AMERICAN BANKRUPTCY INSTITUTE

Consumer Claims against Creditors

Ramona D. Elliott, Moderator
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CONSUMER CLAIMS AGAINST CREDITORS

LEONARD DePASQUALE

ROBERT GAMBRELL

ROBERT A. BYRD

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NACA List Serve - Mortgage Lending

Center for Responsible Lending - www. responsiblelending.org

HOEPA rate table

www.federalreserve.gov/releases/H15/data.htm

Mississippi Department of Banking and Consumer Finance
http://www.dbcf.state.ms.us/mortgage_lending.htm

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by the American Board of Certification

May 20, 2008

Mortgage Company
111 Some Street
Somewhere, USA

Re:	Debtors Name:	John Doe & Jane Doe
	Debtors Address:	12345 Some Street, Biloxi, MS 39530
	Chapter 13 Case No:	06-00000 DWH
	File Date:	October 13, 2006

Dear Sir/Madam:

Please treat this letter as a "qualified written request" the Real Estate Settlement Procedures Act, 12 U.S.C. §2605(e). This request is made on behalf of my clients, the above named debtors, based on the pending dispute in their Chapter 13 case. Specifically, I am requesting the following information:

1. The amount of any legal fees added to the principal debt in this case or charged against the account for any post-filing legal services.

2. The amount of any property inspection fees, property preservation fees, broker price opinion fees, bankruptcy monitoring fees, or other similar fees or expenses added to the principal debt or charged against the account post-petition or associated with any account related to this loan.

3. The amount of any post-petition arrears, including the months that the payments were missed, the aggregate late charges imposed, and the basis for the imposition of each late charge fee.

4. The current amount needed to payoff the loan in full in the form of an itemized printed payoff report.

5. A complete payment transaction history for this loan from January 1, 2001 to the present, including all entries of any nature in the form of a debit, a credit, transfer or otherwise.

6. The amount of any funds deposited in any post-petition suspense accounts or corporate advance accounts or any other similar accounts and the description of all payments from any such accounts, including the date of the payment, the purpose or nature of the payment, and the amount of each such payment.

7. A full and complete comprehensible definitional dictionary of all transaction codes and other similar terms used in the statements requested above.

Sincerely yours,

Robert Gambrell

RG/dew

cc: Terre M. Vardaman, Trustee
Mr. & Ms. John Doe

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

JOHN DOE and JANE DOE	**CHAPTER 13** **NO. 11-11111 SEG**
JOHN DOE and JANE DOE	**PLAINTIFFS**
VS.	**ADV NO. 11-11111**
THE MORTGAGE COMPANY	**DEFENDANT**

COMPLAINT

INTRODUCTION

1. This is an action for actual and punitive damages filed by the Debtors/Plaintiffs pursuant to Sections 105, 362, 502, 503 and 506 of the Bankruptcy Code, Rule 2016, and others of the Federal Rules of Bankruptcy Procedure, the Fair Debt Collections Practices Act, 15 U.S.C. Section 1692 et seq. ("FDCPA"), 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, other state and federal statutes and common law claims.

2. This action is also filed to enforce the Chapter 13 Plan and Order of Confirmation duly entered in this Chapter13 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.

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. The Plaintiffs in this case were and are the Debtors under Chapter 13 of Title 11 of the United States Code in the above entitled Chapter 13 case number, which case is presently pending before this Court. The Plaintiffs are hereinafter referred to as the Plaintiffs or the Does.

10. The Defendant, The Mortgage Company (referred to as "TMC"), has already been served with process in this action and has filed an answer to the previous Complaint.

Factual Allegations

11. The above Plaintiffs/Debtors filed for relief under Chapter 13 on the 10th day of December,2003 in the above styled and numbered bankruptcy proceeding.

12. TMC was a lender who was treated as a secured lender with the arrears paid through the Chapter 13 Plan, and was paid in full under protest at the time the lender was paid off by check in the amount of $58,119.16, dated January 25, 2005.

