

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF MISSISSIPPI

IN RE: ALETHER THOMPSON

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CASE NO. 99-40681

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ALETHER THOMPSON

\*

PLAINTIFF

\*

VS

\*

ADVERSARY PROCEEDING  
NO. 03-01153

\*

HOMEQ SERVICING CORPORATION

\*

DEFENDANT

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AFFIDAVIT OF JOHN DUNNERY

STATE OF NORTH CAROLINA    )  
                                          )    to wit:  
COUNTY OF WAKE                )

I, JOHN DUNNERY, being duly sworn, do hereby depose and say as follows:

1. I am over eighteen (18) years of age, and I am competent to be a witness. I have personal knowledge of the facts and matters set forth herein.

2. I have been employed with HomEq Servicing Corporation ("HomEq") since June of 1998. I currently serve as Vice President of Default Operations for HomEq. The individuals under my supervision deal with defaulted loans and, in particular, loans involved in collection, foreclosure and bankruptcy.

3. HomEq is a servicer of loans for lenders. The Plaintiff, Alether Thompson, is a debtor on a 1998 mortgage loan from Southeast Funding, in the original principal amount of \$28,000, which is serviced by HomEq. Accurate copies of the Plaintiff's Note and Deed of Trust

for this loan are attached to HomEq's Opposition to Plaintiff's Motion for Class Certification (the "Opposition") as Exhibits A and B.

4. When HomEq incurs a fee or charge for a third party service in connection with a debtors's loan, it pays the invoice and records the payment as a "corporate advance" in HomEq's computer system, the same way that businesses generally make accounting entries for expenses that they incur. Examples of such charges include: (i) attorney's fees occurred in collection, foreclosure or bankruptcy matters (sometimes referred to as proof of claim or POC fees, foreclosure fees, attorney's fees, or breach letter fees); (ii) associated court filing fees; and (iii) appraisal or valuation fees (sometimes referred to as Broker's Price Opinions or BPO fees).

5. HomEq also occasionally makes payment to taxing authorities for delinquent taxes owing on property which secures the loans that it services in order to preserve a lender's lien and avoid the sale of secured property at tax sale. Such payments are recorded as "escrow advances" in HomEq's computer system.

6. On occasion, HomEq also records advances to cover short payments made by debtors.

7. The posting of a corporate advance does not mean that it will be charged to or collected from a debtor. Many circumstances affect collection. State law affects whether and in what amounts certain advances can be passed onto a debtor.

8. Many corporate advances are not collected from debtors, but instead are written off or later reimbursed by the lender who holds the loan. Others are approved and paid through approved plans, approved foreclosure petitions, motions for relief from stay, or Rule 2016 motions, or by negotiated agreement with debtors.

9. Changes in bankruptcy law and local practice have resulted in many changes over the years in HomEq's default serving practices. These changes include, but are not limited to, the following.

10. Following notification of a debtor's bankruptcy, it is HomEq's practice to move unpaid corporate advances into one of two suspense accounting categories: (a) a category identified as "Non-Recoverable Corporate Advances; or (b) a category identified as "Third Party Recoverable," sometimes referred to as the "T-bucket."

11. Advances in the T-bucket or Non-Recoverable category are then reviewed with bankruptcy counsel to determine which can be collected through a proof of claim or the debtor's plan (generally pre-petition charges, although some jurisdictions allow collection of POC fees and other pre-confirmation charges via approved plans).

12. Charges incurred during the pendency of a bankruptcy are generally posted to the "T-Bucket" and then, after further review are either: (a) included in the detail underlying lift-stay motions, (b) included in POCs or amended POCs in jurisdictions which allow limited post-petition charges to be included in a proof of claim, (c) included in 2016 motions, (d) written off, in whole or in part, and/or (e) reimbursed by the lender to HomEq.

13. At the end of a bankruptcy, a further review process between HomEq's internal personnel and its external bankruptcy consultants and counsel occurs to determine, on a loan by loan basis, which advances, not otherwise recovered through Chapter 13 plan payments are potentially recoverable from the borrower or the lender, and which must be written off.

