source of funds used to pay for property preservation services, property inspection services, Broker Price Opinions, and legal services and any other expenses.
23. Provide copies of any transactional history indicating how the payments identified in the documents produced in number 21 above relate to the subject mortgage loan.
24. Provide copies of any guidelines related to any type of bankruptcy tracking system used with respect to the subject mortgage.
25. Provide copies of all payment records related to the receipt of post-petition mortgage payments from the Chapter 13 Trustee. Also, if such payments are placed in any suspense or unapplied funds account then identify the amount and date of each such transaction and identify by date and amount of all funds removed from such account or accounts and state exactly how the removed funds were applied.
26. Provide copies of the Key Loan Transaction history for the subject mortgage loan. Also, if you have an XLS spreadsheet for the subject loan please produce the same.
27. Provide a copy of the Pooling and Servicing Agreement for the subject mortgage.
28. Provide a complete life of loan transactional history for the subject mortgage beginning with the origination date and ending with the date of production. This document must include all debits, including any restricted corporate advances, and credits of any nature made at any time with respect to the subject mortgage loan, whether or not such transactions resulted in additions to the outstanding principal balance.
29. Provide copies of all documents included in the initial bankruptcy referral package to the attorney in this case and state whether or not a fee had to be paid to any party for this package. If such a fee had to be paid, then state the amount of the fee, the name of the payee, and the date of the payment.
30. Provide copies of any documents related to any type of review of Schedules A and B in this case.

31. Provide copies of any documents related to any type of review of Schedules D, E and F in this case.
32. Provide copies of any documents related to any type of review of Schedules 22C and I & J in this case.
33. Provide copies of any documents related to any fees or charges related to the preparation and filing of the proof of claim in this case.
34. Provide copies of any documents related to any fees or charges related to the review of the bankruptcy plan in this case.
35. Provide copies of any documents related to any fees or charged related to attending the 341 meeting in this case.
36. Provide copies of any documents related to any loss mitigation activities in this case from the petition date up to and including the date of the response to this request to produce.
37. Provide copies of all monthly reports received from your bankruptcy lawyer or lawyers regarding the loss management efforts pursued during the pendency of this Chapter 13 case.
38. Provide copies of all rules or guidelines related to the amount of the post-petition contractual default that must occur before referring the file to the bankruptcy attorney for filing a motion for relief from stay.
39. Provide copies of any documents related to post-petition remittances to the investor that owns this mortgage that were related to the subject mortgage.
40. Provide copies of any documents related to post-petition advances related to the subject mortgage loan.
41. Provide copies of any documents related to any pool buy-out requirements related to the subject mortgage loan or to any limitations on loan modification options imposed by any of the securitization instruments.
42. Provide copies of any and all servicing guides related to the amount of approved legal fees for any post-petition legal service.
43. Provide copies of any and all servicing guides related to the source of funding for the payment of post-petition legal fees.
44. Provide copies of all cash disbursement request forms in this case related to the

payment of post-petition legal fees.

45. Provide copies of any and all documents related to any standard rule or procedure that provides for the payment of a legal fee to a lawyer or lawyers for post-petition services in a Chapter 13 bankruptcy case.

46. Provide copies of any and all documents that describe the legal services that are to be provided for the legal fee.

47. Provide copies of any and all documents related to any additional legal fees that may be paid post-petition for a lawyer sending a default letter to the debtor's bankruptcy counsel that results in a cure of a post-plan confirmation delinquency.

48. Provide copies of any and all documents related to how legal fees are charged to, advanced against, or assessed to the subject mortgage.

49. Provide copies of any and all documents related to the procedures to be used in Chapter 13 bankruptcy cases for court approval of the legal fees.

50. Provide copies of any and all documents related to written notices to be provided to the debtor or debtor's counsel in a Chapter 13 bankruptcy case with respect to legal fees.

51. Provide copies of any and all guidelines or policies related to the application of court-approved legal fees in Chapter 13 bankruptcy cases that are less than \$1,000.00.

52. Provide copies of any and all accounting rules and procedures related to the receipt of post-petition legal fees included in a Chapter 13 plan (either pre or post-confirmation) and the relation of such fees to the legal fee or any other type of fixed fee paid to a bankruptcy lawyer.

53. Provide copies of any and all guidelines related to the retention of a local bankruptcy attorney by your general bankruptcy attorney, including the amount and procedures for the payment of and accounting for fees and expenses paid to the said local bankruptcy counsel.

54. Please produce a copy of the Master Document Custodial Agreement for the Trust that owns the mortgage loan in this case.

55. Please produce a copy of the Master Document Custodian Guidebook for the Trust that owns the mortgage loan in this case.

56. Please produce copies of all records maintained by the document custodian identified herein that confirm the proper unbroken chain of assignments of the mortgage

or deed of trust from the originator to the Trustee for the Trust that owns the mortgage loan in this case.

57. Please produce copies of all records maintained by the document custodian identified herein that confirm the proper unbroken chain of negotiations and transfers of the mortgage note from the originator to the Trustee for the Trust that owns the mortgage loan in this case.

2. For each and every such transaction identified in Request Number 1, please provide the date it was posted to or associated with the debtors' account, the amount thereof, the type of charge or debit, the resulting balance due and owing on the account or any attached accounts, suspense accounts, or any other related account after the transaction, and any and all information sufficient to identify the purpose for each such transaction.

3. For each and every such payment transaction, provide the date it was posted to the debtors' account, the amount thereof, and the resulting balance due and owing on the account.

4. For each and every such credit transaction (other than from payments), provide the date it was posted to the debtors' account or any sub-account, suspense account or associated account, the amount thereof, and the resulting balance due and owing on the account.

5. For each and every payment, provide:

a. The manner of the payment, whether by personal check, money order, cashier's check, bank check or otherwise; and

b. Any number or other information in your control that would further identify the payment, as for instance, and without limitation to the type of payment or type of information, check numbers, money order numbers, etc.

6. A legend and/or detailed explanation sufficient to allow for a layman's full understanding of all the data provided including but not limited to the accounting transaction codes used with your mortgage servicing software and the appropriate English definition of each such code.

7. A copy of the written notice, required by N.C.G.S. § 58-35-85 (10), sent by the insurer that previously provided insurance coverage to the debtors, to you, indicating that the debtors' insurance has lapsed and/or been cancelled.

8. All contracts or agreements with third-party vendors providing foreclosure and/or bankruptcy processing or administrative services in effect at any time from January of 2000 to the present.
9. All documents regarding Compensation paid to such third-party vendors in connection with the subject bankruptcy case and/or and contested case or adversary proceedings filed herein, and copies of checks, wire transfers or debit/credit memos evidencing all such payments.
10. Copies of all contract documents and/or agreements with all attorneys involved at any time in the subject bankruptcy case.
11. Copies of all time and billing records prepared by any attorney involved at any time in the subject bankruptcy case.
12. Copies of all attorney performance reports for the attorneys involved in the subject bankruptcy case.
13. Documentation of any internal benchmarks used for grading the performance of outside counsel in the processing of the subject bankruptcy case.
14. All documents relating to your internal processes for preparing proofs of claim and Motions for Relief from Stay in the consumer bankruptcy cases. Please state the full name and address of the party or entity that actually drafted the proof of claim and motion for relief from stay filed in this case.
15. All Guidelines, manuals, bulletins and/or policies governing the servicing procedures for the mortgage loan involved in the subject bankruptcy case.
16. All Guidelines, manuals, bulletins and/or policies governing the servicing procedures for defaulted loans serviced by you in effect from January of 200 to the present.
17. Documentation of any and all guidelines you have prepared governing allowable legal fees and timelines for foreclosure and bankruptcy processing that apply to the subject mortgage loan or to any consumer bankruptcy case.
18. Documentation of all Management Assertions, Management Representation Letters, and Independent Accountant's Reports concerning your compliance with the minimum servicing standards identified in the Mortgage Bankers Association of America's Uniform Single Attestation Program for Mortgage Bankers, plus all documents you provided to the accountants documenting these conclusions.
19. Copies of any internal audit, review or special investigation of your default management and escrow procedures from January of 2000 to the present.

20. Copies of performance reviews of your escrow management department and escrow procedures from January of 2000 to the present.
21. A current itemized payoff statement for the mortgage loan involved in this case.
22. The operations guidelines or manuals used in your payoff department for generating the statement referred to in Request Number 21.
23. The written protocols for the treatment of a corporate advance account, restricted corporate advance account, suspense account, or any other similar account for purposes of generating the payoff statement referred to in Request Number 21.
24. Any documentation regarding the type of accounts used in connection with any consumer bankruptcy loan, the use of those accounts, and the implementation of any procedures regarding those accounts.
25. All documents regarding the referral of the mortgage loan in this case to any party for the filing of a motion for relief from stay.
26. All operational manuals available to your attorneys that allow them to access any of the account data regarding the mortgage loan in this case or in any other consumer bankruptcy case.
27. All documents used, relied upon or available to your attorney in connection with the preparation of the motion for relief from stay in this case.
28. All documents used, relied upon or available to the person who signed the affidavit attached to the motion for relief from stay filed in this case. Please also state the full name of such party, the address of such party, and the full name and address of the employer of such party.
29. The job descriptions and names of all of your employees who were involved in the servicing of the mortgage loan in this case subsequent to the filing of the bankruptcy petition.
30. Any documents or notices received from the provider of the mortgage servicing software used in connection with your loans involved in consumer bankruptcy cases related to any problems or common errors regarding the proper application and accounting for payments received from debtors, bankruptcy trustees or other parties.
31. Any and all electronic records in the NewImage system regarding this loan.
32. Any and all electronic records in the NewTrack system regarding this loan.
33. Any and all electronic records in the NewInvoice system regarding this loan.

34. Any and all electronic mail messages regarding this mortgage loan.
35. Please state the name of the entity that paid the law firm that filed the motion for relief from stay in this case.
36. State the amount of any fees or charges that the law firm that filed the motion for relief from stay had to pay to any third-party for any documents in this case and identify any and all such documents.
37. Please itemize and identify by date and amount any reimbursement payments you received from any party other than the debtors for expenses advanced in connection with this loan.
38. Please identify all national law firms you use in connection with consumer bankruptcy cases and identify the firm used in this case.
39. State the amount and date of all fees paid by you to the national law firm in this case.
40. Please produce copies of any all documents you have provided to any third-party that purports to give such party any authority to sign documents on your behalf (such as, for example, a power of attorney form).
41. Please provide an itemized payoff statement for this mortgage pursuant to North Carolina General Statute § 45-36.7. Pursuant to N.C.G.S. § 45-36.7(e), the payoff statement must contain the following information:
- (a) The date on which it was prepared and the payoff amount as of that date, including the amount by type of each fee, charge, or other sum included within the payoff amount;
 - (b) The information reasonably necessary to calculate the payoff amount as of the requested payoff date, including the per diem interest amount; and
 - (c) The payment cutoff time, if any, the address or place where payment must be made, and any limitation as to the authorized method of payment.
42. Provide an itemized statement of the amount needed to fully reinstate this mortgage loan.
43. Provide a detailed itemization of all fees incurred, including the date each fee was incurred, the nature of the fee, a copy of the bill or invoice for such fee, and a copy of

each check or wire transfer in payment thereof.

44. Copies of all statements or notices you have mailed to the consumers named herein pursuant to N.C.G.S. § 45-91(1)b.

45. Copies of all statements or notices you have mailed to the consumers named herein pursuant to N.C.G.S. § 45-91(2).

46. A full and complete explanation of any default in the mortgage payments and the date the account went into default as required by N.C.G.S. § 45-93(1)a.

47. The current balance due on the mortgage loan pursuant to N.C.G.S. § 45-93(a)b.

48. The current amount of any funds held in any suspense account and the source of such funds held in suspense as provided for in N.C.G.S. § 45-93(1)b.

“a statement of all post-petition account activity that is readable, reasonably understandable, and stated in plain English.” [Emphasis supplied]. Please provide me with a complete post-petition transaction history with a definition of the transaction codes

1. A complete and itemized statement of the loan history covering the entire life of this loan including, but not limited to, all receipts by way of payment or otherwise and all charges to the loan in whatever form. This life of the loan transactional history should include the date of each and every debit and credit to any account related to this loan, whether restricted or not restricted, the nature and purpose of each such debit and credit, and the name and address of the payee of any type of disbursement related to this loan.

2. A complete and itemized statement of all advances or charges against this loan, restricted or unrestricted, recoverable or non-recoverable, and for any purpose that are not reflected on the life of loan history transaction statement provided in answer to question #1.

3. A complete and itemized statement of the escrow account of the loan, if any, covering the entire life of this loan, including, but not limited to, any receipts or disbursements with respect to real estate property taxes, fire or hazard insurance, flood insurance, mortgage insurance, credit insurance, purchase mortgage insurance, or any other type of insurance product.

4. Have you purchased and charged to the account any Force-Placed Insurance?

5. A complete and itemized statement covering the entire life of this loan of the amounts charged for any forced-placed insurance, the date of the charge, the name

of the insurance company, the relation of the insurance company to you or a related company, the amount of commission you received for each force-placed insurance event, and an itemized statement of any other expenses related thereto.

6. A complete and itemized statement covering the entire life of this loan of any suspense account entries and/or any corporate advance entries related in any way to this loan.

7. A complete and itemized statement covering the entire life of this loan of any property inspection fees, property preservation fees, broker opinion fees, appraisal fees, bankruptcy monitoring fees, or other similar fees or expenses related in any way to this loan.

8. Identify the provision under the Deed of Trust and/or note that authorizes charging each and every such fee against the loan of the debtors.

9. Please attach copies of all property inspection reports and appraisals, broker price opinions of value, bills and invoices, and checks or wire transfers in payment thereof.

10. A complete copy of any Key Loan Transaction report or reports and any reports indicating any charges for any "add on products" sold to the debtors in connection with this loan at any time.

11. A complete and itemized statement of any and all post-petition arrears including each month in which the default occurred, and the amount of each monthly default.

12. A complete and itemized statement of any late charges added to this loan at any time.

13. A complete and itemized statement covering the entire life of this loan of any fees incurred to modify, extend, or amend the loan or to defer any payment or payments due under the terms of the loan.

14. An itemized statement of the current amount needed to pay-off the loan in full.

15. A full and complete comprehensible definitional dictionary of all transaction codes and other similar terms used in any of the documents or records requested or referred to herein.

16. A complete and itemized statement of any funds deposited in any post-petition suspense account(s) or corporate advance account(s), including, but not limited to, the balance in any such account or accounts and the nature, source and date of any and all funds deposited in such account or accounts.

17. A complete and itemized statement from the date of this loan to the date of your reply to this letter of the amount, payment date, purpose and recipient of all foreclosure expenses, NSF check charges, legal fees, attorney fees, professional fees

and other expenses and costs that have been charged against or assessed to this loan and whether or not such charge or fee is recoverable or non-recoverable.

18. A complete and itemized statement of the amount, payment date, purpose and recipient of all fees for the preparation and filing of the original proof of claim, any amended proofs of claim or any supplemental proofs of claim in this case.

19. The full name, address and telephone number of the current holder of the original mortgage note including the name, address and phone number of any Trustee under the Trust or other fiduciary. This request is being made pursuant to Section 1641(f)(2) of the Truth In Lending Act, which requires the servicer to identify the holder of the debt.

20. The name, address and telephone number of any master servicers, servicers, sub-servicers, contingency servicers, back-up servicers or special servicers for this mortgage loan.

21. A copy of any mortgage Pooling and Servicing Agreement and all Disclosure Statements provided to any Investors with respect to any mortgage-backed security trust or other special purpose vehicle related to the said Agreement and any and all Amendments and Supplements thereto.

22. If a copy of the Pooling and Servicing Agreement has been filed with the SEC, provide a copy of SEC Form 8k and the Prospectus Supplement, SEC Form 424b5.

23. The name, address and telephone number of any Trustee under any pooling or servicing agreement related to this loan.

24. A copy of the Prospectus offered to investors in the trust.

25. Copies of all servicing, master servicing, sub-servicing, contingency servicing, special servicing, or back-up servicing agreements with respect to this loan.

26. All written loss-mitigation rules and work-out procedures and loan modifications options or programs related to any defaults regarding this loan and similar loans.

27. A summary of all fixed or standard legal fees approved for any form of legal services rendered in connection with this loan.

28. Is this a MERS Designated Mortgage Loan? If the answer is yes, then identify the electronic MERS number assigned to this loan. Please attach a copy of the MERS Milestone Reports.

29. Please state the full name and address of any attorney you have retained to provide any legal services in this case within six (6) months of the petition date or at any time post-petition.

30. A copy of your Key Loan Transaction history, bankruptcy work form, or XLS spreadsheet of all accounts associated with this mortgage loan.

31. Copies of all collection notes, collection records, communication files or any other form of recorded data with respect to any communications between you and the debtor.
32. An itemized statement of the full amount needed to reinstate the mortgage as of the date of your response.
33. Copies of all written or recorded communications between you and any non-lawyer third parties regarding this mortgage.
34. All P-309 screen shots of the history all of the accounts (principal, interest, escrow, late charges, legal fees, property inspection fees, broker price opinion fees, statutory expense fees, miscellaneous fees, corporate advance fees, etc.) associated with this loan.



NATIONAL CONSUMER BANKRUPTCY
LITIGATION CENTER

PO Box 1000
403 South Washington Street
Shelby, North Carolina 28151

Phone: (704) 418-2628
Fax: (888) 870-1647

DATE

CitiMortgage, Inc.
Attn: Customer Research Team
P.O. Box 9442
Gaithersburg, MD 20898-9442

RE: My Clients/Borrowers:
Loan Number:
Property Address:

Dear Madam or Sir:

This is a Qualified Written Request (QWR) as defined by the Real Estate Settlement Procedures Act (RESPA) for information regarding my clients' mortgage loan as referenced above.

Based on written information we have received on the above referenced mortgage, we are uncertain as to who is the current holder and owner of the original mortgage note. We are therefore requesting you to resolve this uncertainty and dispute by providing us with the following information:

1. The name and address of the owner of the promissory Note signed by my clients and secured by the deed of trust in the mortgage loan referenced above.
2. The name and address of the entity that legally is the "holder" of the promissory Note signed by my clients and secured by the deed of trust in the mortgage loan referenced above. If your answer is the same as your answer to #1 above, you may simply reply "same as #1".
3. The names of all entities to which the promissory Note referenced above has been sold or otherwise transferred at any time, and the dates that each sale or transfer of the Note occurred.
4. A copy of the Note referenced above showing all endorsements that have occurred, together with any allonge that exists to that Note.
5. The names of all entities to which my clients' mortgage or deed of trust has been assigned, and the dates that each assignment occurred. If any assignment in blank has occurred, include it the list of dates with the notation "In Blank" in place of the name of an entity.
6. A copy of each of the assignments reflecting each assignment referenced in #5 above.

O. Max Gardner III

Chief Executive Officer
Vice President-Litigation
Management
mgardner@maxgardner.com
Admitted in NC

William S. Gardner

Vice President-Legal Affairs
Secretary & Treasurer
wgardner@maxgardner.com
Admitted in NC

John Mull Gardner

Of Counsel
jgardner@maxgardner.com
Admitted in NC

*All Principals are proud
members and supporters of:*





NATIONAL CONSUMER BANKRUPTCY
LITIGATION CENTER

PO Box 1000
403 South Washington Street
Shelby, North Carolina 28151

Phone: (704)418-2628
Fax: (888) 870-1647

7. A copy of each written notice that has been sent to my clients informing them of the sale or transfer or assignment of the Note or mortgage referenced above. You need only include notices sent by you or any corporate affiliate of yours, or notices of which you otherwise have actual knowledge. You need NOT include any Notice of Transfer of Servicing that may have been sent pursuant to RESPA. This request is only for notices that have been sent in compliance with the Truth-in-Lending Act.