13. During the course of the Chapter 13 Plan, TMC withdrew its proof of claim resulting in the Plaintiffs/Debtors completing their Chapter 13 Plan earlier than expected and receiving a discharge. The Trustee's final report on the initial closing of the case was entered on August 18, 2003.

14. Thereafter, TMC sought to collect the arrears that were unpaid as a result of TMC having withdrawn its proof of claim. As a result, TMC refused to accept monthly payments from the Plaintiffs resulting in them falling further behind.

15. On October 27, 2003, the Plaintiffs filed a Motion to Reopen their Chapter 13 Bankruptcy and an Order was entered by this Court on December 2, 2003, reopening the Chapter 13 Bankruptcy.

16. Thereafter, a modified plan was filed on December 8, 2003, and an Order was entered on January 16, 2004, approving the modified plan setting the amount of the additional mortgage arrears to be paid to TMC at $4,902.96.

17. Thereafter, the Does made each and every payment when due up until the time the loan was paid off in its entirety by check dated January 25, 2005. A copy of said payoff check is attached hereto as Exhibit "A" and incorporated herein.

18. The Plaintiffs would show that during the course of the reopened bankruptcy, TMC was paid the sum of $3,467.33. Thus, the remaining amount owed on the post-petition and pre-petition arrears was $1,435.63.

19. A copy of the payoff statement generated by TMC dated November 22, 2004, is attached hereto as Exhibit "B" and incorporated herein. That payoff statement requires numerous charges which exceed the amount allowed to be collected by TMC as the amount of arrears was set by the Order of this Court entered on January 16, 2004.

20. The Plaintiffs submit that this Court should order TMC to reimburse the Does the proper amount which was overpaid at the time the loan was closed paying off TMC.

21. The Plaintiffs would further show that they attempted to obtain a payoff statement from TMC in August of 2004. When the Does finally received a payoff figure, they realized that the amount was substantially greater than the amount to which they would have been entitled. As a result, counsel for the Plaintiffs wrote TMC a letter on October 22, 2004, requesting a proper payoff. A copy of that correspondence is attached hereto as Exhibit "C" and incorporated herein.

22. As a result of the excessive amount of time that expired between the time period the Plaintiffs initially contacted TMC requesting a proper payoff was finally received in November of 2004, (which the Plaintiffs contend was still excessive), the Plaintiffs incurred additional expenses obtaining their loan in the form of an addition one (1%) percent loan closing or origination fee. Thus, the Plaintiffs contend that they are entitled to additional damages in the amount of $670.00 for the increased loan closing cost together with an additional $400.00 appraisal fees as a result of the appraiser having to re-appraise the property on two separate occasions.

23. The payoff statement from TMC included a "Recoverable Balance" of $1,146.00, "Late Charges and/or Ohter Outstanding Fees" of $469.36. The "Recoverable Balance" includes

charges for late fees, property inspections and other fees and charges assessed to the Does' loan during the Chapter 13 Bankruptcy proceeding. The payoff also included an "Escrow/Impound Overdraft" of $1,247.66 and a "Suspense Balance" credit of $522.16.

24. The Does allege that these charges are improper, unauthorized and unapproved post-petition fees and charges assessed to their mortgage loan.

25. The Plaintiffs have been damages 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.

First Claim for Relief
(Violation of the Automatic Stay)

26. The allegations in paragraphs 1 through 25 of this Complaint are re-alleged and incorporated herein by this reference.

27. The actions of TMC in imposing improper, unauthorized and unapproved fees and charges to the Does' mortgage loan account, constitute a gross violation of the automatic stay as set forth in 11 U.S.C. Section 362(a)(3).

28. The imposition of the said unapproved fees constitutes unlawful and illegal bankruptcy fees in violation of the automatic stay.