14. This process, known as the "reclassification" process, has been undertaken by HomEq and refined over the years in an effort to address the ever changing and different practices of bankruptcy courts, to address changes in case law, and to respond to court orders,

such as the class action settlement order in the case of Betty Ann Dean v. First Union Mortgage Corporation, in the U.S. Bankruptcy Court for the Southern District of Alabama, Southern Division (Adversary No. 99-1144-MAM) (the “Dean Settlement”) attached as an Exhibit to the Opposition.

15. While HomEq was not a party in the *Dean* case, many of the loans encompassed by the Dean Settlement were serviced by HomEq and thus required reclassification by HomEq of some of the same charges which Plaintiff seeks to challenge herein.

16. The suspense and reclassification processes adopted by HomEq have been applied to numerous loans beyond those encompassed by the Dean Settlement, including the Plaintiff’s loan.

17. Attached to the Opposition as an exhibit is a Transactional History Reconciliation for Ms. Thompson’s Loan. This reconciliation is not a document that can be simply reproduced through HomEq’s accounting system for each debtor’s loan. It is drawn from different data sources, her bankruptcy, foreclosure and collection files, and the communications log regarding the Plaintiff’s loan. It required over a full business day to create this reconciliation.

18. While HomEq’s data records can produce a report reflecting advances by type posted to serviced loans, this data does not reflect when the underlying charge was incurred or whether the debtor was in bankruptcy at the time the charge was posted. Nor does the data reflect whether the underlying bill was incurred pre-petition, pre-confirmation or post-confirmation, whether the particular advance was included in a proof of claim or an amended proof of claim, or whether it was approved as part of a Chapter 13 plan, a motion for relief from stay, a Rule 2016 Motion or by other court order. It also does not reflect whether the bankruptcy was dismissed without discharge. If the advance was incurred while the debtor was not in

bankruptcy, the data does not reflect whether the particular advance was approved in a foreclosure or collection action, or was compromised in a settlement with the debtor. Nor does this data reflect whether the advance was paid, written off, or reclassified as non-recoverable or third party recoverable.

19. In order to determine the circumstances and timing under which an advance was posted, whether it has been repaid by a debtor, approved or allowed by a court, compromised or written off, requires reconciliation with data and information from many data and paper sources. This would require the review and reconciliation of the communications loan on each debtor's loan, each debtor's bankruptcy, foreclosure and collection files (data and paper), payment records, bankruptcy and foreclosure filings, and sometimes underlying bills and correspondence with third party providers of default related services. The burden to accomplish this for all bankrupt loans serviced by HomEq is insurmountable.

20. In my personal experience, in excess of 80% of all HomEq serviced loans that are involved with a Chapter 13 proceeding ultimately result in a failure by the debtor to satisfy his/her Chapter 13 plan requirements. In those situations, HomEq typically files a motion for relief from the automatic stay and includes any recorded corporate advances as part of the total amount claimed.

21. In a significant number of HomEq bankruptcy files, corporate advances are written off. For example, this is the case whenever a foreclosure sale results in a deficiency; as it is HomEq's usual practice to write off any deficiency amount and not pursue the debtor post-foreclosure. Furthermore, whenever a debtor tenders a deed in lieu of foreclosure, the forgiveness of any deficiency (including any outstanding corporate advances) is one of the benefits received by the debtor.

22. Detail of the specific postings which Plaintiff challenges herein is set forth in Exhibit 2 to the Complaint. This exhibit was a letter sent by HomEq to the Plaintiff on August 6, 2001 in response to an inquiry from the Plaintiff. The advances detailed in the August 6, 2001 letter are reflected on the Transaction History Reconciliation for the Plaintiff's loan attached as an exhibit to the Opposition. An explanation of each advance, reflecting the underlying service date and the posting date is detailed in the chart below:

<i>Nature of Advance Complained Of</i>	<i>Amount</i>	<i>Date Of 3<sup>rd</sup> Party Service (if applicable)</i>	<i>Date Posted (i.e. date paid by HomEq)</i>	<i>Pre-Petition, Post-Petition/Pre-Conf. Or Post-Confirmation</i>
Breach Letter Fee	35.00	11/98	11/11/98	Pre-Petition
Breach Letter	35.00	02/99	02/25/99	Pre-Petition
Appraisal (BPO)	250.00	01/30/99	02/22/99	Pre-Petition
Appraisal (BPO)	250.00	11/18/99	12/02/99	Post-Confirmation
Appraisal (BPO)	250.00	05/01/00	05/18/00	Post-Confirmation
Appraisal (BPO)	255.00	11/06/00	11/21/00	Post-Confirmation
Appraisal (BPO)	285.00	04/24/01	05/08/01	Post-Confirmation
Foreclosure fees	350.00	02/99	04/15/99	Pre-Petition
POC fees	250.00	03/99	04/23/99	Post Petition
Attys Fees	50.00	11/23/00	12/11/00	Post-Confirmation
Delinquent Taxes	583.99		02/24/00	Post-Confirmation
P&I shortage advance	.20		02/10/98	Pre-Petition
P&I shortage advance	250.00		12/12/00	Post-Confirmation
TOTAL	2844.19			

23. Attached to the Opposition as an exhibit are copies of records reflecting the services and invoices underlying the advances for third party services reflected in this chart.

24. These advances are provided for under the terms of the Plaintiff's loan. The tax payment, for example, served to preserve the Deed of Trust on the Plaintiff's home securing her loan. Some of the advances reflected in this chart were part of HomEq's proof of claim in the Plaintiff's initial bankruptcy. Others were later reclassified as "Non-Recoverable Corporate Advances" or "Third Party Recoverable" as reflected on the Transactional History Reconciliation for the Plaintiff's loan.

25. The Plaintiff has also challenged advances made following the discharge of her 1999 bankruptcy. Following her discharge, the Plaintiff again fell into arrears and was sent a breach letter dated February 14, 2003, providing notice of her default and of her right to cure this arrearage by paying the amount necessary to bring her loan current, described in this letter as “the sum of payments that have come due on or after the date of default, 01/07/2003, plus late charges, periodic adjustments to the monthly payment amount (if applicable) and other expenses associated with collection, all of which total \$3,640.11.”

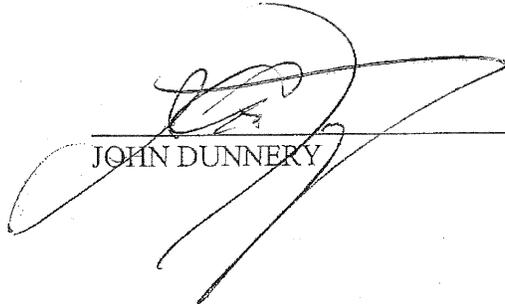
26. The corporate advances outstanding on Plaintiff’s loan were later detailed by HomeEq in a payoff statement requested by the Plaintiff’s counsel. This payoff statement and the February 14, 2003 breach letter were issued while the Plaintiff was not in bankruptcy.

27. After the Plaintiff returned to bankruptcy, the corporate advances on her loan were reclassified as “non-recoverable” and “3<sup>rd</sup> Party Recoverable” as reflected on her Transactional History Reconciliation. HomeEq has not collected these reclassified advances and does not intend to do so.

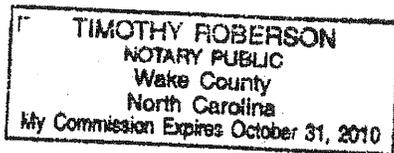
28. The documents referred to herein and attached as Exhibits of the Opposition are accurate copies of business records of HomeEq. These records were created or obtained, and have been maintained by HomeEq in the ordinary course of its business.

I HEREBY SWEAR AND AFFIRM UNDER THE PENALTIES OF PERJURY THAT THE MATTERS AND FACTS SET FORTH IN THE FOREGOING AFFIDAVIT ARE TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE, INFORMATION AND BELIEF.

June 23, 2006  
Date

  
JOHN DUNNERY

SWORN TO BEFORE ME THIS 23 day of June, 2006.



My Commission Expires: \_\_\_\_\_

  
Notary Public