By their signatures below, my clients authorize you to furnish me with the requested information and any other information about my account and about my mortgage loan.

Very truly yours,

O. Max Gardner III

OMG:lp
cc: Clients

I authorize you to furnish the requested information regarding my mortgage loan to my attorney, addressed to:

O. Max Gardner III
Gardner & Gardner PLLC
Post Office Box 1000
Shelby, NC 28151-1000

Signed this the ____ day of _____, 2009.

(Borrower)

(Borrower)

DATE

CitiMortgage, Inc.
Attn: Customer Research Team
P.O. Box 9442
Gaithersburg, MD 20898-9442

RE: Borrowers:
Loan Number:
Property Address:

Dear Madam or Sir:

This is a Qualified Written Request (QWR) as defined by the Real Estate Settlement Procedures Act (RESPA) for information regarding my mortgage loan as referenced above.

Based on written information we have received on our above referenced mortgage, we are uncertain as to who is the current holder and owner of the original mortgage note. We are therefore requesting you to resolve this uncertainty and dispute by providing us with the following information:

1. The name and address of the owner of the promissory Note signed by me and secured by the deed of trust in the mortgage loan referenced above.
2. The name and address of the entity that legally is the "holder" of the promissory Note signed by me and secured by the deed of trust in the mortgage loan referenced above. If your answer is the same as your answer to #1 above, you may simply reply "same as #1".
3. The names of all entities to which the promissory Note referenced above has been sold or otherwise transferred at any time, and the dates that each sale or transfer of the Note occurred.
4. A copy of the Note referenced above showing all endorsements that have occurred, together with any allonge that exists to that Note.
5. The names of all entities to which my mortgage or deed of trust has been assigned, and the dates that each assignment occurred. If any assignment in blank has occurred, include it the list of dates with the notation "In Blank" in place of the name of an entity.
6. A copy of each of the assignments reflecting each assignment referenced in #5 above.
7. A copy of each written notice that has been sent to me informing me of the sale or transfer or assignment of the Note or mortgage referenced above. You need only

include notices sent by you or any corporate affiliate of yours, or notices of which you otherwise have actual knowledge. You need NOT include any Notice of Transfer of Servicing that may have been sent pursuant to RESPA. This request is only for notices that have been sent in compliance with the Truth-in-Lending Act.

I hereby authorize you to furnish the requested information regarding my mortgage loan to my attorney, addressed to:

O. Max Gardner III
Gardner & Gardner PLLC
Post Office Box 1000
Shelby, NC 28151-1000

Thanking you in advance, I am

Very truly yours,

(Borrower)

(Borrower)



NATIONAL CONSUMER BANKRUPTCY
LITIGATION CENTER

PO Box 1000
403 South Washington Street
Shelby, North Carolina 28151

Phone: (704)418-2628
Fax: (888) 870-1647

DATE

CitiMortgage, Inc.
P.O. Box 9438
Gaithersburg, MD 20898-9438

Re: My Clients/Borrowers:
Loan Number:
Property Address:

Dear Madam or Sir:

In accordance with Section 131(f) of the Truth-in-Lending Act, 15 U.S.C. Section 1641(f), please provide me with the name, address, and telephone number of the owner of the promissory Note signed by my clients and secured by the deed of trust in my clients' mortgage loan referenced above.

By their signatures below, my clients authorize you to furnish me with the requested information, and any other information regarding their account and their mortgage loan.

I request that you forward the requested information to me within twenty (20) days from the date of this request.

Thanking you in advance, I am

Very truly yours,

O. Max Gardner III
OMGIII/lp
cc: Client(s)

I authorize you to furnish the requested information regarding my mortgage loan to my attorney, O. Max Gardner III, at his office address as shown above, within twenty (20) days from the date of this request.

Signed this the ____ day of _____, 2009.

(Borrower)

(Borrower)

O. Max Gardner III
Chief Executive Officer
Vice President-Litigation
Management
mgardner@maxgardner.com
Admitted in NC

William S. Gardner
Vice President-Legal Affairs
Secretary & Treasurer
bgardner@maxgardner.com
Admitted in NC

John Mull Gardner
Of Counsel
jgardner@maxgardner.com
Admitted in NC

*All Principals are proud
members and supporters of:*



**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN RE:

Debtors

CASE NO. _____

Debtors.

Plaintiffs.

vs.

LENDING PROCESSING SERVICES

**ADVERSARY PROCEEDING
NO _____**

Defendant.

**INTERROGATORIES AND REQUEST FOR PRODUCTION
DUE UNTO LENDING PROCESSING SERVICES**

Come now the Plaintiffs, and request that the Defendant, Lending Processing Services (hereinafter the "LPS"), answer the following interrogatories and request for production within the time required by the Alabama Rules of Civil Procedure. In addition, the Plaintiffs request that the Defendant attach a copy of each and every document referred to in any of the interrogatories and request for production or in the Defendant's answers thereto.

NOTE A: These interrogatories and request for production shall be deemed continuing so as to require supplemental answers upon receipt of additional information by this defendant or this defendant's attorney subsequent to your original response. Any such supplemental answers are to be filed and served upon counsel for plaintiff within thirty (30) days from receipt of such additional information but not later than the first of the trial of this case.

DEFINITION OF TERMS

1. The term "plaintiff" or "plaintiffs" means the party identified as such in this pleading.

2. The term "defendant or defendants" means any or all of the parties to this litigation who are delineated as defendants in these pleadings and their subsidiaries, affiliates, any successors and assigns, and predecessors, and includes every officer, director, partner, agent, employee, attorney, servant, or any other person presently or formerly acting for or on behalf of said entity.

3. The term "document" is used in its customary broad sense to include, by way of illustration only and not by way of limitation, all written or graphic matter of every kind or description, whether printed or reproduced by any process, or written and/or produced by hand, whether final or draft, original or reproduction, whether or not claimed to be privileged or otherwise subject to exclusion from discovery, whether in the actual or constructive possession,

custody or control of the defendant, including: letters correspondence, memoranda or transcripts of telephone or personal conversations, microfilm, microfiche, telegrams, books, magazines, newspapers, advertisements, periodicals, bulletins, circulars, brochures, pamphlets, statements, notices, advertising layouts, trade letters, press releases, reports, rules, regulations, directives, teletype or telefax messages, minutes or records of meetings, interoffice communications, financial statements, ledgers, books of account, proposals, prospectuses, offers, invoices, orders, receipts, working papers, desk calendars, appointment books, diaries, routing slips, time sheets, logs, movies, tapes (or visual or audio reproduction), records, drawings, blueprints, sketches, plans, graphs, charts, photographs, shipping papers, purchase orders, phonograph records, phono-records, data processing paper results, data printouts and computations (both in existence and stored in memory components), transcripts of oral statements or testimony, reports and/or summaries of interviews, reports and/or summaries of investigations, opinions or reports of consultants, forecasts, opinions of counsel, court papers and any and all other data compilations or information resources from which information can be obtained or translated, if necessary, through detection devices into reasonably usable form, or material similar to any "document" as used herein. "Document" as used herein also includes the original of any document in whatever form or medium it may exist, and all copies of each such document bearing, on any sheet or side thereof, any marks, including by way of illustration only and not by way of limitation, initials, stamped indicia, any comment or notation, or any character not a part of the original text, or any reproduction thereof.

4. The term "communication" means any contact, oral or written, formal or informal, at any time or place, under any circumstances, in any manner, whereby a statement of any nature is transmitted or transferred, and shall include, without limitation, any documents containing, constituting reflecting, memorializing, referring or relating to any such contact.

5. The word "or" means and/or and should be read both ways so as to encompass both constructions and calls for documents to be produced responsive to both constructions.

6. The term "representative" refers to any employee, agent, attorney or accountant.

7. The term "person" means natural person, proprietorships, partnerships, groups, corporations, associations, societies, organizations, or government bodies or any other individual or entity.

8. The term "identify" when used in connection with a natural person means to set forth the full name, title, present business address and present business affiliation of said person.

9. The term "identify" when used in connection with a person which is a proprietorship, partnership, corporation, or other organization means to set forth the full name and present business address of that dealership, proprietorship, partnership, corporation, or other organization.

10. The term "identify" when used with reference to a document means to state the date and author (and, if different, the signer or signers), the addresses of the author(s), signer(s), or any individual(s) receiving copies, the type of document (e.g., letter, memorandum, chart), and its present or last known location or custodian.

11. The term "identify" when used with reference to an agreement, contract, understanding or communication means, in addition to Definition 10 above: (a) to state whether it was written or oral, to identify the parties thereto, the place where it was made or occurred, and the date or dates thereof; (b) to identify the parties thereto, the place where it was made or occurred, and the date or dates thereof; (c) to identify the persons who negotiated or had any role in suggesting, framing or drafting the terms of the agreement, contract or understanding or who participated therein; and (d) to state the substance of the communication, agreement, contract or understanding.

12. The term "identify" when used with reference to a meeting, incident, occurrence or conversation means to state its date, place and subjects covered, to identify its participants and to identify all documents reporting upon or otherwise recording or referring to anything that transpired at such meetings.

13. The term "the transaction" or "the transactions" or "account" or "accounts" when used herein without qualifications means the transactions and accounts between and among the Debtors and the named defendants in all related activities and agents or assigns of either party.

14. The term "Note" shall refer to the Mortgage Promissory Note executed by the plaintiffs in connection with the mortgage loan transaction that is the subject of this litigation.

15. The term "Mortgage" shall refer to the Document filed in the Records of the Probate Judge's Office for the County in which the Real Property that is the subject of this litigation is located which is alleged to secure one of the defendants' alleged lien against the Real Property.

16. The term "Real Property" shall refer to the Real Property and improvements that is the subject of this litigation.

17. The term "present" means up to and including the date of your final response to these interrogatories and requests for production of documents.

18. The term "relating to" or "relates to" means regarding, reflecting, discussing, describing, containing, identifying, analyzing, studying, reporting, commenting, evidencing, constituting, revealing, setting forth, considering, recommending, questioning, disputing, contesting, correcting, construing, mentioning, associated with, referring to, alluding to, or pertaining to, in whole or in part.

19. The singular shall be construed to include the plural, and the plural shall be construed to include the singular.

20. The masculine includes the feminine, and the feminine includes the masculine.

21. The word "and" shall be construed to include the word "or", and the word "or" shall be construed to include the word "and."

22. The word "each" shall be construed to include the word "every", and the word "every" shall be construed to include the word "each".

23. The word “any” shall be construed to include the word “all”, and the word “all” shall be construed to include the word “any”.

II. INSTRUCTIONS

1. The time period for which production of documents and things requested shall be from the date of origination of the mortgage loan that is the subject of this litigation until the date of your responses unless otherwise specified.

2. Each of the following requests is continuing, and in the event that at any later date you obtain or discover any additional document responsive to any request, you shall submit such document promptly.

3. If an objection is made to any request herein, all documents covered by the request not subject to the objection should be produced. Similarly, if an objection is made to production of a document, the portion(s) of that document not subject to objection should be produced with the portion(s) objected to deleted and indicated clearly.

4. Each document is to be produced in its entirety even if only a portion of the document is related to the identified subject matter and without abbreviation, editing, or expurgation and including all appendices, tables, or other attachments. If an appendix, table, or other attachment is not presented with the original but is attached to a copy thereof or is otherwise available, it should be submitted and clearly marked to indicate the document to which it corresponds. With the exception of privileged material, no document or portion thereof should be masked or deleted in any manner. To the extent possible, documents should be produced in the same order and arrangement as in the file form which they are taken.

5. Unless otherwise requested, in lieu of producing original documents, you may produce photocopies, provided that you shall retain the original documents and produce them to the plaintiffs upon request. Further, copies of original documents may be submitted in lieu of originals only if they are true, correct, and complete copies of the original documents, and their submission constitutes a waiver of any claim as to the authenticity of the copy should it be necessary to introduce such copy into evidence in any legal proceeding. ***Please provide color copies of any document originally produced in color or containing type, writing, or other marks in any color other than black.***

6. Documents that may be responsive to more than one request need not be submitted more than once; however, such documents should be so identified.

7. All headings herein are included only for organization purposes and should not be construed as being part of any request, or as limiting any request in any manner.

III. PRIVILEGE

If any document would be required to be produced in response to any request except for the fact that a privilege against production is claimed, set forth for each such document:

1. Its date, title, type of document (memorandum, letter, e-mail, electronic communication, data file, data image, etc.), and length;

2. Its preparer, sender, addressee, recipient and anyone who received a copy of that document when it was originally disseminated;

3. A general description of its subject matter (without revealing the information as to which any privilege is claimed);

4. The exact grounds upon which the objection to production is based;

5. The identity of all persons, in addition to those identified as required by section 2 herein, known to you who have seen or had access to the document;

6. The identity of all parties who have had custody or possession of the document and at what periods of time; and

7. The identity of the person now in possession of the document.

IV. DOCUMENTS NO LONGER IN EXISTENCE OR NO LONGER UNDER YOUR POSSESSION, CUSTODY OR CONTROL

If any document, requested herein was at one time in existence and under your possession, custody or control but has since been lost, discarded or destroyed or has been removed from your possession, custody or control, then with respect to each such document:

1. Identify and describe such document by date, title and type of document;

2. State when each such document was most recently in your possession or subject to your control and what disposition was made of such document, including an identification of the person, if any, presently in possession or control of such document if such document has not been lost or destroyed;

3. Please identify all of your systems that contained at one time images of the originals of such documents, where such images are stored, how they are stored, and produce a copy of your document retention and document destruction policy;

4. Please state where you maintain copies of all documents in the event of a mass disaster and identify all documents at such location and how they are stored at such location;

5. State the name, title, and location of each party who conducted a search for any lost documents in this case and describe in detail the nature and extent of each search and produce all reports, findings or search results generated by said parties;

6. State the full name and address of the Master Document Custodian for the original loan documents in this case and produce all records related to such documents in the possession of the said Custodian and all documents, reports, or forms produced by said Custodian with respect to all of the documents related to the securitization of the mortgage note in this case;

7. State when any such lost document was transferred or destroyed, identify the person who transferred or destroyed such document and the persons who authorized or directed

that the document be transferred or destroyed or having knowledge of its transfer or destruction and state the reason such document was transferred or destroyed; and

8. Identify all persons having knowledge of the contents of any lost or destroyed documents.

V. ORGANIZATION

Pursuant to the Alabama Rules of Civil Procedure it is requested that the documents produced be organized and labeled so as to correspond with the categories of this request for production.

VI. INTERROGATORIES AND REQUESTS FOR PRODUCTION

1. Please state the name of every subsidiary or affiliate of this defendant. If this defendant does not have any subsidiaries or affiliates please state whether or not this defendant has any divisions and for each division please state the name of the division and its primary purpose as well as the executives in charge of managing that division.

2. Please provide an outline or chart of your corporate structure which sets forth every subsidiary, affiliate division or relationship between this defendant and any other corporate entity in which this defendant has an ownership interest in or which this defendant controls through any other management agreement or similar type agreement.

3. Please state the name of each and every software program which is either owned or managed by this defendant. Please state whether or not this defendant owns the software program commonly referred to as MSP "Mortgage Servicing Platform".

4. Please state whether this defendant owns or controls software known as Fiserv.

5. Please state whether this defendant owns or controls the software known as LPS Desktop. For each of the software programs previously mentioned please provide any documentation provided to any party as part of any sales material which explains the capacities, abilities, capabilities, functions or uses for each of the software's previously mentioned.

6. Please produce any contract between this defendant and any other defendant to this lawsuit.

7. Please produce a contract between this defendant and the attorneys who attempted to foreclose upon the consumers in this action.

8. Please identify the persons who are most familiar with the capabilities of each of these software programs referred to in the previous questions.

9. Please produce all sales presentation material(s) and/or marketing agreements made between this defendant which were provided to any entity to explain the capabilities or

services provided by LPS or offered to be provided by LPS at anytime during the last ten (10) years.

10. Please produce any sales or marketing material(s) provided by and/or between this defendant and any law firm which was intended to explain the services provided by this defendant or that in any way communicates what this defendant could offer to law firms which were provided as sales or marketing material(s) at any time in the last ten (10) years.

11. Please state the name of every entity which has a contract(s) with this defendant for the provision of services either through the use of MSP, Fiserv, or LPS Desktop.

12. Please provide a list of the names and addresses of every attorney or law firm who is licensed to do business in the state of Alabama which has a contract for services with this defendant and who has provided services to this def by virtue of the network attorney agreement with in the state of Alabama in the last ten (10) years.

13. Identify every employee of LPS who is employed as a member of a document execution team at your facility located in **Mendota Heights**, Minnesota.

14. List the name of any other employee of your company who is a member of a document execution team in any other facility where your company employs persons to work on its behalf.

15. Provide the names and addresses of every facility which this defendant owns, rents, leases, or otherwise controls where any of your employees are physically located for the purpose of conducting their work.

16. Please explain why your company "co-locates" employees physically on the premises of a mortgage servicing company which you have contracts with and for each such arrangement, if there are any additional contractual agreements for the provisions of employees on the premises of those parties with whom you contract, please provide those additional agreements as well. Please also identify the name of the person(s) who is most knowledgeable about the reason for this relationship and the reason that employees of your company are located on the premises of companies you have a contract with.

17. Please state the name of every company which this defendant owns, controls, or contracts with who either executes or prepares any documents effecting any interest in a mortgage whether it is a lien release, mortgage assignment, endorsement or alonge to a promissory not or any other document which effects any other interest in a real estate owned by a consumer. For each such company please provide the name, physical address, and any agreements which exist between your company and that company.

18. Please state whether or not you have any relationship written or otherwise with any national law firm provision of foreclosure or bankruptcy services. The term national law firm being defined as a law firm whom does business in at least 5 states on a regular basis for the purpose of conducting foreclosures or representing creditors in bankruptcy proceedings. for each such relationship please provided a copy of the agreements for the provision of those services and state whether or not your agreement with those law firms authorize them to subcontract their services to any other state or local law firms in the state in which they do business.

19. Please provide any training materials published provided by your company or provided by any medium including electronically for which explains, trains, or otherwise communicates regarding the portions of your LPS Desktop software which are known as process management, image solutions, or invoice solutions.

20. Please provide a complete copy of the guidelines and timelines which are set forth in your process management portion of your LPS Desktop software for the completion of foreclosures. In providing those timelines please provide a list of every objective that a network attorney must meet under the process management system. For each objective provide the time in which that objective must be completed and provide the fee schedule for which each service which a network attorney may complete or provide.

21. Please any training materials which are provided in any manner to any network attorney which your comp has furnished in the last ten (10) years. With respect to those attorneys who have executed a network attorney agreement with your company in the state of Alabama for the last ten (10) years.

22. Please provide those attorneys or attorney firms performance ratings as well as any materials you have provided to those attorneys or attorneys firms which communicate to them what their attorney performance rating is, how it was determined, and any comments regarding the attorney performance rating. Please also provide any communication by any method which discusses any incentives, payments, benefits, gifts, or any other form of compensation, bonus, or payment which is based in whole or in part upon the attorney performance rating earned by those attorneys or attorneys firms in the state of Alabama for the last ten (10) years.