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

Second Claim for Relief
(Fair Debt Collection Practices Act)

30. The allegations in paragraphs 1 through 29 of this Complaint are re-alleged and incorporated herein by this reference.

31. TMC violated the FDCPA. TMC's violations include but are not limited to engaging in any conduct the natural consequences of this is to harass, oppress or abuse any person in connection with the collection of a debt, 15 U.S.C. Section 1692d; use of false, deceptive or misleading representation or means in connection with the collection of any debt, Section 1692e; use of unfair or unconscionable means to collect or attempt to collect any debt, Section 1692f.

32. As a result of the above violations of the FDCPA, TMC 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 if Title 11 of the United States Code)

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

34. The actions of TMC by charging post-petition 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:

> "Any 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."

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

Fourth Claim for Relief
(Improper and Unauthorized Fees)

36. The allegations in paragraphs 1 through 35 of this Complaint are re-alleged and incorporated herein by this reference

37. The actions alleged herein are acts in violation of Section 506 of Title 11 of the Untied States Code as the said fees charged by TMC were not part of the underlying agreement by and between the original lender and the Does, and the fees and costs are otherwise unreasonable and excessive.

38. The Plaintiffs further allege, upon information and belief, that the said fees are in violation of the Chapter 13 Plan, the Confirmation Order and rulings of the Bankruptcy Courts for the Southern and Northern Districts.

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

Fifth Claim for Relief
(Common Law Claims and Violations)

40. The allegations in paragraphs 1 through 39 of this Complaint are re-alleged and incorporated herein by this reference.

41. The actions alleged herein are acts that also fall within the common law definitions of deception and deceptive acts and practices, misleading, unfair acts or practices, unconscionable acts and practices, and breach of the obligation of good faith and fair dealing, without reference to any particular statute.

42. The Plaintiffs further allege that the actions alleged herein are also acts that fall within the common loan definitions of breach of contract and breach of the underlying loan

agreement as the said fees charged by TMC were not part of the underlying agreement by and between the lender and the Does and the fees and costs are otherwise unreasonable and excessive.

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

Sixth Claim for Relief
(Misapplication of Mortgage Payments)

44. The allegations in paragraphs 1 through 43 of this Complaint are re-alleged and incorporated herein by this reference.

45. The actions alleged herein result from the misapplication of mortgage payments, received by TMC, and the resulting fees and costs are otherwise unreasonable, excessive, unfair and deceptive.

46. The Plaintiffs further allege that the said mortgage payments were not applied pursuant to and in the Order required by the application of payments provisions and covenants set our in the underlying loan documents and are in violation of said covenants and such misapplication constitutes a breach of the underlying agreement and loan documents.

47. The Plaintiffs further allege that the said misapplication of said mortgage payments involved the use of a "suspense account" which was not authorized by the underlying mortgage documents and is in breach of the underlying loan documents.

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

Seventh Claim for Relief
(Violation of RESPA)

49. The allegations in paragraphs 1 through 48 of this Complaint are re-alleged and incorporated herein by this reference.

50. TMC 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.

51. The Does and their prior counsel sent numerous written requests and complaints to TMC in an effort to resolve some of the issues and violations set out herein. Each one of these writings was a QWR or "qualified written request". TMC failed to acknowledge each QWR within 20 days if receipt as required by Section 2605(e)(1)(A) of Title 12 of the United States Code and Section 3500.21(e)(1) of Req. X.

52. TMC did not, within 60 days of receipt of the "qualified written request", provide the information requested and inform the Plaintiffs or their counsel 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 Req. X.

53. TMC has failed to comply with Section 2605 of Title 12 of the United States Code.

54. Pursuant to Section 2605(f) of Title 12 of the United States Code and Section 3500.21(f) of Req. X, the Plaintiffs may recover of the Defendant, actual damages, costs and reasonable attorney's fees for each failure of TMC 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 Mortgage Company, 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 attorneys;

E. That this Court order TMC to pay additional actual damages and statutory damages in a sum to be determined by the Court for violating FDCPA pursuant to 15 U.S.C. Section 1692k;

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

Dated this 12 September, 2007.