23. Please provide the dollar amount of any financial incentives paid to any attorney or attorney firm in the state of Alabama in the last ten (10) years which was in any way based upon the APR rating of the attorney or their firm.

24. Please provide a full and complete description of any incentive programs established for network attorneys for the last ten (10) years including but not limited to the criteria to achieve the financial incentive as well as any payments which were made under that system.

25. Please provided a front and back copy of every image in your invoicing system as well as any remittances which were made to pay the invoices in your imaging system. Please explain fully the technology fee which your co assesses to its network attorneys. Please state fully every element which makes up the determination of the technology fee as well as any other or separate fee charged within the technology fee if there is more than one (1) fee which is charged as a technology fee please explain every element of the technology fee including why the technology fee is charged. Provide a complete listing for every fee that is charged as a technology fee. Please explain what service is provided for each fee. Please provide an explanation of how the fee is determined. Please also identify all persons who determined the amount of the fee. Please produce any media of an type which explains or provides any explanation of the basis of the fee, the purpose of the fee, and the services to be provided as a result of the payment for the fee.

26. Please provide any promotional, sales or marketing materials which in any way explain or attempt to explain the technology fee or any of the services provided as a result of the payment of the technology fee.

27. Please explain the administrative support fee. Please explain how the fee is derived. Please explain the what the amount of the fee is. Please explain if the administrative support fee is different for different services. Please state every element that makes up the determination of the administrative support fee. Please identify the persons responsible for formulating that fee amount. Please provide any records, documents, notes, memoranda, or any other materials in any other form which memorialize , discuss, or otherwise document the determination of the amount of the fees charged for the administrative support fees.

28. Please identify the persons responsible for the determination of the amount those fees. with respect to the actions of those attorneys who are members of your attorney network or whom have executed a network attorney agreement. Please state whether said attorneys are required to submit all of their invoices through the LPS Desktop program for payment. Specifically, are the attorneys required to submit their invoices though the invoice management function of the LPS Desktop computer program. If the answer to the preceding question is in the affirmative please state whether the servicers whom use the LPS Desktop program to manage the foreclosure and default services are required to pay the attorney fees which are invoiced to them by the network attorneys directly to LPS or if those fees are paid directly to the law firms.

29. Please provide a schedule of all fees which network attorney(s) agree to perform services for in the state of Alabama. Please provide a complete schedule of every fee which is determined by LPS and agreed to by the network attorney(s) for the state of Alabama. For every fee which is set by LPS in its contracts with any mortgage servicer, please set forth a complete list of every administrative fee for each fee set forth on the schedule of fees that is included in the agreement between LPS and its network attorneys. Please provide a copy of every agreement for signing authority between this defendant or any other defendant in this lawsuit as well as any network attorney firm(s) who attempted to foreclose upon this consumer.

30. With respect to your LPS Desktop system please provide any training materials as well as any instructional materials which explain the powers and capabilities of the LPS Desktop system.

31. Please provide any materials which explain the integration between LPS Desktop, MSP, Fiserv, or any other software program provided by LPS to any other party in the mortgage industry. Please provide any materials which explain the ability of LPS Desktop or MSP to gather data from any vendee system as well as this defendants employees or computers systems ability to alter, update, amend, modify, change, delete or otherwise affect the data of its vendees through the use of either LPS Desktop, MSP, or any other software system employed by LPS through its relationship with any vendee or network attorney.

32. Please provide any materials which set forth the right, power, or permissions set out in any format that sets forth LPS of this defendants directives or instructions to your network attorneys with respect to your network attorneys ability to communicate directly with a vendee to LPS (mortgage servicer or user of the MSP or LPS Desktop).

33. Please produce a copy of every set of servicing guidelines employed by your company on behalf of any national mortgage servicer which provides you with servicing guidelines pursuant to the contracts between your firm and the national mortgage servicers.

34. Please produce any document, writing, media in any other format which may indicate your respective timeline for the foreclosure of a mortgage loan in the state of Alabama. Please also produce every timeline for foreclosures if the timeline differs between any of the mortgage servicers to whom this defendant provides services.

35. With respect to your software program LPS Desktop please produce a list of every possible issue that an attorney may open in LPS Desktop. Please produce a list of every possible process that an attorney may open in LPS Desktop. Please produce a list of any issue that any party may open in LPS Desktop. Please produce a list of every issue that any party may open in LPS Desktop. Please produce a list of every possible process an attorney may open using LPS Desktop. Please produce a list a list of any issue(s) that any party may open in LPS Desktop. Please produce a list of every process that any party may open in LPS Desktop.

36. Please produce every internal code or identification system for any process or issue of any type of nature which is set up or maintained by the defendant, any of its subsidiaries, affiliates, technology providers, vendors or vendees which will explain in plain English the explanation(s) or description(s) of the issue or process which is referenced by the code. If you are in any manner unsure of the information sought herein refer to the deposition of **B. Newell**, page 189, line 3 to page 190, line 1 wherein he explained that every process in LPS Desktop has a code and that every code has a written explanation of what they mean and that there is a library that details the meaning of each of those processes that is the information sought by this request.

37. Please state whether any of the codes, issues, or processes identified in the previous request are assigned to any particular vendor, vendee, outsource provider, department, group, other sub category of persons, or entities who provide services to the licensees of LPS Desktop or MSP. Please describe every code so identified and how this defendant determines or signs responses to the issue of process based upon its code.

38. Please produce every document stored in the LPS Desktop imaging system by producing the document by its unique identification number (ID #) which is generated by LPS. For each document you should identify the identification number (ID #) and then produce each image associated with the image number so that a lay person could identify what images are associated with the identification number (ID #) maintained in the LPS Desktop system.

39. Please produce a list of every subsidiary, entity, vendor, vendee, outsource provider, any other person, or firm who provides any service to this defendant in relation to foreclosure and the default servicing division in relation to its business where it engages in foreclosure or default servicing immediately prior to beginning the foreclosure process.

40. Please state the total number of foreclosures referred to this defendant by any servicer by an annual total for the last five (5) years. This should include the aggregate number of referrals by any servicer under contract with this defendant or any former entity each year for the last five (5) years.

41. Please state the total number of foreclosures during the same five (5) year period referred to this defendant where the servicer chose to use a non network attorney for the foreclosure services.

42. Please produce every email, sms, mms, im, voice mail, memorandum, any other document, media of any type or nature which reflects or relates to any communication between LPS, any other defendant to this action, any employee of any defendant to this action, any person, firm or entity that has a relationship with LPS or any defendant to this action which discusses, mentions, or otherwise communicates entered by any method any information of any type or nature regarding the consumers loan. Excluded from this request are any communication which are attorney client privileged. For any communication which is withheld as a result of any claim of privilege, please produce a privilege log indicating the timing of the communications by and between the parties to said communications, the basis for the claim of privilege and any other material required to provide a privilege log in compliance with the controlling rules of evidence in discovery.

Dated this _____ day of _____, 20__.

O. Max Gardner III
Gardner & Gardner PLLC
Attorney for the Debtors/Respondents
NC State Bar #6164
P.O. Box 1000, Shelby, NC 28151-1000
(704) 487-0616 / FAX (704) 487-0619
e-mail maxgardner@maxgardner.com

MORTGAGE SERVICER DISCOVERY- ALPHABET PROBLEM & FAKE DOCUMENTS

**IN THE UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:)	
)	
John Doe,	)	CHAPTER 13 CASE NO.
	)	OUR FILE NO.
)	
Debtor.)	
<hr/>)	
)	
Deutsche Bank National Trust	)	ADV. PROC. NO.
Company, as Trustee of Argent)	
Securities, Inc., Asset-Backed)	
Pass Through Certificates,)	
Series 2004-PW1,)	
)	
Plaintiff,)	
)	
vs.)	
)	
John Doe,)	
)	
)	
Defendant.)	

**DEFENDANT'S FIRST INTERROGATORIES TO PLAINTIFF
(for Alphabet Problem of Transfers of Assignments)**

COMES NOW the above-named debtor and defendant herein, by and through his attorney of record, and herewith serve upon plaintiff in this case the following written interrogatories pursuant to the provisions of Rule 7033 of the Rules of Bankruptcy Procedure and Rule 33 of the Federal Rules of Civil Procedure. Answers to these Interrogatories must be furnished within forty-five (45) days of the service of the Summons and Complaint or within thirty (30) days of the service of these Interrogatories, whichever is later.

INSTRUCTIONS

1. These requests for interrogatories are directed toward all information known or available to Deutsche Bank National Trust Company – not its lawyer, Ralph F. Casale, Esq. – including information contained in the records and documents in Deutsche Bank National Trust Company's custody or control or available to Deutsche Bank National Trust Company upon reasonable inquiry.
2. Each request for interrogatory is to be deemed a continuing one. If, after serving an answer, you obtain or become aware of any further information pertaining to that request, you are requested to serve a supplemental answer setting forth such information.

3. As to every request for interrogatory which an authorized officer of Deutsche Bank National Trust Company fails to answer in whole or in part, the subject matter of that request will be deemed confessed and stipulated as fact to the Court.

4. Kindly attach additional sheets as required identifying the Interrogatory being answered. You have a continuing obligation to update the information in these Interrogatories as you acquire new information. If no such update is provided in a reasonable period of time that you acquired such information, it may be excluded at trial or hearing.

DEFINITIONS

A. "You" and "your" include Deutsche Bank National Trust Company and any and all persons acting for or in concert with Deutsche Bank National Trust Company.

B. "Document" is synonymous in meaning and equal in scope to the usage of this term in Federal Rule of Civil Procedure 34(a) and includes computer records in any format. A draft or non-identical copy is a separate document within the meaning of this term. The term "document" also includes any "tangible things" as that term is used in Rule 34(a).

C. Parties. The term "plaintiff" or "defendant", as well as a party's full or abbreviated name or a pronoun referring to a party, means the party and, where applicable, (his/her/its) agents, representatives, officers, directors, employees, partners, corporate parent, subsidiaries, or affiliates.

D. Identify (person). When referring to a person, "identify" means to give, to the extent known, the person's full name, present or last known address, telephone number, and when referring to a natural person, the present or last known place of employment. Once a person has been identified in compliance with this paragraph, only the name of that person needs to be listed in response to later discovery requesting the identification of that person.

E. Identify (document). When referring to a document, "identify" means to give, to the extent known, the following information: (a) the type of document; (b) the general subject matter of the document; (c) the date of the document; (d) the authors, address, and recipients of the document; (e) the location of the document; (f) the identity of the person who has custody of the document; and (g) whether the document has been destroyed, and if so, (i) the date of its destruction, (ii) the reason for its destruction, and (iii) the identity of the person who destroyed it.

F. Relating. The term "relating" means concerning, referring, describing, evidencing, or constituting, directly or indirectly.

G. Any. The term "any" should be understood in either its most or its least inclusive sense as necessary to bring within the scope of the discovery request all reasons that might otherwise be construed to be outside of its scope.

REQUEST FOR INTERROGATORIES

1. Please identify each person who answer these interrogatories and each person (attach pages if necessary) who assisted, including attorneys, accountants, employees of third party entities, or any other person consulted, however briefly, on the content of any answer to these interrogatories.

ANSWER:

2. For each of the above persons please state whether they have personal knowledge regarding the subject loan transaction.

ANSWER:

3. Please state the date of the first contact between Deutsche Bank National Trust Company and the borrower in the subject loan transaction, the name, address and telephone number of the person(s) in your company who was/were involved in that contact.

ANSWER:

4. Please identify every potential party to this lawsuit.

ANSWER:

5. Please identify the person(s) involved in the underwriting of the subject loan. "Underwriting" refers to any person who made representations, evaluations or appraisals of value of the home, value of the security instruments, and ability of the borrower to pay.

ANSWER:

6. Please identify any person(s) who had any contact with any third party regarding the securitization, sale, transfer, assignment, hypothecation or any document or agreement, oral, written or otherwise, that would affect the funding, closing, or the receipt of money from a third party in a transaction that referred to the subject loan.

ANSWER:

7. Please identify any person(s) known or believed by anyone at Deutsche Bank National Trust Company who had received physical possession of the note and allonges, the mortgage, or any document (including but not limited to assignment, endorsement, allonges, Pooling and Servicing Agreement, Assignment and Assumption Agreement, Trust Agreement, letters or email or faxes of transmittals including attachments) that refers to or incorporates terms regarding the securitization, sale, transfer, assignment, hypothecation or any document or agreement, oral, written or otherwise, that would affect the funding, or the receipt of money from a third party in a transaction, and whether such money was allocated to principal, interest or other obligation related to the subject loan.

ANSWER:

8. Please identify all persons known or believed by anyone in Deutsche Bank National Trust Company or any affiliate to have participated in the securitization of the subject loan including but not limited to mortgage aggregators, mortgage brokers, financial institutions, Structured Investment Vehicles, Special Purpose Vehicles, Trustees, Managers of derivative securities, managers of the company that issued an Asset-backed security, Underwriters, Rating Agency, Credit Enhancement Provider.

ANSWER:

9. Please identify the person(s) or entities that are entitled, directly or indirectly to the stream of revenue from the borrower in the subject loan.

ANSWER:

10. Please identify the person(s) in custody of any document that identifies the loan servicer(s) in the subject loan transaction.

ANSWER:

11. Please identify any person(s) in custody of any document which refers to any instruction or authority to enforce the note or mortgage in the subject loan transaction.

ANSWER:

12. Other than people identified above, identify any and all persons who have or had personal knowledge of the subject loan transaction, underwriting of the subject loan transaction, securitization, sale, transfer, assignment or hypothecation of the subject loan transaction, or the decision to enforce the note or mortgage in the subject loan transaction.

ANSWER:

13. Please state address, phone number, and employment history for the past 3 years of Tamara Price, Vice President, Argent Mortgage Company, LLC, "designated as the Assignor" of the mortgage loan to Deutsche Bank National Trust Company (Assignment of Mortgage recorded in Cleveland County Register of Deed's Office on June 25, 2009).

ANSWER:

14. Please state the date on which Argent Mortgage Company, LLC (originator) sold the mortgage loan to Ameriquest Mortgage Company (Seller and Master Servicer).

ANSWER:

15. Please state the date on which Ameriquest Mortgage Company (Seller and Master Servicer) sold the mortgage loan to Argent Securities, Inc. (Depositor).

ANSWER:

16. Did Argent Mortgage Company, LLC (originator) or previous servicers of this account receive any compensation, fee, commission, payment, rebate or other financial considerations from Ameriquest Mortgage Company (Seller and Master Servicer) or any affiliate or from the trust funds, for handling, processing, originating or administering this loan?

ANSWER:

17. If yes, please describe and itemize each and every form of compensation, fee, commission, payment, rebate or other financial consideration paid to Argent Mortgage Company, LLC, the originator or previous servicers of this account by Ameriquest or any affiliate, or from the trust fund.

ANSWER:

18. Please identify any party, person or entity known or suspected by Deutsche Bank National Trust Company or any of your officers, employees, independent contractors or other agents, or servants of your company who might possess or claim rights under the subject loan or mortgage and/or note.

ANSWER:

19. Please identify the custodian of the records that would show all entries regarding the flow of funds for the subject loan transaction prior to and after closing of the loan. (Flow of funds, means any record of money received, any record of money paid out and any bookkeeping or accounting entry, general ledger and accounting treatment of the subject loan transaction at your company or any affiliate including but not limited to whether the subject loan transaction was ever entered into any category on the balance sheet at any time or times, whether any reserve for default was ever entered on the balance sheet, and whether any entry, report or calculation was made regarding the effect of this loan transaction on the capital reserve requirements of your company or any affiliate.)

ANSWER:

20. Please identify the auditor and/or accountant of your financial statements or tax returns.

ANSWER:

21. Please identify any attorney with whom you consulted or who rendered an opinion regarding the subject loan transaction or any pattern of securitization that may have affected the subject loan transaction directly or indirectly.

ANSWER:

22. Please identify any person who served as an officer or director with Deutsche Bank National Company or Argent Mortgage Company LLC commencing with 6 months prior to closing of the subject loan transaction through the present. (This interrogatory is limited only to those people who had knowledge, responsibility, or otherwise made or received reports regarding information that included the subject loan transaction, and/or the process by which solicitation, underwriting and closing of residential mortgage loans, or the securitization, sale, transfer or assignment or hypothecation of residential mortgage loans to third parties.)

ANSWER:

23. Did any investor/certificate holder approve or authorize foreclosure proceedings on Debtor/Defendant's property?

ANSWER:

24. Please identify the person(s) involved or having knowledge of any insurance policy or product, plan or instrument describing over-collateralization, cross-collateralization or guarantee or other instrument hedging the risk of default as to any person or entity acting as an issuer of any securities or certificates. (Such instrument(s) relate to the composition of a pool, tranche or other aggregation of assets that was created, included or referred to the subject loan and the pool or aggregation was transmitted, transferred, assigned, pledged or hypothecated to any entity or buyer. A person who "transmitted, transferred, assigned, pledged or hypothecated" refers to any person who suggested, approved, received or accepted the composition of the pool or aggregation made or confirmed representations, evaluations or appraisals of value of the home, value of the security instruments, ability of the borrower to pay.)

ANSWER:

25. Please identify the person(s) involved or having knowledge of any credit default swap or other instrument hedging the risk of default as to any person or entity acting as an issuer of any securities or certificates. (Such instrument(s) relate to the composition of a pool, tranche or other aggregation of assets that was created, included or referred to the subject loan.)

ANSWER:

Dated this ____ day of _____, 20__.

O. Max Gardner III
Gardner & Gardner PLLC
Attorney for the Debtor/Defendant
NC State Bar #6164
P.O. Box 1000, Shelby, NC 28151-1000
(704) 487-0616 / FAX (704) 487-0619
e-mail maxgardner@maxgardner.com

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN RE:

**STEWART FOREST PEARSON
SSN xxx xx 0204
LAUREN ELISSA PEARSON
SSN xxx xx 1749**

**CASE NO. 08-40328
(Chapter 13)**

Debtors.

**STEWART FOREST PEARSON,
LAUREN ELISSA PEARSON, AND
STEVEN G. TATE, STANDING
TRUSTEE,**

Plaintiffs.

vs.

**ADVERSARY PROCEEDING
NO. 08-04016**

**DECISION ONE MORTGAGE COMPANY, L.L.C.;
MORTGAGE ELECTRONIC REGISTRATION
SYSTEMS INC.; THE CAUDLE LAW FIRM P.A.
AS AND ONLY AS SUBSTITUTE TRUSTEE IN THAT
CERTAIN DEED OF TRUST RECORDED IN BOOK
1649 AT PAGE 164 OF THE LINCOLN COUNTY
PUBLIC REGISTRY; CWABS ASSET-BACKED
CERTIFICATES TRUST 2005-BC1; THE BANK OF
NEW YORK AS TRUSTEE FOR THE CERTIFICATE
HOLDERS CWABS ASSET-BACKED CERTIFICATES
SERIES 2005-BC1; AND LITTON LOAN SERVICING, L.P.**

Defendants.

**PLAINTIFFS' SECOND REQUEST FOR PRODUCTION OF DOCUMENTS
(for Alphabet Problem of Transfers of Assignments)**

TO: LITTON LOAN SERVICING, L.P.

The plaintiffs, Stewart Forest Pearson and wife Lauren Elissa Pearson (the "Debtors") pursuant to Federal Rules 26, 33 and 34 of the Federal Rules of Civil Procedure and Rules 7026, 7033 and 7034 of the Rules of Bankruptcy Procedure hereby serve upon the defendant Litton Loan Servicing, L.P. ("Litton") the following Plaintiffs first set of interrogatories and first request for production of documents. The plaintiffs request that the defendant within 30 days of this request, fully answer under oath and in writing each of the interrogatories set forth herein and that the defendants produce the documents requested herein, such production to take place at the offices of O. Max Gardner III, Gardner & Gardner PLLC, 403 South Washington Street (28150), Post Office Box 1000, Shelby, North Carolina 28151-1000.

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I

DEFINITION OF TERMS

- A. The term "plaintiff" means Stewart Forest Pearson and wife Lauren Elissa Pearson.
- B. The term "debtors" means Stewart Forest Pearson and wife Lauren Elissa Pearson.
- C. The term "Litton" means the defendant, Litton Loan Servicing, L.P. its subsidiaries, affiliates, any successors and assigns, and predecessors, and includes every officer, director, partner, agent, employee, attorney, servant, or any other person presently or formerly acting for or on behalf of said entity.
- D. The term "document" is used in its customary broad sense to include, by way of illustration only and not by way of limitation, all written or graphic matter of every kind or description, whether printed or reproduced by any process, or written and/or produced by hand, whether final or draft, original or reproduction, whether or not claimed to be privileged or otherwise subject to exclusion from discovery, whether in the actual or constructive possession, custody or control of the defendant, including: letters correspondence, memoranda or transcripts of telephone or personal conversations, microfilm, microfiche, telegrams, books, magazines, newspapers, advertisements, periodicals, bulletins, circulars, brochures, pamphlets, statements, notices, advertising layouts, trade letters, press releases, reports, rules, regulations, directives, teletype or telefax messages, minutes or records of meetings, interoffice communications, financial statements, ledgers, books of account, proposals, prospectuses, offers, invoices, orders, receipts, working papers, desk calendars, appointment books, diaries, routing slips, time sheets, logs, movies, tapes (or visual or audio reproduction), records, drawings, blueprints, sketches, plans, graphs, charts, photographs, shipping papers, purchase orders, phonograph records, phono-records, data processing paper results, data printouts and computations (both in existence and stored in memory components), transcripts of oral statements or testimony, reports and/or summaries of interviews, reports and/or summaries of investigations, opinions or reports of consultants, forecasts, opinions of counsel, court papers and any and all other data compilations or information resources from which information can be obtained or translated, if necessary, through detection devices into reasonably usable form, or material similar to any "document" as used herein. "Document" as used herein also includes the original of any document in whatever form or medium it may exist, and all copies of each such document bearing, on any sheet or side thereof, any marks, including by way of illustration only and not by way of limitation, initials, stamped indicia, any comment or notation, or any character not a part of the original text, or any reproduction thereof.
- E. The term "communication" means any contact, oral or written, formal or informal, at any time or place, under any circumstances, in any manner, whereby a statement of any nature is transmitted or transferred, and shall include, without limitation, any documents containing, constituting reflecting, memorializing, referring or relating to any such contact.
- F. The word "or" means and/or and should be read both ways so as to encompass both constructions and calls for documents to be produced responsive to both constructions.
- G. The term "representative" refers to any employee, agent, attorney or accountant.
- H. The term "person" means natural person, proprietorships, partnerships, groups,

corporations, associations, societies, organizations, or government bodies or any other individual or entity.

I. The term "identify" when used in connection with a natural person means to set forth the full name, title, present business address and present business affiliation of said person.

J. The term "identify" when used in connection with a person which is a proprietorship, partnership, corporation, or other organization means to set forth the full name and present business address of that dealership, proprietorship, partnership, corporation, or other organization.

K. The term "identify" when used with reference to a document means to state the date and author (and, if different, the signer or signers), the addresses of the author(s), signer(s), or any individual(s) receiving copies, the type of document (e.g., letter, memorandum, chart), and its present or last known location or custodian.

L. The term "identify" when used with reference to an agreement, contract, understanding or communication means, in addition to Definition 10 above: (a) to state whether it was written or oral, to identify the parties thereto, the place where it was made or occurred, and the date or dates thereof; (b) to identify the parties thereto, the place where it was made or occurred, and the date or dates thereof; (c) to identify the persons who negotiated or had any role in suggesting, framing or drafting the terms of the agreement, contract or understanding or who participated therein; and (d) to state the substance of the communication, agreement, contract or understanding.

M. The term "identify" when used with reference to a meeting, incident, occurrence or conversation means to state its date, place and subjects covered, to identify its participants and to identify all documents reporting upon or otherwise recording or referring to anything that transpired at such meetings.

N. The term "the transaction" or "the transactions" or "account" or "accounts" when used herein without qualifications means the transactions and accounts between and among the Debtors and the named defendants in all related activities and agents or assigns of either party.

O. The term "Note" shall refer to the Note executed by the female plaintiff in connection with the Deed of Trust in which you allege you are the owner and holder.

P. The term "Deed of Trust" or "Mortgage" shall refer to the Document filed with the County Record's Office that secures The Bank of New York's alleged lien against the Real Property.

Q. The Real Property shall refer to the Real Property and improvements located thereon at 2822 Crest Drive, Iron Station, North Carolina, 28080 (the "Real Property").

R. The term "present" means up to and including the date of your final response to these requests for production of documents.

S. The term "relating to" or "relates to" means regarding, reflecting, discussing, describing, containing, identifying, analyzing, studying, reporting, commenting, evidencing, constituting, revealing, setting forth, considering, recommending, questioning, disputing, contesting, correcting, construing, mentioning, associated with, referring to, alluding to, or pertaining to, in whole or in part.

- T. The term "you" or "your" refers to the defendants Litton Loan Servicing, L.P.
- U. The singular shall be construed to include the plural, and the plural shall be construed to include the singular.
- V. The masculine includes the feminine, and the feminine includes the masculine.
- W. The word "and" shall be construed to include the word "or", and the word "or" shall be construed to include the word "and."
- X. The word "each" shall be construed to include the word "every", and the word "every" shall be construed to include the word "each".
- Y. The word "any" shall be construed to include the word "all", and the word "all" shall be construed to include the word "any".
- Z. The term "Complaint" means the Complaint in the above captioned action.
- AA. The term "Proof of Claim" means the proof of claim filed in the Debtors' bankruptcy case on July 2, 2008 by Litton as servicing agent for The Bank of New York as Trustee for the Certificate Holder CWABS Asset-Backed Certificates Series 2005-BC1.

II

INSTRUCTIONS

- BB. The time period for which production of documents and things requested shall be from January 1, 2004, unless otherwise specified.
- CC. Each of the following requests is continuing, and in the event that at any later date you obtain or discover any additional document responsive to any request, you shall submit such document promptly.
- DD. If an objection is made to any request herein, all documents covered by the request not subject to the objection should be produced. Similarly, if an objection is made to production of a document, the portion(s) of that document not subject to objection should be produced with the portion(s) objected to deleted and indicated clearly.
- EE. Each document is to be produced in its entirety even if only a portion of the document is related to the identified subject matter and without abbreviation, editing, or expurgation and including all appendices, tables, or other attachments. If an appendix, table, or other attachment is not presented with the original but is attached to a copy thereof or is otherwise available, it should be submitted and clearly marked to indicate the document to which it corresponds. With the exception of privileged material, no document or portion thereof should be masked or deleted in any manner. To the extent possible, documents should be produced in the same order and arrangement as in the file form which they are taken.
- FF. Unless otherwise requested, in lieu of producing original documents, you may produce photocopies, provided that you shall retain the original documents and produce them to the plaintiffs upon request. Further, copies of original documents may be submitted in lieu of originals only if they are true, correct, and complete copies of the original documents, and their submission constitutes a waiver of any claim as to the authenticity of the copy should it be

necessary to introduce such copy into evidence in any legal proceeding. Please provide color copies of any document originally produced in color or containing type, writing, or other marks in any color other than black.

GG. Documents that may be responsive to more than one request need not be submitted more than once; however, such documents should be so identified.

HH. All headings herein are included only for organization purposes and should not be construed as being part of any request, or as limiting any request in any manner.

III

PRIVILEGE

II. If any document would be required to be produced in response to any request except for the fact that a privilege against production is claimed, set forth for each such document:

- i. Its date, title, type of document (memorandum, letter, etc.), and length;
- ii. Its waiver, preparer, sender, addressee, recipient and copyee;
- iii. A general description of its subject matter (without revealing the information as to which privilege is claimed);
- iv. The exact grounds upon which the objection to production is based;
- v. The identity of all persons, in addition to those identified as required by section 2, supra, known to you who have seen or had access to the document;
- vi. The identity of the person now in possession of the document.

IV

DOCUMENTS NO LONGER IN EXISTENCE OR NO LONGER UNDER POSSESSION, CUSTODY OR CONTROL

JJ. If any document, requested herein was at one time in existence and under Defendant's possession, custody or control but has been lost, discarded or destroyed or has been removed from Defendant's possession, custody or control, with respect to each such document:

- i. Identify and describe such document by date, title and type of document;
- ii. State when each such document was most recently in the possession or subject to the control of Defendant and what disposition was made of such document, including an identification of the person, if any, presently in possession or control of such document;
- iii. State when such document was transferred or destroyed, identify the person who transferred or destroyed such document and the persons who authorized or directed that the document be transferred or destroyed or having knowledge of its transfer or destruction and state the reason such document was transferred or destroyed; and

- iv. Identify all persons having knowledge of the contents thereof.

V

ORGANIZATION

KK. Pursuant to Federal Rule for Civil Procedure 34 it is requested that the documents produced be organized and labeled so as to correspond with the categories of this request.

VI

DOCUMENT REQUESTS

1. Please produce any Prospectus form 424B5 and/or Prospectus supplements filed with the SEC pursuant to Rule 424(b)(5), relating to CWABS Asset-Backed Certificates Series 2005-BC1.
2. Please produce any Free Writing Prospectus (FWP) filed pursuant to Securities Act Rules 163/433 relating to CWABS Asset-Backed Certificates Series 2005-BC1.
3. Please produce the Pooling and Servicing Agreement and Amendments thereto, relating to CWABS Asset-Backed Certificates Series 2005-BC1, including any Supplement Pooling and Servicing Agreements.
4. Please produce all Attestation Reports on Assessment of Compliance (EX-34) filed with the SEC relating to CWABS Asset-Backed Certificates Series 2005-BC1.
5. Please produce Assessments of Compliance (EX-33) filed with the SEC relating to CWABS Asset-Backed Certificates Series 2005-BC1.
6. Please produce all Servicer Compliance Statements (EX-35) filed with the SEC relating to CWABS Asset-Backed Certificates Series 2005-BC1.
7. Please provide all SEC Assignment and Assumption Agreements relating to CWABS Asset-Backed Certificates Series 2005-BC1.
8. Please provide all Research Reports filed with the SEC related to CWABS Asset-Backed Certificates Series 2005-BC1 for the subject time period.
9. Please provide all Form 8-K reports filed with the SEC relating to CWABS Asset-Backed Certificates Series 2005-BC1.
10. Please provide all Annual Reports (10-K) relating to CWABS Asset-Backed Certificates Series 2005-BC1.
11. Please provide all Period Distribution Reports by an Asset-Backed Issuer (10-D) filed with the SEC relating to CWABS Asset-Backed Certificates Series 2005-BC1.
12. Please provide all Forms 15-15D, Notices of Suspension of Duty to File Reports, filed with the SEC relating to CWABS Asset-Backed Certificates Series 2005-BC1.
13. Please provide all Certifications per Sarbanes-Oxley Act Section 302 (EX-31) filed with the SEC relating to CWABS Asset-Backed Certificates Series 2005-BC1.

14. Please provide all Material Contracts (EX-10) filed with the SEC relating to CWABS Asset-Backed Certificates Series 2005-BC1.
15. Please provide all Miscellaneous Exhibits including Press Releases (EX-99) filed with the SEC relating to CWABS Asset-Backed Certificates Series 2005-BC1.
16. Please provide all Opinions of Legality (EX-5) filed with the SEC relating to CWABS Asset-Backed Certificates Series 2005-BC1.
17. Please provide all Opinions of Tax Matters (EX-8) filed with the SEC relating to CWABS Asset-Backed Certificates Series 2005-BC1.
18. Please provide all Voting Trust Agreements (EX-9) filed with the SEC relating to CWABS Asset-Backed Certificates Series 2005-BC1.
19. Please produce all rating agency reports prepared with respect to CWABS Asset-Backed Certificates Series 2005-BC1 prepared by Fitch, Standard & Poor's, Moody's, or any other recognized public agency.
20. Please produce all sworn accounts and legal affidavits prepared by any party in connection with the unbroken assignments and sales of mortgages, deeds of trust, and mortgage notes to from the originators of the same to CWABS Asset-Backed Certificates Series 2005-BC1.
21. Please produce the Master Document Custodial Agreement for CWABS Asset-Backed Certificates Series 2005-BC1, including the Master Document Custodial handbook and all standard forms for use by the Master Document Custodian.
22. Please produce copies of all documents in the possession of the Master Document Custodian for CWABS Asset-Backed Certificates Series 2005-BC1 with respect the mortgage loan of the debtors-plaintiffs in this case.
23. Please produce all exception and compliance reports prepared by the Master Document Custodian for CWABS Asset-Backed Certificates Series 2005-BC1 with respect the mortgage loan of the debtors-plaintiffs in this case.
24. Please produce all documents that the CWABS Asset-Backed Certificates Series 2005-BC1 Trust can access from the Mortgage Electronic Registration System (MERS) with respect to the sale and transfer of the mortgage note for the debtors-plaintiffs in this case (including the MIN report, the MERS and MERS-PLUS report).
25. Please produce copies of all rules, regulations, policies and procedures related to the assignment of mortgages and deeds of trust to CWABS Asset-Backed Certificates Series 2005-BC1 from the originators to the sponsors to the depositors and to the said Trust.
26. Please produce copies of all rules, regulations, policies and procedures related to the transfers, deliveries and endorsements of all mortgage notes to CWABS Asset-Backed Certificates Series 2005-BC1 from the originators to the sponsors to the depositors and to the said Trust.
27. Please produce copies of all rules, regulations, policies and procedures related to or associated with the use of allonges for the endorsement of mortgage notes from the originators to the sponsors, from the sponsors to the depositors, and from the depositors to CWABS Asset-

Backed Certificates Series 2005-BC1.

28. Please produce all documents that confirm that the depositor and sponsor for CWABS Asset-Backed Certificates Series 2005-BC1 trust are members in good standing of the Mortgage Electronic Registration System (MERS) and were such members at the time of the execution of any documents related to the mortgage loan of the debtors-plaintiffs in this case.

29. Produce any documents, records, forms, agreements, contracts or other similar documents that would indicate that at any time the Mortgage Electronic Registration System (MERS) had anything whatsoever to do with the original mortgage note of the debtors-plaintiffs in this case, including but not limited in rights of ownership thereto or therein.

30. Please produce the 18 digit number assigned to the mortgage or deed of trust in this case by the Mortgage Electronic Registration System (MERS).

31. Please produce "blue ink" signed copies of all original notes, mortgages, deeds of trust, true sale agreements, acceptance and delivery receipts, assignments, legal opinion letters, and any other documents related to any of the documents related to the mortgage loan of the debtors-plaintiffs in this case.

32. Produce copies of all documents prepared by an underwriter or providers of any credit enhancement products (insurance, residual tranches, default swaps, etc.) related to in any way the true sale of the mortgage notes in CWABS Asset-Backed Certificates Series 2005-BC1 from the originators to the sponsor and from the sponsor to the depositor and from the depositor to the said trust.

33. Please produce copies of all Swap Agreements and Swap Counterparty Agreements related in any way to CWABS Asset-Backed Certificates Series 2005-BC1.

34. Please produce copies of all mortgage loan repurchase agreements related to CWABS Asset-Backed Certificates Series 2005-BC1.

35. Please produce copies of all Legal and Accounting Reporting Agreements related to CWABS Asset-Backed Certificates Series 2005-BC1.

36. Please produce copies of all Depositor Shareholder Agreements related to CWABS Asset-Backed Certificates Series 2005-BC1.

37. Please produce copies of all Credit Enhancement Agreements related to CWABS Asset-Backed Certificates Series 2005-BC1.

38. Please produce copies of any rules, regulations, procedures, and policies for CWABS Asset-Backed Certificates Series 2005-BC1 related to lost, stolen or destroyed mortgage notes.

39. Please produce copies of any type of Master Document Custodian Manual used by the Master Document Custodian for CWABS Asset-Backed Certificates Series 2005-BC1.

40. Please produce all ledgers, statements, records and images in the possession of the Master Document Custodian for CWABS Asset-Backed Certificates Series 2005-BC1 related to the mortgage loan of the debtors-plaintiffs in this case.

41. Please produce copies of any certifications of the Master Document Custodian for CWABS Asset-Backed Certificates Series 2005-BC1 related to mortgage loan of the debtors-plaintiffs in

this case.

42. Please produce copies of all security measures that the Master Document Custodian for CWABS Asset-Backed Certificates Series 2005-BC1 is required to have in place in order to comply with requirements of any certifying agency such as the FDIC, the FHLB, the FRB, the NCUA, the OCC or the OTS.

43. Please produce copies of all insurance contracts that the Master Document Custodian must maintain to indemnify CWABS Asset-Backed Certificates Series 2005-BC1 for losses including trust operation errors and omissions, premises insurance, transit insurance, forgery or alteration insurance, and fidelity bond insurance.

44. Please produce a copy of any and all written disaster recovery plans that include facilities restoration, backup and recovery of electronic data and physical recovery of any files in the possession of the Master Document Custodian for CWABS Asset-Backed Certificates Series 2005-BC1.

45. Please produce copies of any investor reports from any agent of CWABS Asset-Backed Certificates Series 2005-BC1 to the owners of the certificates issued by the underwriters for said trust that relate in any way to the mortgage loan of the plaintiff-debtor.

46. Please produce the list of mortgage loans sold to CWABS Asset-Backed Certificates Series 2005-BC1 as required by Regulation AB duly adopted by the Securities and Exchange Commission and effective as of January 1, 2006.

47. Please produce a copy of any Prepayment Charge Schedule related to the mortgage loan of the plaintiffs-debtors in this case for CWABS Asset-Backed Certificates Series 2005-BC1.

48. Please produce all written agreements or contracts between the Master Servicer and/or CWABS Asset-Backed Certificates Series 2005-BC1 and the Collateralized Debt Obligations Manager for said Trust.

49. Please produce copies of all documents, rules and regulations related to your participation in the Homeowners Affordable Home Program including copies of any written limitations on your legal ability to comply with the said program.

50. Please produce copies of all written Loss Mitigation Rules or Policies for mortgage notes in CWABS Asset-Backed Certificates Series 2005-BC1.

This the ____ day of _____, 2010.

O. Max Gardner III
Gardner & Gardner PLLC
Attorney for the Debtors/Plaintiffs
NC State Bar #6164
P.O. Box 1000, Shelby, NC 28151-1000
(704) 487-0616 / FAX (704) 487-0619
e-mail maxgardner@maxgardner.com

**IN THE UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

**John Q. Public and
Mary Public,**

Debtors.

**Bank of America Home Loans
Servicing, L.P.,**

Movant,

vs.

John Q. Public and Mary Public,

Respondents.