/s/ Robert Gambrell

Robert Gambrell, Atty for Plaintiffs
Gambrell & Thornburg, PLLC
2462 Pass Road
Biloxi, MS 39535
(228)388-9316
(228)388-4433 Fax
MS Bar #4409

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI

IN RE: PATRICK & TINA McGREGOR **DEBTORS**	**CASE NO: 07-13173**
PATRICK & TINA McGREGOR, **PLAINTIFFS**	
v.	**ADVERSARY NO. 08-01005**
B-REAL, LLC **DEFENDANT**	

COMPLAINT

COME NOW the Plaintiffs in the above-styled bankruptcy case, by and through their counsel, Mitchell, Cunningham & Fava, Inc., and file this Complaint objecting to the proof of claim filed by defendant. Plaintiffs pray this Honorable Court, through its powers, will award actual and punitive damages and sanctions against the Defendant pursuant to 11. U.S.C. § 105(a), 362(a)(3) and 502(b)(1) and Rule 3001 of the Federal Rules of Bankruptcy Procedure:

Jurisdiction and Venue

1. This matter is a core proceeding and therefore the Bankruptcy Court has jurisdiction to enter a final order.

2. 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.

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

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

Parties

5. Plaintiffs are citizens and residents of Horn Lake, DeSoto County, Mississippi, and are debtors under Chapter13 of Title 11 of the United States Code, case no. 07-13173, which case is presently pending before this Court.

6. The Defendant, B-Real, LLC, is upon information and belief a corporation engaged in the business of debt collection located at P.O. Box 91121, Seattle, Washington 98111-9221. Its Registered Agent for service of process is Edward Barton that is located at 2101 Fourth Ave., #1030, Seattle, Washington 98121.

Facts

7. On September 7, 2007, Plaintiffs commenced the current Chapter 13 proceeding by filing a voluntary petition and Chapter 13 Plan with this Court. Plaintiffs did not list B-Real, LLC in their Schedules.

8. The 341(a) meeting of creditors was held in Southaven, Mississippi on October 16, 2007.

9. On January 3, 2008 B-Real, LLC filed a sworn proof of claim in the Plaintiffs' Chapter 13 case which was marked Claim No. 3. A copy of this claim is attached hereto and marked "Exhibit A".

10. Defendant's claim was filed for an alleged unsecured debt of $365.00 and stated that the original creditor was "SE Emergency Physicians QCM398" for "Services Performed". In the section titled "Date debt was incurred:" Defendant listed "Charges made Prior to Filing". On the attached sheet Defendant lists 07/13/2004 as the "Open Date".

11. Plaintiffs' did not know the origin of this debt and their attorney contacted Defendant at the phone number listed on the proof of claim. Plaintiffs' attorney spoke to a representative of Defendant that identified herself as "Carrie" who stated they had no further information on the account and did not know what the "Open Date" on the proof of claim meant.

12. Upon information and belief, the proof of claim filed by Defendant is a computer-generated claim produced by merging bankruptcy debtor name databases and PACER to produce proof of claims with very little to no human intervention, review, or signature.

13. The Defendant in this matter is a sophisticated debt collector who is well versed in bankruptcy law and procedure and files proofs of claims in bankruptcy cases on a regular basis.

FIRST CLAIM – OBJECTION TO PROOF OF CLAIM

14. The allegations of paragraphs 1-13 above are realleged and incorporated herein by reference.

15. Plaintiffs allege that the sworn proof of claim filed by Defendant in this case is for a debt that is not a valid debt of the Plaintiffs.