**CASE NO.
OUR FILE NO.**

**FIRST REQUESTS FOR ADMISSIONS
PROPOUNDED UPON THE MOVANT
BY RESPONDENTS JOHN Q. PUBLIC AND MARY PUBLIC
(false docs)**

TO: Bank of America Home Loans Servicing, L.P.:

COME NOW the above-named debtors-respondents, by and through their attorney of record, and herewith serve upon you the following requests for admissions of fact. These requests are being made pursuant to the provisions of Rules 9014 and 7036 of the Rules of Bankruptcy Procedure, Rule 36 of the Federal Rules of Civil Procedure, and Rules 7016-1, 7026-1 and 7030-1 of the Local Bankruptcy Rules for the United States Bankruptcy Court for the Western District of North Carolina, and the Bankruptcy Practice Guide for the United States Bankruptcy Court for the Western District of North Carolina.

You are hereby requested by way of a proper officer to admit for the purpose of this action only the following facts. Please note that under the provisions of the applicable court rules each and every matter set forth below will be deemed admitted unless, within thirty (30) days after service of this request, you serve a

written answer or objection addressed to the matter, signed by you or your attorney.

DEFINITION OF TERMS

1. Unless otherwise indicated, "you," "your," or "Movant" shall mean Movant, its predecessor in interest Countrywide Home Loans Servicing, L.P., its agents, employees, independent contractors, attorneys, consultants, experts, investigators, and any other person acting for or on behalf of Movant.

2. Unless otherwise indicated, "Respondent" shall mean Respondents John Q. Public and Mary Public, their successors and assigns.

3. "Discovery Requests" means interrogatories, requests for admission, along with any contemporaneously served requests for production of documents.

4. "Describe" shall require that you provide a detailed response with particularized content and not just respond in summary or outline fashion.

5. "Document" refers to and includes all information in tangible form of any kind, including the originals and all non-identical copies of correspondence, memoranda, notes, worksheets, invoices, bills, diaries, letters, telegrams, contracts, reports, checks, receipts, summaries, notations of any sort of conversations, telephone calls, meetings, e-mail communications, and printed matter of any kind, together with all drafts or versions of these items; any graphical or aural records or representations of any kind (including, but not limited to, photographs, charts, videotapes, and recordings); and the electronic, mechanical, or electrical records of any kind (including, but not limited to, tapes, discs, diskettes, computer storage or retrieval hardware and software, and recordings).

6. "Identification" or "identify" or "give the description of" or "describe" or a request to "identify," when referring to a document, shall mean to state all of the following information with respect to the document: (a) the nature of the document, including a summary of its content or subject matter; (b) the date of the composition, execution and publication of the document; (c) the name, address, position, and business affiliation of all writers, authors and signers of the document; (d) the name, address, and position of any person responsible for preparing or having all or part of the document prepared if different than 5(c); (e) the parties thereto, including persons to whom copies of the document were addressed, mailed, delivered or circulated; (f) the name, address, position, and business affiliation of each addressee and each recipient; and (g) the title, heading or subject matter of the document:

7. "Identification" or "identify," when referring to any person, shall mean to state such person's full name, age, home address, telephone number(s), e-mail address(s), their relationship to you, their employer, and their job title.

8. "Consulted" or "relied upon," when referring to documents, shall mean that the person has, at any time, read, reviewed, scanned, seen or looked at such documents in connection with the information or materials referred to in the Discovery Requests.

9. "Person" shall mean any natural person, partnership, proprietorship, corporation, limited liability company, association, union, governmental entity or agency, or any other entity or any director, officer, employee or agent thereof.

10. The term "Motion for Relief from Stay" refers to the motion filed by Movant herein.

11. Where appropriate, the singular form of a word shall include the plural form, and vice versa; and, the masculine form of the word shall include the feminine form, and vice versa.

12. The term “refer,” “relate,” or “related” shall mean all documents or information, which in any way reviews, memorializes, references, etc. the subject matter of the request.

13. “Note” means the Promissory Note attached to the Motion for Relief from Stay as Exhibit A.

14. “Mortgage” means the Mortgage securing the “Note” at issue in this case.

15. “Property” shall refer to the property secured by the Mortgage and/or referenced or described in any manner by the Motion for Relief from Stay.

16. “Closing” refers to the period of time during which the Respondent(s) signed the Note, the Mortgage, a settlement statement for liens on the Property, and/or any other related document.

17. “Loan Transaction” means the entirety of the communications and documents that culminated in signing documents at the Closing.

18. “Answer” shall include the amended answer Respondents filed to Movant’s motion, along with any objections, responses or amendments Respondents filed in this case.

19. “HAMP” means Home Affordable Modification Program.

20. “MERS” shall mean Mortgage Electronic Registration Systems, Inc.

REQUESTS FOR ADMISSION

ADMISSION REQUEST NO. 1: The MERS Membership Rules attached as Exhibit A were in effect during the entire month of March 2009.

ANSWER:

ADMISSION REQUEST NO. 2: The Membership Rules referenced in Admission Request No. 1 applied to you during the entire month of March 2009.

ANSWER:

ADMISSION REQUEST NO. 3: You reviewed the final draft of the Motion for Relief from Stay before it was filed.

ANSWER:

ADMISSION REQUEST NO. 4: You approved the filing of the Motion for Relief from Stay.

ANSWER:

ADMISSION REQUEST NO. 5: The Note was not endorsed to you on the date the Motion for Relief from Stay was filed.

ANSWER:

ADMISSION REQUEST NO. 6: The Note was not endorsed in blank at the time the Motion for Relief from Stay was filed.

ANSWER:

ADMISSION REQUEST NO. 7: The copy of the Note attached to the Motion for Relief from Stay as Exhibit A was a true and accurate copy of the original.

ANSWER:

ADMISSION REQUEST NO. 8: The copy of the Note attached hereto as Exhibit 1 is a true and accurate copy of the original.

ANSWER:

ADMISSION REQUEST NO. 9: The copy of the Affidavit as to Real Party in Interest attached hereto as Exhibit 2 is a true and accurate copy of the original.

ANSWER:

ADMISSION REQUEST NO. 10: The copy of the Amended Affidavit as to Real Party in Interest attached hereto as Exhibit 3 is a true and accurate copy of the original.

ANSWER:

ADMISSION REQUEST NO. 11: MERS was Mortgagee of record at the time the Motion for Relief from Stay was filed.

ANSWER:

ADMISSION REQUEST NO. 12: Rule 8, Section 2(d) of the MERS Membership Rules referenced in Admission Request No. 1 above, did not authorize the assignment of the Note to Countrywide Home Loans Servicing, L.P.

ANSWER:

ADMISSION REQUEST NO. 13: The Assignment of Mortgage attached hereto as Exhibit 4 is a true and accurate copy of the original.

ANSWER:

ADMISSION REQUEST NO. 14: The person who signed the mortgage assignment attached hereto as Exhibit 4 was an employee of the law firm Lerner, Sampson, and Rothfuss at the time she signed the document.

ANSWER:

ADMISSION REQUEST NO. 15: The Corporate Resolution attached hereto as Exhibit 5 is a true and accurate copy of the original.

ANSWER:

ADMISSION REQUEST NO. 16: The Agreement for Signing Authority attached as Exhibit 6 is a true and accurate copy of the original.

ANSWER:

ADMISSION REQUEST NO. 17: Shellie Hill is the name that appears on the signature line of Exhibit 4.

ANSWER:

ADMISSION REQUEST NO. 18: The name Shellie Hill appears on a list of names attached to Exhibit 5.

ANSWER:

ADMISSION REQUEST NO. 19: You authorized the filing of Exhibit 5 with the Court in this case.

ANSWER:

ADMISSION REQUEST NO. 20: Exhibit 5 did not provide authority for Shellie Hill to assign the Note to Countrywide Home Loans Servicing, LP.

ANSWER:

ADMISSION REQUEST NO. 21: Exhibit 4 was executed after the Motion for Relief was filed.

ANSWER:

ADMISSION REQUEST NO. 22: Exhibit 4 was delivered to the Movant after the Motion for Relief was filed.

ANSWER:

ADMISSION REQUEST NO. 23: You were a member of MERS during the month of March 2009.

ANSWER:

ADMISSION REQUEST NO. 24: The document attached hereto as Exhibit 7 (MERSCORP, Inc. Rules of Membership) is a true and accurate copy of the MERSCORP, Inc. Rules of Membership in effect on March 23, 2009.

ANSWER:

ADMISSION REQUEST NO. 25: You authorized the filing of Exhibit 7 with the Court in this case.

ANSWER:

ADMISSION REQUEST NO. 26: Rule 8, Section 2(d) of the document attached as Exhibit 7 governed the assignment of the Note by MERS to Countrywide Home Loans Servicing, L.P.

ANSWER:

ADMISSION REQUEST NO. 27: Countrywide Home Loans Servicing, L.P. changed its name to Bank of America Home Loans Servicing, L.P. in April 2009.

ANSWER:

ADMISSION REQUEST NO. 28: The person who signed Exhibit 4, "Assignment of Mortgage," did so as an agent of MERS.

ANSWER:

ADMISSION REQUEST NO. 29: The person who signed Exhibit 4 did so as your agent.

ANSWER:

ADMISSION REQUEST NO. 30: The person who signed Exhibit 4 did so as an agent of Lerner, Sampson, and Rothfuss, L.P.A.

ANSWER:

ADMISSION REQUEST NO. 31: You authorized the preparation of Exhibit 4.

ANSWER:

ADMISSION REQUEST NO. 32: You authorized the filing of the Motion for Relief from Stay.

ANSWER:

ADMISSION REQUEST NO. 33: You authorized Lisa Allinson to sign the affidavits attached to the Motion as Exhibits 2 and 3.

ANSWER:

ADMISSION REQUEST NO. 34: You authorized the filing of the affidavits attached to the Motion as Exhibits 2 and 3 with the Court.

ANSWER:

ADMISSION REQUEST NO. 35: You authorized the preparation of the Proof of Claim filed with the Court in this case.

ANSWER:

ADMISSION REQUEST NO. 36: You authorized the filing of a Proof of Claim in this case.

ANSWER:

ADMISSION REQUEST NO. 37: You are not listed as a lienholder in the Proof of Claim filed with the Court in this case.

ANSWER:

ADMISSION REQUEST NO. 38: You paid for the preparation of the Proof of Claim filed with the Court in this case.

ANSWER:

ADMISSION REQUEST NO. 39: You authorized the recording of Exhibit 4, "Assignment of Mortgage," with the Cleveland County Register of Deeds.

ANSWER:

ADMISSION REQUEST NO. 40: You paid the cost of recording Exhibit 4.

ANSWER:

ADMISSION REQUEST NO. 41: You are in the business of mortgage loan servicing.

ANSWER:

ADMISSION REQUEST NO. 42: The Federal Home Loan Mortgage Corporation has an interest in the subject matter of this action.

ANSWER:

ADMISSION REQUEST NO. 43: You are the sub-servicer for the mortgage loan which is the subject of this case.

ANSWER:

ADMISSION REQUEST NO. 44: You did not purchase the Note from MERS.

ANSWER:

ADMISSION REQUEST NO. 45: You did not determine the Respondents' eligibility to participate in HAMP prior to obtaining a judgment against them.

ANSWER:

ADMISSION REQUEST NO. 46: The payee on the Note is Resource Bancshares Mortgage Group, Inc.

ANSWER:

ADMISSION REQUEST NO. 47: The copy of the Note attached to the Motion for Relief from Stay as Exhibit A is identical to the copy of the Note attached as Exhibit A to the Affidavit of Lisa Allinson filed with the Court in this case on or about September 18, 2009.

ANSWER:

ADMISSION REQUEST NO. 48: The copy of the Note attached to the Motion for Relief from Stay as Exhibit A is identical to the copy of the Note attached as Exhibit

A to the Amended Affidavit of Lisa Allinson filed with the Court in this case on or about October 28, 2009.

ANSWER:

ADMISSION REQUEST NO. 49: Countrywide Home Loans Servicing, L.P. did not purchase the Note from MERS.

ANSWER:

ADMISSION REQUEST NO. 50: Countrywide Home Loans, L.P. did not purchase the Note on July 19, 2007.

ANSWER:

ADMISSION REQUEST NO. 51: Natixis Real Estate Capital, Inc. has an interest in the subject matter of this case.

ANSWER:

ADMISSION REQUEST NO. 52: Natixis Real Estate Capital, Inc. is the servicer for the loan which is the subject of this case.

ANSWER:

ADMISSION REQUEST NO. 53: The Motion for Relief from Stay was delivered to the Clerk of the United States Bankruptcy Court by U.S. mail.

ANSWER:

ADMISSION REQUEST NO. 54: Exhibit 4 was delivered to the Cleveland County Register of Deeds by U.S. mail.

ANSWER:

ADMISSION REQUEST NO. 55: Exhibit 2, "Affidavit as to Real Party in Interest," was attached to Plaintiff's Motion for Relief from Stay.

ANSWER:

ADMISSION REQUEST NO. 56: Exhibit 3, "Amended Affidavit as to Real Party in Interest," was delivered to the Clerk of the United States Bankruptcy Court by U.S. mail.

ANSWER:

ADMISSION REQUEST NO. 57: No proof of signing authority or Power of Attorney was attached to any of the affidavits or assignments.

ANSWER:

Dated this _____ day of _____, 20__.

O. Max Gardner III
Gardner & Gardner PLLC
Attorney for the Debtors/Respondents
NC State Bar #6164
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**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN RE:

**Debtors
SSN xxx xx xxxx**

CASE NO.

(Chapter 13)

SSN xxx xx xxxx

Debtors.

Debtors,

Plaintiffs.

vs.

**ADVERSARY PROCEEDING
NO.**

**Argent Securities, Inc.;
Ameriquest Mortgage Company, Inc.;
Deutsche Bank National Trust Company, Trustee; and
Argent Securities, Inc., Asset-Backed Pass-Through Certificates, Series 2006-W2**

Defendants.

**PLAINTIFFS' REQUESTS FOR ADMISSIONS
(Alphabet Problem of Assignments)**

TO: Defendant, Deutsche Bank National Trust Company

The Plaintiffs, _____ and _____ (the "Debtors") pursuant to Federal Rule 36 of the Federal Rules of Civil Procedure and Rule 7036 of the Rules of Bankruptcy Procedure hereby serve upon the Defendant Deutsche Bank National Trust Company the following Plaintiffs' Requests for Admissions. The Plaintiffs request that the defendant within 30 days of these requests fully answer under oath and in writing each of the requests set forth herein.

I

DEFINITION OF TERMS

- A. The term "Plaintiff" means _____ and wife _____.
- B. The term "debtors" means _____ and wife _____.
- C. The term "Defendant" means the Defendant, Deutsche Bank National Trust Company its subsidiaries, affiliates, any successors and assigns, and predecessors, and includes every officer, director, partner, agent, employee, attorney, servant, or any other person presently or formerly acting for or on behalf of said entities.
- D. The term "document" is used in its customary broad sense to include, by way of illustration only and not by way of limitation, all written or graphic matter of every kind

or description, whether printed or reproduced by any process, or written and/or produced by hand, whether final or draft, original or reproduction, whether or not claimed to be privileged or otherwise subject to exclusion from discovery, whether in the actual or constructive possession, custody or control of the defendant, including: letters correspondence, memoranda or transcripts of telephone or personal conversations, microfilm, microfiche, telegrams, books, magazines, newspapers, advertisements, periodicals, bulletins, circulars, brochures, pamphlets, statements, notices, advertising layouts, trade letters, press releases, reports, rules, regulations, directives, teletype or telefax messages, minutes or records of meetings, interoffice communications, financial statements, ledgers, books of account, proposals, prospectuses, offers, invoices, orders, receipts, working papers, desk calendars, appointment books, diaries, routing slips, time sheets, logs, movies, tapes (or visual or audio reproduction), records, drawings, blueprints, sketches, plans, graphs, charts, photographs, shipping papers, purchase orders, phonograph records, phono-records, data processing paper results, data printouts and computations (both in existence and stored in memory components), transcripts of oral statements or testimony, reports and/or summaries of interviews, reports and/or summaries of investigations, opinions or reports of consultants, forecasts, opinions of counsel, court papers and any and all other data compilations or information resources from which information can be obtained or translated, if necessary, through detection devices into reasonably usable form, or material similar to any "document" as used herein. "Document" as used herein also includes the original of any document in whatever form or medium it may exist, and all copies of each such document bearing, on any sheet or side thereof, any marks, including by way of illustration only and not by way of limitation, initials, stamped indicia, any comment or notation, or any character not a part of the original text, or any reproduction thereof.

E. The term "communication" means any contact, oral or written, formal or informal, at any time or place, under any circumstances, in any manner, whereby a statement of any nature is transmitted or transferred, and shall include, without limitation, any documents containing, constituting reflecting, memorializing, referring or relating to any such contact.

F. The word "or" means and/or and should be read both ways so as to encompass both constructions and calls for documents to be produced responsive to both constructions.

G. The term "representative" refers to any employee, agent, attorney or accountant.

H. The term "person" means natural person, proprietorships, partnerships, groups, corporations, associations, societies, organizations, or government bodies or any other individual or entity.

I. The term "the transaction" or "the transactions" or "account" or "accounts" when used herein without qualifications means the transactions and accounts between and among the Debtors and the named defendants in all related activities and agents or assigns of either party.

J. The term "Note" shall refer to the Note executed by the plaintiffs in connection with the Deed of Trust in which you allege you are the owner and holder.

K. The term "Deed of Trust" or "Mortgage" shall refer to the Document filed with the County Record's Office that secures the alleged lien against the Real Property.

L. The Real Property shall refer to the Real Property and improvements located thereon at _____ (the "Real Property").

M. The term "present" means up to and including the date of your final response to these Requests for Admission.

N. The term "relating to" or "relates to" means regarding, reflecting, discussing, describing, containing, identifying, analyzing, studying, reporting, commenting, evidencing, constituting, revealing, setting forth, considering, recommending, questioning, disputing, contesting, correcting, construing, mentioning, associated with, referring to, alluding to, or pertaining to, in whole or in part.

O. The term "you" or "your" refers to the Defendant, Deutsche Bank National Trust Company.

P. The singular shall be construed to include the plural, and the plural shall be construed to include the singular.

Q. The masculine includes the feminine, and the feminine includes the masculine.

R. The word "and" shall be construed to include the word "or", and the word "or" shall be construed to include the word "and."

S. The word "each" shall be construed to include the word "every", and the word "every" shall be construed to include the word "each".

T. The word "any" shall be construed to include the word "all", and the word "all" shall be construed to include the word "any".

U. The term "Complaint" means the Complaint in the above captioned action.

V. The term "Proof of Claim" means the proof of claim filed in the Debtors' bankruptcy case on _____.

II

INSTRUCTIONS

W. The time period for each request shall be from _____ unless otherwise specified.

X. All headings herein are included only for organization purposes and should not be construed as being part of any request, or as limiting any request in any manner.

III

PLAINTIFFS' REQUEST FOR ADMISSIONS

ADMISSION NO. 1: That the Defendant is the trustee for a trust registered with the Securities and Exchange Commission ("SEC") on March 14, 2006 (Hereinafter "the trust").

RESPONSE:

ADMISSION NO. 2: That the CIK number for the said Trust is 0001353319.

RESPONSE:

ADMISSION NO. 3: That the SIC number for the Trust is 6189.

RESPONSE:

ADMISSION NO. 4: That the SEC file number for the Pooling and Servicing Agreement in this matter is 333-121782-04.

RESPONSE:

ADMISSION NO. 5: That the full name of the trust is Argent Securities, Inc., Asset Backed Pass-Through Certificates, Series 2006-W5.

RESPONSE:

ADMISSION NO. 6: That the trust identified in Number 3 above was formed pursuant to the laws of the State of Delaware.

RESPONSE:

ADMISSION NO. 7: That the address for the Trust is 1100 Town & Country Rd., Suite 1100, Orange CA 92868.

RESPONSE:

ADMISSION NO. 8: That the trust identified herein was created by a Pooling and Servicing Agreement under date of March 14, 2006.

RESPONSE:

ADMISSION NO. 9: That the Pooling and Servicing Agreement was filed as Exhibit 4.1 to Form 8-K, which form was filed with the SEC on or about March 14, 2006.

RESPONSE:

ADMISSION NO. 10: That the SEC digital document number for the Pooling and Servicing Agreement is d442487_ext4-1.htm.

RESPONSE:

ADMISSION NO. 11: That pursuant to Section 2.01 of the Pooling and Servicing Agreement the closing date for all mortgage loans to be delivered to the Trust was February 1, 2006.

RESPONSE:

ADMISSION NO. 12: That pursuant to Section 1.01 of the Pooling and Servicing Agreement the term "cut-off date" is defined with respect to any mortgage loans included in the trust to mean the that the consumer residential mortgage loan must have been originated on or before the close of business on February 1, 2006.

RESPONSE:

ADMISSION NO. 13: That the PSA required all non-conforming loans to be repurchased by the Depositor within 180 days of the closing date.

RESPONSE:

ADMISSION NO. 14: That the loan of the Plaintiffs was originated before February 1, 2006 and was sold to the Trust identified herein before the cut-off date.

RESPONSE:

ADMISSION NO. 15: That Argent Securities, Inc., was the party named as the "Depositor" for the trust identified herein.

RESPONSE:

ADMISSION NO. 16: The mortgage loan of the Plaintiffs was sold to the Trust by Argent Securities, Inc., and that such sale occurred before February 1, 2006.

RESPONSE:

ADMISSION NO. 17: Argent Securities, Inc., was a Delaware Corporation with a place of business located at 1100 Town & Country Road, Suite 1100, Orange, California.

RESPONSE:

ADMISSION NO. 18: The SEC File Number for Argent Securities, Inc, is 2333-1218782-04.

RESPONSE:

ADMISSION NO. 19: The IRS employer identification number for Argent Securities, Inc., is 77-0599834.

RESPONSE:

ADMISSION NO. 20: Ameriquest Mortgage Company was designated as the Master Servicer for the Trust identified herein.

RESPONSE:

ADMISSION NO. 21: Deutsche Bank National Trust Company was designated as the Trustee for the Trust created and identified herein with a notice address of 1761 East St. Andrew Place, Santa Ana, California 92705-4934.

RESPONSE:

ADMISSION NO. 22: That on February 27, 2006, a series of certificates entitled Argent Securities, Inc., Asset-Backed Pass-Through Certificates, Series 2006-W2, were issued and sold to various investors pursuant to the Pooling and Servicing Agreement identified herein.

RESPONSE:

ADMISSION NO. 23: That the certificates issued on February 27, 2006, consisted of eighteen classes of certificates designated as Class A-1 through Class R-X.

RESPONSE:

ADMISSION NO. 24: That the certificates issued on February 27, 2009, represented in the aggregate the entire beneficial ownership interest in the trust consisting of a pool of residential mortgage loans, including the loan of the Plaintiffs herein.

RESPONSE:

ADMISSION NO. 25: That the sale of the Plaintiffs' mortgage loan from Argent Securities, Inc. as Depositor to the Trust was a true sale for adequate consideration of the Plaintiffs' note and deed of trust.

RESPONSE:

ADMISSION NO. 26: That the sale of Plaintiffs' mortgage loan from Argent Securities, Inc., as Depositor, to the Trust, was confirmed as a "true sale" for fair value and consideration by the law firm of Thatcher and Profit.

RESPONSE:

ADMISSION NO. 27: That the pool of mortgage loans in the trust identified herein was subject to an election made by the Trustee for the said trust to treat the pool of assets consisting of the said mortgage loans and certain other related assets subject to the Pooling and Servicing Agreement as a REMIC for federal income tax purposes.

RESPONSE:

ADMISSION NO. 28: That the REMIC election made by the Trustee for the trust identified herein was irrevocable for the purposes of satisfying regulations issued by the Department of the Treasury, Internal Revenue Service, Regulation 1.860G-1(a)(4)(m), and the Internal Revenue Code of 1986, as amended.

RESPONSE:

ADMISSION NO. 29: That pursuant to the irrevocable REMIC election the latest possible origination date for any mortgage loan in the pool was February 1, 2006.

RESPONSE:

ADMISSION NO. 30: That the mortgage loan of the Plaintiffs was classified as an "eligible mortgage loan" pursuant to Section 3.04 of the Pooling and Servicing Agreement.

RESPONSE:

ADMISSION NO. 31: That Fitch Ratings in connection with the sale of the certificates identified herein issued a report that confirmed that the sale of the mortgage loans, including the loan of the Plaintiffs, from Argent Securities, Inc., to the Trust was a "true" sale and was made for "fair" and "reasonable" consideration.

RESPONSE:

ADMISSION NO. 32: That sale of the Plaintiffs' loan from Argent Securities, Inc., to the Trust was a true sale for fair and reasonable consideration.

RESPONSE:

ADMISSION NO. 33: That the Plaintiffs loan conformed to the Rules of the Trust and thus was not subject to any repurchase or recourse rights of the Trust and was not sold back to the Depositor.

RESPONSE:

ADMISSION NO. 34: That the loan of the Plaintiffs herein was originated by Home Loan Mortgage Company of Western North Carolina.

RESPONSE:

ADMISSION NO. 35: That the loan of the Plaintiffs was evidenced by a promissory note payable to Home Loan Mortgage Company of Western North Carolina (hereinafter "the Note") and by a Deed of Trust naming John L. Smith, Esq., as Trustee for Home Loan Mortgage Company of Western North Carolina (hereinafter the "Deed of Trust").

RESPONSE:

ADMISSION NO. 36: That the Note was duly transferred by negotiation for fair value and physical delivery of the original document from Home Loan Mortgage Company of Western North Carolina to Argent Mortgage Company.

RESPONSE:

ADMISSION NO. 37. That the Deed of Trust was duly assigned and transferred for fair value and physical delivery of the original document from Home Loan Mortgage Company of Western North Carolina to Argent Mortgage Company.

RESPONSE:

ADMISSION NO. 38: That the sale of the Note and Deed of Trust from Home Loan Mortgage Company of Western North Carolina to Argent Mortgage Company occurred and was closed before February 1, 2006.

RESPONSE:

ADMISSION No. 39: That Argent Mortgage Company as Seller duly transferred by negotiation for fair value and physically delivered the original mortgage Note of the Plaintiffs and assigned and physically delivered for fair value the Deed of Trust to Argent Securities, Inc., by a true sale for fair consideration.

RESPONSE:

ADMISSION NO. 40: That the sale from Argent Mortgage Company to Argent Securities, Inc., occurred and was closed before February 1, 2006.

RESPONSE:

ADMISSION NO. 41: That the law firm of Thatcher & Profitt filed a legal opinion with the Securities and Exchange Commission that the sale of the Plaintiffs' mortgage Note, Deed of Trust and loan from Home Loan Mortgage Company of Western North Carolina to Argent Mortgage Company was a true sale, for market value, and for fair consideration, and that the original mortgage note of the Plaintiffs was duly negotiated and physically delivered along with a proper assignment and deliver of the Deed of Trust at the time of the sale from the seller to the buyer.

RESPONSE:

ADMISSION NO. 42: That the law firm of Thatcher & Profitt filed a legal opinion with the Securities and Exchange Commission that the sale of the Plaintiffs' mortgage Note, Deed of Trust and loan from Argent Mortgage Company to Argent Securities, Inc., was a true sale, for market value, and for fair consideration, and that the original mortgage Note and Deed of Trust of the Plaintiffs was duly negotiated and assigned and physically delivered at the time of the sale from the seller to the buyer.

RESPONSE:

ADMISSION NO. 43: That Deutsche Bank National Trust Company was designated by the Pooling and Servicing Agreement as the Master Document Custodian for all mortgage loan files acquired by the Trust identified herein.

RESPONSE:

ADMISSION NO. 44: That Section 2.01 of the Pooling and Servicing Agreement provides as follows:

The Depositor, concurrently with the execution and delivery hereof, does hereby transfer, assign, set over and otherwise convey to the Trustee without recourse for the benefit of the Certificateholders all the right, title and interest of the Depositor, including any security interest therein for the benefit of the Depositor, in and to the Mortgage Loans identified on the Mortgage Loan Schedule, the rights of the Depositor under the Mortgage Loan Purchase Agreement, all other assets included or to be included in REMIC I, payments made to the Trustee by the Swap Administrator under the Swap Administration Agreement and the Swap Account. Such assignment includes all interest and principal received by the Depositor or the Master Servicer on or with respect to the Mortgage Loans (other than payments of principal and interest due on such Mortgage Loans on or before the Cut-off Date). The Depositor herewith delivers to the Trustee an executed copy of the Mortgage Loan Purchase Agreement, and the Trustee, on behalf of the Certificateholders, acknowledges receipt of the same.

In connection with such transfer and assignment, the Depositor does hereby deliver to, and deposit with, the Trustee the following documents or instruments with respect to each Mortgage Loan so transferred and assigned, and the Depositor shall deliver or cause to be delivered to the Custodian the following documents or instruments (a "Mortgage File"):

(i) the original Mortgage Note, endorsed in blank, without recourse, or in the following form: "Pay to the order of Deutsche Bank National Trust Company, as Trustee under the applicable agreement, without recourse," with all prior and intervening endorsements showing a complete chain of endorsement from the originator to the Person so endorsing to the Trustee, or with respect to any lost Mortgage Note, an original Lost Note Affidavit; provided however, that such substitutions of Lost Note Affidavits for original Mortgage Notes may occur only with respect to Mortgage Loans, the aggregate Cut-off Date Principal Balance of which is less than or equal to 2.00% of the Pool Balance as of the Cut-off Date;

(ii) the original Mortgage, with evidence of recording thereon, and a copy, certified by the appropriate recording office, of the recorded power of attorney, if the Mortgage was executed pursuant to a power of attorney, with evidence of recording thereon;

(iii) an original Assignment assigned in blank, without recourse;

(iv) the original recorded intervening Assignment or Assignments showing a complete chain of assignment from the originator to the Person assigning the Mortgage to the Trustee as contemplated by the immediately preceding clause (iii) or the original unrecorded intervening Assignments;

(v) the original or copies of each assumption, modification, written assurance or substitution agreement, if any; and

(vi) the original lender's title insurance policy or an attorney's opinion of title or similar guarantee of title acceptable to mortgage lenders generally in the jurisdiction where the Mortgaged Property is located, together with all endorsements or riders which were issued with or subsequent to the issuance of such policy, or in the event such original title policy is unavailable, a written commitment or uniform binder or preliminary report of title issued by the title insurance or escrow company.

RESPONSE:

ADMISSION NO. 45: That all terms of Section 2.01 of the Pooling and Servicing Agreement provide as follows:

Servicing Agreement were fully executed with respect to the mortgage loan of the Plaintiffs herein.

RESPONSE:

ADMISSION NO. 46: That the Master Document Custodian for the trust named herein confirmed in writing to the Master Servicer of the said trust that there was a complete, and unbroken chain of transfers and assignments of the mortgage loan documents of the Plaintiffs in this case from Home Loan Mortgage Company of Western North Carolina to Argent Mortgage Company, from Argent Mortgage company to Argent Securities, Inc., and from Argent Securities, Inc. to Argent Securities, Inc., Asset-Backed Pass-Through Certificates, Series 2006-W2.

RESPONSE:

ADMISSION NO. 47: That the mortgage loan of the Plaintiffs was included in the list of loans attached to the Mortgage Loan and Asset Purchase Agreement between Argent Mortgage Company and Argent Securities, Inc., and in the Mortgage Loan and Asset Purchase agreement between Argent Mortgage Company and Argent Securities, Inc., and in the Mortgage Loan and Asset Purchase Agreement between Argent Securities, Inc. and Argent Securities, Inc., Asset-Backed Pass-Through Certificates, Series 2006-W2.

RESPONSE:

ADMISSION NO. 48: That all of the original loan documents of the Plaintiffs, all of the True Sale Agreements, all of the true sale legal opinions, all of the transfer and delivery receipts, all of the true payment advices, checks and electronic payment records, and all other related or collateral documents for the unbroken sale and transfer of the mortgage loan of the Plaintiffs from Home Loan Mortgage Company of Western North Carolina to the other parties named herein are currently in the exclusive custody, care and physical possession of the Master Document Custodian for the trust named herein.

RESPONSE:

ADMISSION NO. 49: That the Master Document Custodian for the trust named herein has submitted one or more written reports to the Master Servicer for the trust named herein confirming that it has possession of all of the documents referred to in Request Number 48 and that all documents conform to the conveyancing rules of the Pooling and Servicing Agreement both as to form and substance.

RESPONSE:

ADMISSION NO. 50: That neither the Master Servicer nor the Master Document Custodian for the Trust named herein has found or discovered or reported any materially defective document, or any missing document, in the mortgage file for the Plaintiffs.

RESPONSE:

ADMISSION NO. 51: That in the event the Master Document Custodian or the

Master Servicer for the trust named herein had found or discovered any materially defective documents, or and missing documents, in the mortgage loan file for the Plaintiffs then a written report confirming the same as a deficiency or an exception would have been prepared and filed with all necessary parties.

RESPONSE:

ADMISSION NO. 52: That no such document as described in Request Number 51 was prepared with respect to the mortgage loan file of the Plaintiffs.

RESPONSE:

ADMISSION NO. 53: That the Master Servicer, the Trustee or the Master Document Custodian for the trust identified herein has never notified Argent Securities, Inc., of any missing loan documents or defective loan documents or any materially non-conforming loan documents with respect to the loan file of the Plaintiffs herein.

RESPONSE:

ADMISSION NO. 54: That Argent Securities, Inc. has never been requested to and in fact has never repurchased the mortgage loan of the Plaintiffs from the trust identified herein.

RESPONSE:

ADMISSION NO. 55: That the mortgage loan of the Plaintiffs has never been removed from the trust identified herein and replaced by one or more qualified substitute mortgage loans in the manner and subject to the limitations of Section 2.03(c) of the Pooling and Servicing Agreement.

RESPONSE:

ADMISSION NO. 56: That the Master Servicer for the trust identified herein has never discovered or received notice of the breach of any representation, warranty or covenant related to the mortgage loan of the Plaintiffs which would materially and adversely affect the interest of the certificate holders of the said trust.

RESPONSE:

ADMISSION NO. 57: Both the Master Servicer and the Master Document Custodian for the trust named herein acknowledged in writing the receipt of all necessary and conforming documents for the mortgage loan of the Plaintiffs.

RESPONSE:

ADMISSION NO. 58: The mortgage loan of the Plaintiffs in this case constitutes a qualified mortgage within the meaning of Section 860G(a)(3) of the Internal Revenue Code of 1986, as amended.

RESPONSE:

ADMISSION NO. 59: Argent Mortgage Securities, Inc., represented and warranted to the Trustee for the Trust named herein that concurrently with the execution of the Pooling and Servicing Agreement it was transferring, assigning, setting over and otherwise conveying in trust to the Trustee and without recourse all right, title and interest of any and all type, kind or right of Argent in the mortgage loan of the Plaintiffs.

RESPONSE:

ADMISSION NO. 60: The mortgage loan of the Plaintiffs herein has never been purchased by or sold to any NIMIS Insurer identified in the Pooling and Servicing Agreement referred to herein.

RESPONSE:

ADMISSION NO. 61: The closing date for the Trust identified herein was also designated by the Pooling and Servicing Agreement as the "Startup Day" for the REMIC trust provisions as provided for by Section 860G(a)(9) of the Internal Revenue Code of 1986, as amended.

RESPONSE:

ADMISSION NO. 62: The Internal Revenue Service has never imposed any tax on the trust identified herein for any "prohibited transactions" of any REMIC created herein as defined by Section 860F(a)(2) of the Internal Revenue Code of 1986, as amended, or pursuant to Section 10.03 of the Pooling and Servicing Agreement.

RESPONSE:

ADMISSION NO. 63: Section 10.02 of the Pooling and Servicing Agreement for the mortgage loan of the Plaintiffs provides that neither Argent Securities, Inc., the Master Servicer nor the Trustee for the trust identified herein shall sell, dispose of or substitute any mortgage loans in the trust or acquire any assets for the trust or sell or dispose of any assets with the trust or accept any contribution to the trust after the "closing date" as provided for by the said Pooling and Servicing Agreement.

RESPONSE:

ADMISSION NO. 64: The Pooling and Servicing Agreement referred to herein has never been amended by the Depositor, the Master Servicer, the Trustee, the Master Document Custodian and the NIMIS Insurer at any time since February 1, 2006.

RESPONSE:

ADMISSION NO. 65: The Pooling and Servicing Agreement identified herein provides that it shall be construed in accordance with the laws of the State of New York and

the obligations, rights and remedies of the parties thereunder shall be determined in accordance with such laws excluding the choice of laws provisions therein.

RESPONSE:

Dated this _____ day of _____, 2010.

By: _____
Signature

NAME: _____

TITLE: _____

ADDRESS: _____

PHONE: _____

A note to Boot Campers:

This is the link for the PSA I used in the Request for Admissions:

http://www.sec.gov/Archives/edgar/data/1353319/000088237706000783/d442487_ex4-1.htm

**IN THE UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:

**John Q. Public and
Mary Public,**

Debtors.

**Bank of America Home Loans
Servicing, L.P.,**

Plaintiff,

vs.

John Q. Public and Mary Public,

Defendants.

**CASE NO.
OUR FILE NO.**

**DEFENDANTS' FIRST SET OF INTERROGATORIES AND
REQUESTS FOR PRODUCTION
OF DOCUMENTS TO PLAINTIFF**

(Note: This discovery request pertains to an Assignment notarized by a notary public in a State that requires notaries to maintain a record, such as a detailed notebook or log, of their notarial acts. Similar discovery requests may be used for other notarized instruments.)

TO: Bank of America Home Loans Servicing, L.P.:

The defendants, pursuant to Federal Rules 26, 33 and 34 of the Federal Rules of Civil Procedure and Rules 7026, 7033 and 7034 of the Rules of Bankruptcy Procedure hereby serve upon the plaintiff, Bank of America Home Loans Servicing, L.P. ("Bank of America") the following first set of interrogatories and first requests for production of documents. The defendants request that the plaintiff within 30 days of this request, answer the interrogatories and produce the documents requested herein, such production to take place at the offices of O. Max Gardner, III, Gardner & Gardner, PLLC, 403 South Washington Street (28150), P.O. Box 1000, Shelby, NC 28151-1000.