16. Plaintiffs allege that Defendant undertook no meaningful review procedures to determine if this claim was disqualified for collection before the preparation and filing of said claim with this Court. The Plantiffs allege that any such review would have revealed that collection of the underlying debt is barred by the applicable state statute of limitations. The Plaintiffs specifically and affirmatively raise the statute of limitations pursuant to Section 502(b)(1) of the Bankruptcy Code.

17. By filing this proof of claim Defendant is attempting to collect a debt through judicial means.

18. As a result of the above acts and/or omissions, Defendant is liable to Plaintiffs for actual damages, punitive damages and legal fees in an amount to be determined by the Court under Section 105(a) of the Bankruptcy Code, and said claim should be disallowed.

SECOND CLAIM – VIOLATION OF RULE 3001

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

20. Plaintiffs allege that Defendant 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 and without any proof of the proper assignment of the claim, if any. The Plaintiffs also allege that such claim was prepared and filed without any regard to the "Instructions for Filing" attached to the Official Proof of Claim form.

21. Plaintiffs further allege that Defendant intentionally failed to implement adequate bankruptcy controls, which caused the unlawful and improper actions as alleged herein, and these actions are normal practice for Defendant. Plaintiffs and his attorney have been caused to expend a tremendous amount of time and expense in attempting to resolve the issues at hand.

22. As a result, Defendant is liable to Plaintiffs for monetary damages, punitive damages, costs and legal fees as may be determined by the court under Section 105(a) of the Bankruptcy Code.

THIRD CLAIM – STATUTE OF LIMITATIONS

23. The allegations of paragraphs 1-22 above are realleged and incorporated herein by reference.

24. Plaintiffs allege that the debt that Defendant is attempting to collect is barred by the applicable statute of limitations. However, as noted above, Defendant has been unable to produce any such information on the origination of this debt.

25. The applicable statute of limitations in Mississippi is three years from the date of breach for Credit Cards, Contracts and Promissory Notes (Miss. Code §75-2-725 and §15-1-49) and three years from the date at which time the items on the account became due and payable for Open Accounts (Miss. Code §15-1-29).

26. That the United States Supreme Court in *Travelers Casualty and Surety Co. v. Pacific Gas and Electric Co.*, 127 S.Ct. 1199,(2007) held that applicable non-bankruptcy law applies in bankruptcy cases and that under 11 U.S.C. §502(b)(1) claims may be disallowed if the claim cannot be enforced against the debtor under applicable law. In *Skiba v. Estate of Marta Tobias*, 297 B.R. 435 (W.D.Pa.2003), the Court held that applicable state statutes of limitations constituted applicable state law as it pertained to 11 U.S.C. §502(b)(1) and disallowed claims in bankruptcy.

27. Rule 8(c) of the Mississippi rules of Civil Procedure states that the statute of limitations is an affirmative defense that must be raised or the defense is waived.

28. Therefore, the Plaintiffs are hereby invoking the affirmative defense of the statute of limitations to the proof of claim filed by the Defendant.

29. Upon information and belief, Defendant is attempting to exploit Plaintiffs by creating a debt collection loophole on debts otherwise not collectable outside of Bankruptcy.

30. The claim filed by Defendant should be disallowed with prejudice and this Court should direct the Chapter13 Trustee to strike said claim.

31. Further, the Defendant should be precluded from filing any amended, modified or substitute claim in this case and the underlying debt be canceled and forever discharged whether or not the debtor receives a Discharge Order in this case.

FOURTH CLAIM – AUTOMATIC STAY VIOLATION

32. The allegations of paragraphs 1-31 above are realleged and incorporated herein by reference.

33. The Plaintiffs allege that the Defendant in this has willfully and intentionally filed the claim with this Court with full knowledge that said claim was barred by the applicable statue of limitations.

34. The Plaintiffs allege that such actions by the Defendant are prejudicial to the other unsecured claimants in this case with valid and enforceable claims against this estate in bankruptcy and could otherwise damage the Plaintiffs by the need to increase the monthly plan payments.