DEFINITION OF TERMS

1. Unless otherwise indicated, "you," "your," or "Plaintiff" shall mean Plaintiff, its predecessor in interest, its agents, employees, independent contractors, attorneys, consultants, experts, investigators, and any other person acting for or on behalf of Plaintiff.
2. Unless otherwise indicated, "Defendant" or "Debtor" shall mean Defendants John Q. Public and Mary Public, their successors and assigns.
3. The term "document" is used in its customary broad sense to include, by way of

illustration only and not by way of limitation, all written or graphic matter of every kind or description, whether printed or reproduced by any process, or written and/or produced by hand, whether final or draft, original or reproduction, whether or not claimed to be privileged or otherwise subject to exclusion from discovery, whether in the actual or constructive possession, custody or control of the defendant, including: letters correspondence, memoranda or transcripts of telephone or personal conversations, microfilm, microfiche, telegrams, books, magazines, newspapers, advertisements, periodicals, bulletins, circulars, brochures, pamphlets, statements, notices, advertising layouts, trade letters, press releases, reports, rules, regulations, directives, teletype or telefax messages, minutes or records of meetings, interoffice communications, financial statements, ledgers, books of account, proposals, prospectuses, offers, invoices, orders, receipts, working papers, desk calendars, appointment books, diaries, routing slips, time sheets, logs, movies, tapes (or visual or audio reproduction), records, drawings, blueprints, sketches, plans, graphs, charts, photographs, shipping papers, purchase orders, phonograph records, phono-records, data processing paper results, data printouts and computations (both in existence and stored in memory components), transcripts of oral statements or testimony, reports and/or summaries of interviews, reports and/or summaries of investigations, opinions or reports of consultants, forecasts, opinions of counsel, court papers and any and all other data compilations or information resources from which information can be obtained or translated, if necessary, through detection devices into reasonably usable form, or material similar to any "document" as used herein. "Document" as used herein also includes the original of any document in whatever form or medium it may exist, and all copies of each such document bearing, on any sheet or side thereof, any marks, including by way of illustration only and not by way of limitation, initials, stamped indicia, any comment or notation, or any character not a part of the original text, or any reproduction thereof.

4. The term "communication" means any contact, oral or written, formal or informal, at any time or place, under any circumstances, in any manner, whereby a statement of any nature is transmitted or transferred, and shall include, without limitation, any documents containing, constituting reflecting, memorializing, referring or relating to any such contact.

5. The word "or" means and/or and should be read both ways so as to encompass both constructions and calls for documents to be produced responsive to both constructions.

6. The term "representative" refers to any employee, agent, attorney or accountant.

7. The term "person" means natural person, proprietorships, partnerships, groups, corporations, associations, societies, organizations, or government bodies or any other individual or entity.

8. The term "identify" when used in connection with a natural person means to set forth the full name, title, present business address and present business affiliation of said person.

9. The term "identify" when used in connection with a person which is a proprietorship, partnership, corporation, or other organization means to set forth the full name and present business address of that dealership, proprietorship, partnership, corporation, or other organization.

10. The term "identify" when used with reference to a document means to state the date and author (and, if different, the signer or signers), the addresses of the author(s), signer(s), or any individual(s) receiving copies, the type of document (e.g., letter, memorandum, chart), and its present or last known location or custodian.

11. The term "identify" when used with reference to an agreement, contract, understanding or communication means, in addition to Definition 10 above: (a) to state whether it was written or oral, to identify the parties thereto, the place where it was made or occurred,

and the date or dates thereof; (b) to identify the parties thereto, the place where it was made or occurred, and the date or dates thereof; (c) to identify the persons who negotiated or had any role in suggesting, framing or drafting the terms of the agreement, contract or understanding or who participated therein; and (d) to state the substance of the communication, agreement, contract or understanding.

12. The term "identify" when used with reference to a meeting, incident, occurrence or conversation means to state its date, place and subjects covered, to identify its participants and to identify all documents reporting upon or otherwise recording or referring to anything that transpired at such meetings.

13. The term "the transaction" or "the transactions" or "account" or "accounts" when used herein without qualifications means the transactions and accounts between and among the Debtors and the named plaintiff in all related activities and agents or assigns of either party.

14. The term "Note" shall refer to the Note executed by the debtors in connection with the Deed of Trust in which you allege you are the owner and holder.

15. The term "Deed of Trust" shall refer to the Document filed with the County Record's Office that secures plaintiff's alleged lien against the Real Property.

16. The term "Assignment" shall refer to the Document filed with the County Record's Office allegedly assigning the Deed of Trust to another party.

17. The Real Property shall refer to the Real Property and improvements located thereon at 2000 Green Street, Shelby, Cleveland County, North Carolina, 28150 (the "Real Property").

18. The term "present" means up to and including the date of your final response to these requests for production of documents.

19. The term "relating to" or "relates to" means regarding, reflecting, discussing, describing, containing, identifying, analyzing, studying, reporting, commenting, evidencing, constituting, revealing, setting forth, considering, recommending, questioning, disputing, contesting, correcting, construing, mentioning, associated with, referring to, alluding to, or pertaining to, in whole or in part.

20. The singular shall be construed to include the plural, and the plural shall be construed to include the singular.

21. The masculine includes the feminine, and the feminine includes the masculine.

22. The word "and" shall be construed to include the word "or", and the word "or" shall be construed to include the word "and."

23. The word "each" shall be construed to include the word "every", and the word "every" shall be construed to include the word "each".

24. The word "any" shall be construed to include the word "all", and the word "all" shall be construed to include the word "any".

INTERROGATORIES

1. Identify the name, address and telephone numbers of all persons signing the Assignment.

ANSWER:

2. With reference to the employment of each person identified in your answer to Interrogatory 1, identify:

- a. the name, address and telephone numbers of each person's employer;
- b. the job title and description for each person identified above;
- c. the name, title, address and telephone number of each person's supervisor;
- d. the dates of employment with the current employer.

ANSWER:

3. With reference to any person signing the Assignment as an agent for Bank of America, specifically identify the authority by which the person is authorized to sign in such capacity.

ANSWER:

4. Explain in detail the processing of the Assignment from the preparation of the Assignment to the document custodian's receipt of the Assignment. Identify by name, title and address, all persons and/or entities involved at each step in the process.

ANSWER:

REQUESTS FOR DOCUMENTS

1. With reference to the Assignment signed by _____, witnessed by _____, and recorded on _____, 20__ in Book _____, Page _____, in the office of the Cleveland County Register of Deeds, please produce copies of the notebook maintained by Jane Doe, a Texas Notary Public, for the dates of _____ to _____, including the date the Assignment was allegedly signed. The Notary's notebook should itemize the following:

- a. A brief description of each instrument notarized;
- b. The date of each instrument notarized;
- c. The date of the notarization of each instrument;
- d. The names of the signer, grantor, or maker;
- e. The residences or alleged residences of the signer, grantor, or maker;
- f. Whether the signer, grantor, or maker was (i) personally known by the notary public; (ii) identified by an identification card issued by a United States federal or state governmental agency or a passport issued by the United States; or (iii) introduced to the notary public and, if introduced, the name and residence or alleged residence of the individual introducing the signer, grantor, or maker to the notary public;

- g. The name of the person identified as the witness on the Assignment;
 - h. The residence or alleged residence of the witness;
 - i. Whether the witness was (i) personally known by the notary public; (ii) identified by an identification card issued by a United States federal or state governmental agency or a passport issued by the United States; or (iii) introduced to the notary public and, if introduced, the name and residence or alleged residence of the individual introducing the witness to the notary public;
 - j. The name and residence or alleged residence of the grantee;
 - k. The name of the original grantee and the county where the land is located.
2. Please produce a copy of the notary public's certificate.
3. Please provide the notary public's verification of residence as of the date the Assignment was signed and notarized.
4. Please provide the notary public's verification of employment as of the date the Assignment was signed and notarized.
5. Produce a complete copy of the notary's public registration book or record for all documents duly notarized by said party.

Dated this _____ day of _____, 20__.

O. Max Gardner III
Gardner & Gardner PLLC
Attorney for the Debtor/Defendants
NC State Bar #6164
P.O. Box 1000, Shelby, NC 28151-1000
(704) 487-0616 / FAX (704) 487-0619
e-mail maxgardner@maxgardner.com

MERS DISCOVERY

**IN THE UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION**

IN THE MATTER OF:)	
)	
)	
Mary Public,	)	CASE NO.
	)	OUR FILE NO.
)	
Debtor.)	
<hr style="width: 35%; margin-left: 0;"/>)	
)	
Mary Public,	)	ADV. PROC. NO.
)	
Plaintiff,)	
)	
vs.)	
)	
MERSCORP, INC.; MORTGAGE)	
ELECTRONIC REGISTRATION SYSTEM,)	
INC., SOLELY AS NOMINEE FOR GMAC)	
MORTGAGE, LLC, SUCCESSOR BY MERGER)	
WITH GMAC MORTGAGE CORPORATION;)	
et al.,)	
)	
Defendants.)	
)	
)	

**PLAINTIFF'S FIRST INTERROGATORIES AND
REQUEST FOR PRODUCTION OF DOCUMENTS
TO THE DEFENDANTS**

COMES NOW the Plaintiff, by and through her attorney of record, and serves upon Defendant **Mortgage Electronic Registration System, Inc., solely as nominee for GMAC Mortgage, LLC, successor by merger with GMAC Mortgage Corporation** the following written interrogatories pursuant to the provisions of Rule 33 of the Federal Rules of Civil Procedure and the following request for the production and inspection of documents pursuant to Rule 34 of the Federal Rules of Civil Procedure as provided for and set forth in the foregoing rules. Answers to these Interrogatories and Request for Production of Documents must be furnished within thirty (30) days of the service of these discovery requests.

DEFINITIONS

A. If there is insufficient space after each interrogatory for you to provide a full and complete answer, then you should state your full and complete answer on a separate page, identify the page, and attach the page to your response as a properly identified and marked exhibit.

B. The term "Document" means all writings of any kind, including the originals and all other non-identical copies, whether different from the originals by reason of any notation made on such copies or otherwise, including but not limited to correspondence, memoranda, notes, diaries, desk or other calendars, statistics, letters, telegrams, minutes,

business records, personal records, accountants' statements, account statements, contracts, reports, credit reports, studies, checks, statements, receipts, invoices, bills, return checks, summaries, pamphlets, books, inter-office and intra-office communications, notations of any sort of conversations or meetings, telephone call meetings or other communications, written agreements, bulletins, printed matter, computer printouts, teletypes, telefaxes, invoices, worksheets, all drafts, alterations, modifications, changes and amendments of any kind with respect to any of the foregoing, graphic or oral records or representations of any kind (including, without limitation, tapes, cassettes, discs, recordings, electronic mail records, computer memory records such as hard disk drives and master back-up tapes, diskettes, or other devices such as zip drive records).

C. The term "act" as used herein includes acts of every kind and description.

D. The term "identify" or "describe" when used in reference to a "document" means to state:

- a. The type of document (e.g., letter, memorandum, report, electronic mail records, notes, etc.);
- b. The date of the document;
- c. The name of the parties or parties who originated the document, their past or present position with the defendants, their general duties and responsibilities, their current physical location with the company, and their e-mail, telephone number and telephone extension;
- d. The name and address of the current custodian of the document;
- e. The name and current address of each signatory;
- f. The reason, in detail, for the preparation of the document;
- g. The subject or subjects covered by the document;
- h. The names, business addresses and titles of the persons to whom the document writing was directed; and
- i. The name and address and title of each person who originated, read or received the document.

E. The term "identify" as used herein in connection with a "person" or "persons" means to state the names, titles, the present employer of such "person" or "persons," the relationship of such person or persons to any of the defendants, and such person's current business address and business telephone number.

F. The term "identify" as used herein with respect to or in connection with an "act" means to:

- a. Furnish the date and place of the act;
- b. Identify the person acting, the person for whom the act was performed, and the person against whom the act was directed; and
- c. Describe in detail the act.

G. The terms "describe" or "state" as used herein mean:

- a. Describe or state fully by reference to underlying facts rather than by ultimate facts or conclusions of law;
- b. Particularize as to the:
 - i. Time;
 - ii. Date;
 - iii. Manner; and
 - iv. Place.

H. The term "oral communication" as used herein means and includes any face-to-face conversation, meeting, conference, telephone conversation, cell-phone conversation, computer conversation with voice mail, or any one for more of these or related devices.

I. The term "person" or "persons" as used herein means and includes all natural persons, public and private corporations, associates, wholly owned affiliates or subsidiary corporations or any other form of a business association, and any other type of entity and the agents, employees, officers, deputies and representatives.

J. The terms "you" or "your" as used herein shall refer to any one or all of the named defendants and any related or affiliated companies associated in any way.

K. All requests shall be deemed to include any documents made by, held by, or maintained in the files of any predecessor, successor, employee, agent or assignee of either one or all of the defendants.

L. The term "the transaction" or "the transactions" or "account" or "accounts" when used herein without qualification means the transactions and accounts between or among the debtors and the named defendants and all related activities and agents or assigns of either party.

M. The term "accepted servicing practices" with respect to any Mortgage Loan, when used herein means those mortgage servicing practices (including collection procedures) of prudent mortgage banking institutions which service mortgage loans of the same type as such Mortgage Loan in the jurisdiction where the related Mortgaged Property is located, and which are in accordance with FNMA servicing practices and procedures, for MBS pool mortgages, as defined in the FNMA Guidelines including future updates.

N. The term "adjustable rate mortgage loan" when used herein means any Mortgage Loan purchased pursuant to this Agreement as to which the related Mortgage Note contains a provision whereby the Mortgage Interest Rate is adjusted from time to time in accordance with the terms of such Mortgage Note.

O. The term "assignment of mortgage" when used herein means an assignment of the Mortgage, notice of transfer or equivalent instrument in recordable form, sufficient under the laws of the jurisdiction wherein the related Mortgaged Property is located to reflect the sale of the Mortgage to the Purchaser.

P. The term "FNMA" when used herein means Fannie Mae, formerly known as The Federal National Mortgage Association, or any successor organization.

R. The term "FNMA Guidelines" when used herein means the Fannie Mae Sellers' Guide and the Fannie Mae Servicers' Guide and all amendments or additions thereto, including, but not limited to, future updates thereof.

S. The term "HUD" when used herein means The Department of Housing and Urban Development or any federal agency or office thereof which may from time to time succeed to the functions thereof.

T. The term "MERS" when used herein means Mortgage Electronic Registration Systems, Inc., a corporation organized and existing under the laws of the State of Delaware, or any successor thereto.

U. The term "MERS Mortgage Loan" when used herein means any Mortgage Loan registered with MERS on the MERS System.

V. The term "MERS System" when used herein means the system of recording transfers of mortgages electronically maintained by MERS.

W. The term "MIN" when used herein means the Mortgage Identification Number for any MERS Mortgage Loan.

X. The term "MOM Loan" when used herein means any Mortgage Loan as to which MERS is acting as mortgagee, solely as nominee for the originator of such Mortgage Loan and its successors and assigns.

Y. The term "mortgage" when used herein means the mortgage, deed of trust or other instrument securing a Mortgage Note, which creates a first lien on an unsubordinated estate in fee simple in real property securing the Mortgage Note; except that with respect to real property located in the state of Hawaii, the mortgage, deed of trust or other instrument securing the Mortgage Note may secure and create a first lien upon a leasehold estate of the Mortgagor.

Z. The term "mortgage note" when used herein means the note or other evidence of the indebtedness of a Mortgagor secured by a Mortgage.

AA. The term "mortgaged property" when used herein means the real property (or leasehold estate, if applicable, in the case of a Mortgage Loan in the state of Hawaii) securing repayment of the debt evidenced by a Mortgage Note.

BB. The term "mortgagor" when used herein means the obligor on a Mortgage Note.

CC. The term "person" when used herein means any individual, corporation, partnership, joint venture, association, joint-stock company, limited liability company, trust, unincorporated organization or government or any agency or political subdivision thereof.

DD. The term "REMIC" when used herein means a "real estate mortgage investment conduit" within the meaning of Section 860D of the Internal Revenue Code.

INSTRUCTIONS

A. If the space provided below each interrogatory is not sufficient for your answer, then use additional sheets, numbered consecutively after each such interrogatory, and inserted in the proper order of all copies filed and served. For example, in the case of Interrogatory number 1, any additional sheets for your answers would be numbered as 1-A, 1-B, 1-C, etc.

B. Each of the following requests for production of documents and interrogatories is intended to be a continuing request to produce and answer. As a result, the Plaintiffs hereby demand that, in the event that at any later date you obtain any additional facts, or form any conclusions, opinions or contentions different from those set forth in your responses herein, then you shall amend your answers to such responses and document production promptly and sufficiently in advance of any trial date, to fully set forth such differences and to produce and documents in connection therewith.

INTERROGATORIES AND REQUEST FOR PRODUCTION OF DOCUMENTS

1. Is this defendant correctly designated by its correct legal name in this lawsuit? If the preceding answer is in the negative please state the correct legal name of the Defendant.

RESPONSE:

2. Is the Defendant an electronic registration system which tracks interests in mortgages?

- a. If the preceding answer is in the affirmative, please state each interest in a mortgage loan which the Defendant's system tracks.
- b. For each interest identified in 2(a) please provide a full description of each interest in a mortgage loan which this defendant tracks.
- c. Produce any documentation, media, writing or opinions in the possession of the Defendant or reasonably available to the Defendant which explain each of these interests.
- d. In the event that this defendant has ever taken a legal position which defines or explains the interests set forth in 2(a) please state the Court in which this defendant has taken that position and identify the documents, testimony, pleadings, affidavits, or other filings which set forth that position and produce the same.

RESPONSE:

3. Please produce every document which is in the possession of this defendant or reasonably available to this defendant concerning the incorporation, formation and creation of this defendant as a legal entity in any form or iteration. This request is specifically meant to include any predecessors in interest of this defendant and any parent or subsidiary corporations or legal entities.

RESPONSE:

4. Please identify by name, address and contact information including last known address, email address, and last known telephone number every individual who assisted or took part in formulating the responses to this discovery.

RESPONSE:

5. Please identify every person, firm or entity which acted as an incorporator of this defendant.

RESPONSE:

6. Please identify the persons or entities responsible for formulating the idea or concept of an electronic registry of mortgages.

- a. This request should be deemed to include the identity of the persons by name, last known address and any other contact information including email address and phone number(s).
- b. If the response includes the name of any entity please designate the entity and include its contact information and identify any person designated by the entity to represent the entity in developing the idea or concept of an electronic registry of mortgages including the individuals name, last known address, last known employer, and last known contact information including email address and any phone numbers known or previously known for the individual.
- c. Please produce any notes, memorandum, recordings, e-mails or any other communications or memorializations of any type or nature regarding any meetings, planning sessions, phone calls or gatherings, discussions or talks of any type or nature wherein the idea or concept of an electronic registry of mortgages was discussed or mentioned and which refer to in any way this idea or concept and its creation.

RESPONSE:

- 7. Please explain the position of "Certifying Officer" for this Defendant.
 - a. Include with this explanation a complete explanation of any material differences between a "Certifying Officer" and a Corporate Officer of this Defendant.
 - b. Please include in this explanation every power or authority granted to a "Certifying Officer" of this Defendant.
 - c. Please include in this explanation every power or authority granted to a Corporate Officer of this Defendant.
 - d. Please explain any differences between the power granted to a "Certifying Officer" and a Corporate Officer of this Defendant.
 - e. Please explain how "Certifying Officers" of this defendant are compensated.
 - f. Please explain every role that a "Certifying Officer" plays with respect to the Corporate Governance of this Defendant.
 - g. Please state how many Corporate Officers exist for this Defendant.
 - h. Please produce a complete list of every Corporate Officer of this Defendant which includes their name, employer, address, present contact information including email and phone number(s), length of employment and office held by the Officer listed and summarize the scope of the Officers powers and authority to act on behalf of this Defendant.
 - i. Please state how many "Certifying Officers" exist for this Defendant.
 - j. Please produce a complete list of every "Certifying Officer" of this Defendant which includes their name, employer, address, present contact information including email and phone number(s), length of employment and office held

by the Officer listed and summarize the scope of the Officers powers and authority to act on behalf of this Defendant.

- k. For each Certifying Officer listed in response to paragraph "j", please produce a legible copy of each person's signature.

RESPONSE:

8. Please state every qualification that exists for an individual to be a "Certifying Officer" of this Defendant. For each qualification listed please state:

- a. When that qualification was enacted;
- b. Who was responsible for setting or creating the qualification;
- c. Who is responsible for insuring that the "Certifying Officer" meets the qualifications;
- d. Every method which this defendant uses to verify the qualifications of its Certifying Officers;
- e. Every action that this defendant undertakes to insure that the Certifying Officers meet the qualifications set by this defendant;
- f. Beginning ten years prior to the date of this request through the date of this Defendant's response, please produce copies of the Minutes of every board meeting wherein such resolutions were adopted authorizing this defendant to issue incumbency certificates or "resolutions" or other such documents that in any other way refer to, authorize, or ratify the overall certifying officer concept and process.
- g. Please produce any documents which are responsive to this request which tend to support, verify, describe or explain any of the items material to this interrogatory.

RESPONSE:

9. Please state every method by which this Defendant monitors the actions of its Corporate Officers. For every method mentioned in the preceding answer please produce any and all documentation which reflects, memorializes, describes or communicates the results of the efforts to monitor the actions of this Defendant's Corporate Officers.

RESPONSE:

10. Please state every method by which this Defendant monitors the actions of its "Certifying Officers". For every method mentioned in the preceding answer please produce any and all documentation which reflects, memorializes, describes or communicates the results of the efforts to monitor the actions of this Defendant's "Certifying Officers".

RESPONSE:

11. Please state the total number of employees including Corporate Officers who are employed by this Defendant.

RESPONSE:

12. Please state every department or division which this Defendant recognizes within its Corporate Structure and for each such department or division please state the total number of employees who work in each such department or division so identified.

RESPONSE:

13. Please state whether this defendant has any publicly traded stock or debt instruments? If the answer is in the affirmative please explain each category of stock or debt instrument which this defendant has issued or become the obligee upon a debt instrument.

RESPONSE:

14. Is this defendant wholly owned by other corporations or entities?

RESPONSE:

15. If the answer to the previous question is in the affirmative, please state whether those entities or corporations may be considered to be wholly made up of entities or corporations which are involved in some respect with the origination, servicing, financing or collections of mortgage loans?

RESPONSE:

16. Please provide the names, addresses and contact information of each shareholder or owner of this defendant.

RESPONSE:

17. Please provide the name, last known address, last known employer and last known contact information of each member of the Board of Directors of this defendant.

RESPONSE:

18. Please produce every authentic corporate resolution where this defendant authorized and/or appointed any person or entity to act as a "certifying officer" of this defendant.

RESPONSE:

19. Please identify the individuals or entities who developed or were otherwise responsible for the concept of a "Certifying Officer" on behalf of this defendant. For each

person so identified provide the name, last known address, last known employer and last known contact information for that person or those persons.

RESPONSE:

20. Please produce every document, memorandum, report, communication, or correspondence by any medium (electronic, print, typewritten, voicemail, recording, etc.) where this defendant discussed or considered the creation of a "Certifying Officer" label, name or position for this defendant.

RESPONSE:

21. Please state whether any "Certifying Officer" of this defendant is an employee of this defendant. If the answer is in the affirmative please provide a list which includes the name, last known address, last known employer and last known contact information of every "Certifying Officer" of this Defendant who is an employee of this Defendant.

RESPONSE:

22. Please state whether MERS is entitled to the payment of any money with respect to the promissory note that is in issue in this case. If the answer is anything other than an unqualified "No" please provide a full explanation of MERS claim that it is entitled to payment of monies due on this promissory note complete with every document or agreement which MERS relies upon to claim the right to be paid any monies due under the terms of the promissory note in issue in this case.

RESPONSE:

23. Please state the name of the person who is in possession of the promissory note in this case and for said person please provide their name, last known address, last known employer and last known contact information. For said person please produce any agreements, authorizations, powers of attorney, agency agreements or any other documents which this defendant contends provides the person identified with the right to act as a holder of the promissory note which is in issue in this case.

RESPONSE:

24. Please provide a complete description of every person or entity who has had possession of the promissory note which is in issue in this case since it was made by the borrower until the present date and for each person or entity so identified describe in complete detail:

- a. Their identity;
- b. Their physical location;
- c. Their contact information including any email addresses or phone numbers;
- d. If the party holding the note is identified as an individual provide their name, last known address, last known employer and last known contact information;

- e. The authority for the person or entity identified to hold the promissory note including the documents or agreements granting that authority;
- f. The time period in which the party identified held the promissory note;
- g. The party from whom the holding party received the promissory note;
- h. The party to whom the promissory note was delivered when the identified party negotiated or transferred the promissory note;
- i. The basis for the claim that the party currently holding the promissory note has the right to enforce the note including any agreements or contracts which support that claim.

RESPONSE:

25. Please produce any and all documents relating to the endorsement and delivery of the promissory note from the originator to the current alleged owner of the promissory note. This should include any endorsements, any allonges, any transfer or delivery receipts from any party since the instrument was made by the borrower through the person or entity presently claiming ownership of the promissory note.

RESPONSE:

26. Please produce a copy of any executed agreements between MERS and any other defendant to this action.

RESPONSE:

27. Please produce the MERS milestone report for the promissory note that is the subject of this litigation.

RESPONSE:

28. Please produce the Registration Verification report for the promissory note that is the subject of this litigation.

RESPONSE:

29. Please produce all of the member information stored in the MERS system for every entity identified in the responses to this written discovery which has an ORG ID on the MERS system.

RESPONSE:

30. Please state the name and identity of every agreement that exists between this defendant and any other defendant to this action including any applicable insurance, reinsurance or indemnity agreements.

- a. For each such agreement so identified please describe the agreement with sufficient particularity to delineate between each agreement so identified;
- b. Please produce a copy of every such agreement so identified;

RESPONSE:

31. Please produce a copy of every Power of Attorney for any person signing any of the documents requested in any of these interrogatories.

RESPONSE:

32. Please produce a copy of all documents that purport to grant authority to any person to sign any of the documents referenced in this discovery.

RESPONSE:

33. Please explain every basis of authority claimed by this defendant to execute a mortgage assignment as nominee of a legal entity which no longer legally exists.

RESPONSE:

34. Please explain every basis of authority claimed by this defendant to execute a mortgage assignment as nominee of a legal entity which has filed for Bankruptcy protection under any Chapter of the Bankruptcy Code.

RESPONSE:

35. Please list the name of every member of this defendant known to the defendant to have sought relief under any Chapter of the Bankruptcy Code.

RESPONSE:

36. For any such member identified in the previous question as having sought relief under any Chapter of the Bankruptcy Code please produce any authorizations granted to this Defendant by any Bankruptcy Court which allows this Defendant to continue to execute documents affecting the assets of the Bankrupt member, specifically mortgage assignments, after the date of the filing of a Bankruptcy Petition by any member of the Defendant.

RESPONSE:

37. Please produce a complete copy of your Rules of Membership.

RESPONSE:

38. Please identify every rule of membership which has been altered in the last ten years and produce any previous versions of any rules which have been altered, amended or modified in the last ten years.

RESPONSE:

39. Please produce the notary registration book for any notary public who certified the signature of any person on any document produced in this discovery.

RESPONSE:

40. Please identify every Court or Administrative Action in the last ten years where this defendant has either given testimony as a party to the action or litigation or provided an affidavit in support of a motion for summary judgment filed by this defendant. For each such action please provide the following identifying information:

- a. The Style of the Action or Litigation which includes the Jurisdiction where the action was filed and the venue of the Court or Body where the action or litigation was commenced.
- b. The type of testimony given by this defendant (deposition, trial or affidavit).
- c. The party testifying on behalf of this defendant.
- d. The identity of the attorneys adverse to this defendant.
- e. A short summation of the substance of the testimony offered.

RESPONSE:

41. Please state this defendant's understanding of the purpose of filing an assignment of mortgage in the public land records of the State of North Carolina.

RESPONSE:

42. Please state this defendant's understanding of who has the legal right to change the name of the mortgagee in the public land records of the State of North Carolina by the filing of a mortgage assignment.

RESPONSE:

43. Please state whether this defendant claims any right in any mortgage lien where the owner of the debt secured by that lien is not a MERS member. If the answer to the foregoing is in the affirmative please fully explain, including producing any relevant documents the basis for the defendant's claim that it has legal rights in a mortgage lien which secures the repayment of a debt which is not owned by a MERS member.

RESPONSE:

44. Please identify every interest which this defendant tracks in any mortgage loan for each interest identified provide a full and complete explanation of that interest.

RESPONSE:

45. Please state who is the owner of the mortgagee interest in any loan where this defendant appears as mortgagee of record.

RESPONSE:

46. Please state whether a member of this defendant, or this defendant, has any rights to transfer the ownership of a promissory note by a mortgage assignment. If the answer to this question is anything other than an unqualified "No" please provide a complete explanation of the claimed right or authority to transfer the ownership of any promissory note by either this defendant or its member by the use of language in a mortgage assignment which claims to transfer the ownership of the promissory note to the person or entity who is the assignee of the mortgage assignment.

RESPONSE:

47. Do you concede that every action taken in this case by this defendant in the name of this defendant is an action actually undertaken by the mortgage servicer for underlying mortgage loan who is using this defendant's name to take foreclosure and collection actions?

RESPONSE:

48. Please produce every document or other information in the possession of this Defendant which indicates that the consumer is in default under the terms of their loan documents.

RESPONSE:

49. Do you concede that the information which is entered on the MERS database is entered by employees of Members of MERS and not by employees of MERS?

RESPONSE:

50. Please state every manner in which MERS verifies the accuracy of the entries on the MERS database by the employees of the members of MERS. If there are any documents which support this defendant's response to this question please produce all of the relevant documentation regarding this question.

RESPONSE:

51. Does this defendant contend that physical possession of a promissory note endorsed in blank entitles this Defendant to payment of the proceeds of the promissory note?

RESPONSE:

52. Does this defendant contend that it is ever entitled to the payment of the proceeds of a promissory note which it is presenting to a Court for foreclosure on behalf of one of its members?

RESPONSE:

53. Does this defendant agree that its membership agreement with all of its members expressly disavows any ownership of any promissory note owned by its members and expressly disavows any right to payment of the proceeds of any promissory note owned by one of its members?

RESPONSE:

54. Does this defendant concede that when it prepares a mortgage assignment that this defendant cannot legally assign any interest in a mortgage loan that it does not own?

RESPONSE:

55. Do you agree that this defendant does not create any beneficial interest in a mortgage loan by registering the loan on its system?

RESPONSE:

56. Do you agree that the use of this defendant's system (the MERS database) does not transfer any beneficial interest in any mortgage loan?

RESPONSE:

57. Do you agree that the MERS database is simply an electronic registry where the members of MERS track the actual underlying promissory notes and mortgages which are registered on the MERS system?

RESPONSE:

58. Do you agree that registering a transfer of an interest on the MERS database does not legally transfer any interest in any promissory note or mortgage lien?

RESPONSE:

59. Do you agree that the integrity of the data which is entered in the MERS database depends upon the accuracy of the information which is input to the MERS database by MERS members?

RESPONSE:

60. Do you agree that this defendant has no way to verify the authenticity or accuracy of the entries made in the MERS database by its members?

RESPONSE:

61. Do you agree that entries in the MERS database are not evidence of the legal transfer of ownership interests in any mortgage lien or promissory note?

RESPONSE:

62. Do you agree that MERS is not a party to the mortgage indebtedness (the promissory note) which is secured by any mortgage that names MERS as mortgagee?

RESPONSE:

63. Has this defendant ever claimed as an asset on any financial statement, tax return or statement of financial affairs any mortgage that lists MERS as mortgagee?

RESPONSE:

64. Has MERS ever claimed as a loss on any tax return, financial statement or statement of financial affairs any monetary loss as the result of the foreclosure of any mortgage lien which names MERS as mortgagee?

RESPONSE:

65. Does MERS have any risk as to the nonpayment of any mortgage for which it serves as nominee?

RESPONSE:

66. Does MERS ever experience a default when any borrower fails to make a payment on any MERS as mortgagee mortgage securing the payment of a promissory note?

RESPONSE:

67. Was this defendant principally formed to act as an agent in conducting foreclosures for the beneficial owners of promissory notes?

RESPONSE:

68. Is the conduction of foreclosure activities for the beneficial owners of promissory notes a principal purpose of MERS?

RESPONSE:

69. Does MERS have any personal interest in whether any borrower makes any payment on any mortgage promissory note secured by a MERS as mortgagee mortgage lien?

RESPONSE:

70. Please explain what this defendant means when it states that "MERS immobilizes the mortgage lien" and produce any documents or any other materials which explain this statement.

RESPONSE:

71. When this defendant is involved in a foreclosure of a MERS as mortgagee mortgage, when this defendant obtains possession of a promissory note from the beneficial owner in support of its foreclosure, do you concede that this defendant does not pay any consideration to obtain possession of that promissory note in furtherance of its foreclosure activities?

RESPONSE:

72. With respect to the actual time that this defendant gains possession of a promissory note during the foreclosure process does this defendant either pay or receive payment of any compensation for obtaining possession of the promissory note?

RESPONSE:

73. When MERS obtains physical possession of a promissory note for the purposes of foreclosure is there any entry made in the MERS database which reflects that any transfer of beneficial interest occurred between the owner of the beneficial interest in the promissory note and MERS?

RESPONSE:

74. Would you agree that any indication on the MERS database of any transfer of any interest in any mortgage loan registered on the MERS system is not the basis for determining whether there was actually a transfer of any interest in any mortgage loan? In other words an inquiring party would have to examine the actual documents which were executed by the parties to the transfer registered on the MERS database to determine if any transfer of any interest legally occurred?

RESPONSE:

75. Would you agree that any foreclosure being conducted in the name of MERS is actually being conducted by the entity which is identified on the MERS database as owning the servicing interest in the mortgage loan being foreclosed?

RESPONSE:

76. Would you agree that irrespective of your membership agreement with any member granting them the right to assign a mortgage lien that the member may not make the mortgage assignment unless the member would have the right to make the mortgage assignment under the controlling State law?

RESPONSE:

77. Would you agree that any authority to act which this defendant grants to any member of this defendant is at all times subordinate to the controlling State law applicable to the transaction in question?

RESPONSE:

78. Would you agree that any grant of authority to act on this defendant's behalf to any member of this defendant does not supersede the State law requirement that the member have an independent right under State law to undertake the proposed action?

RESPONSE:

79. Please state whether this defendant is operated with the goal of being a profitable company or if this defendant is operated with the goal of creating only enough income to cover the costs of its operations.

RESPONSE:

80. Please produce the MIN transfer audit for the subject loan in this case.

RESPONSE:

81. Please produce the MIN audit for the subject loan in this case.

RESPONSE:

82. Please state the name, address, phone number and current employer of each person who assisted in the formulation of the answers to these questions.

RESPONSE:

83. Please provide a complete copy of the MERS membership agreement executed by any other defendant to this action.

RESPONSE:

84. Please state how many mortgage promissory notes MERS owns, or claims to own the beneficial interest in the notes which are secured by liens naming MERS as Mortgagee in the State of North Carolina.

RESPONSE:

85. Please state how many mortgage liens MERS is the owner of in the State of North Carolina.

RESPONSE:

86. Please state the total number of properties in the State of North Carolina since 1999 that have been foreclosed on in the name of MERS.

RESPONSE:

87. All documents or records maintained by any duly appointed custodian of the mortgage loan file of the plaintiff in this action.

RESPONSE:

88. Please explain MERS position that MERS "immobilizes" the mortgage lien while changes in the ownership and servicing rights of any given promissory note continue to change.

RESPONSE:

Dated this _____ day of _____, 20__.

O. Max Gardner III
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Attorney for the Debtor/Plaintiff
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PRIVILEGE LOG

How to draft a privilege Log:

According to American Records Management Association, more than 90% records created today are in electronic format. The 2005 Litigation Trends Survey conducted by Fulbright & Jaworski L.L.P., states 90 percent of U.S. corporations are engaged in some type of litigation.

Drafting a privilege log is not an easier thing. It requires the adequate knowledge of all the laws concerning privileged and non privileged documents. This document is aims to provide basic information on a drafting of Privileged Logs.

What is a privilege log?

Privileged logs are list of documents the plaintiff and defendant (Parties in a Case) believes that the privileged and immune from turned over to the other side or production before the court.

Laws concerning privilege logs:

- Federal Rules of Civil Procedure (2009) and Federal Rules of Evidence
- Respective State Civil procedure Rules and State rules of Evidence

Laws concerning privileged logs are governed by both the state and federal laws in USA. Federal rules apply to the cases filed before the federal courts and the state rule applies to the cases filed before the federal courts.

Rule 26(b)(1)¹ of Federal Rules of Civil Procedure states: Parties may obtain discovery regarding any no privileged matter that is relevant to any party's claim or defense — including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. Hence the rule specifically excludes the documents which are privileged from the scope of the discovery.

Even many states of the USA have its own law concerning electronic discovery and privileged logs.

In Florida, Florida Rules of Civil Procedure § 1.280(b)(5), states a privilege log must be submitted when a party withholds information otherwise discoverable under the rules by claiming that it is privileged or subject to protection as trial preparation material.

Similarly many states have adopted their own law concerning drafting and filing of privileged logs.

Burden of Proof:

All the documents drafted as privileged logs are not said to be privileged unless the producing party proves that it is privileged. Hence, the party withholding document or information bears the burden of establishment that such document are privileged.

Time limits for production of privilege logs:

Rule 34(b) (2) (A) states, the party to whom the request is directed must respond in writing within 30 days after being served² and a shorter or longer time may be stipulated to under Rule or be ordered by the court.

What are privilege logs?

¹ <http://www.law.cornell.edu/rules/frcp/Rule26.htm>

² http://www.law.cornell.edu/rules/frcp/Rule34.htm#Rule26_b

1. Attorney client privilege: such as communication between attorney.
2. Privacy laws: Such as persons right to privacy under the constitution or any law enacted by the government.
3. Work Product: Such as the trial preparation documents, Reports, statements, correspondence, memoranda or other documents prepared in anticipation of litigation by the client
4. Trade secrets Such as the formula, practice, process, design, instrument, pattern, or compilation of information which is not generally known or reasonably ascertainable, by which a business can obtain an economic advantage over competitors or customers.

Contents/description of privilege log:

1. type of document for which the privilege is claimed
2. The name and designation or capacity of the provider/ author of the document;
3. The name and designation or capacity of each recipient
4. The date of the information was learned or the document was prepared/ sent or shared
5. The title and/or description of the information or document;
6. The subject matter addressed in the information or document;
7. The purpose(s) for which it was prepared or communicated;
8. privilege claimed

E.g. of privilege log:

Document No.(Sl.No.)	Bates No.	Document type	Date of Document	Author and affiliation/ from / designation / capacity	Recipient and affiliation/ To	Copy and affiliation / other persons having access to document and their capacity	Subject matter	Category of privilege
1.	32479 - 32482	Mail	9/28/2006	ATSR LLC	BTSR LLP	None		Attorney-client privilege
2.	35892 - 35921	letter	9/30/2006	ATSR LLC	KTSLR LLP	BTSLR LLP		Trade Secret