35. The Plaintiffs allege that by filing these claims the Defendant engaged in an "act" to "obtain possession of property of the estate or of property from the estate" in violation of Section 362(a)(3) of the Bankruptcy Code.

36. As a result, the Plaintiffs are entitled to the recovery of actual damages, punitive damages and reasonable legal fees.

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

A. That the Proof of Claim filed by Defendant be disallowed and stricken, with prejudice;

B. That the underlying debt be canceled and forever discharged whether or not the debtor receives a Discharge Order in this case;

C. That a show cause order be issues to determine whether the Defendant's procedures fulfill its obligations under Rule 3001 and Rule 9011 in filing proofs of claims in this district;

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

E. 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;

F. That the Plaintiffs have and recover against the Defendant all reasonable legal fees and expenses incurred by their attorney; and

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

Date this the 10th day of January, 2008.

/s/William L. Fava
WILLIAM L. FAVA (MSB# 101348)
Mitchell, Cunningham & Fava, Inc.
Attorneys for Plaintiffs

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UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI

In Re: JOHN SAMPLE and SARAH SAMPLE — CHAPTER 13
NO: 06-00000 DWH

JOHN SAMPLE and
SARAH SAMPLE — PLAINTIFFS

VS. — ADV. NO. _____ DWH

THE MORTGAGE CO. — DEFENDANT

COMPLAINT TO SET ASIDE DEED OF TRUST
AND AVOID LIEN OF THE MORTGAGE CO.

COMES NOW, JOHN SAMPLE and SARAH SAMPLE, Plaintiffs in the above styled and numbered cause, by and through undersigned counsel, and file this their Complaint to Set Aside Deed of Trust and Avoid Lien of The Mortgage Co., respectfully showing unto the Court as follows:

1. This Court has jurisdiction over the parties and the subject matter pursuant to 28 U.S.C. §1334 and this is a core proceeding pursuant to 28 U.S.C. §157(2)(A) & (K).

2. Plaintiffs filed a petition for relief under Chapter 13 of the Bankruptcy Code on the 5th day of March, 2006, in the above styled and numbered cause.

3. The Defendant, The Mortgage Co. is a California corporation which is authorized to do business in the State of Mississippi.

4. Prior to the filing of the bankruptcy petition, the Plaintiff, John Sample, executed a promissory note and deed of trust in favor of the Defendant. A copy of the deed of trust entered into between the parties on March 16, 2005, is attached hereto as Exhibit "A" and incorporated herein.

5. That on March 16, 2005, at the time the deed of trust was signed by the parties, Sarah Sample, the wife of John Sample, was residing in the premises located at 130 Triple A Street, Oxford, Mississippi. Thus, the property in question is the homestead of the Plaintiffs. The legal description of said parcel being more particularly described on Exhibit "B" which is attached hereto and incorporated herein.

6. That the deed of trust was only signed by John Sample, the husband in the marriage between the Plaintiffs.

7. That under Mississippi law, a deed of trust which is signed solely by one spouse is void as to all parties if the property conveyed is the homestead of the parties.

8. As a result of the foregoing, this the deed of trust of March 16, 2005 is entitled to be set aside and determined to be void pursuant to Mississippi law.

WHEREFORE, Plaintiffs pray that upon a hearing hereon, this Court will enter its Order setting aside the deed of trust entered on March 16, 2005, attached hereto as Exhibit "A" by declaring that the deed of trust is void pursuant to Mississippi law. Plaintiffs pray for such other, further and general relief to which they may be entitled.

Respectfully Submitted,
JOHN SAMPLE and SARAH SAMPLE,
Plaintiffs

By: /s/ Robert Gambrell
ROBERT GAMBRELL, Atty for Plaintiffs
Gambrell & Thornburg, PLLC
106 King Street
Oxford, MS 38655
662-281-8800 / 662-202-1004 (fax)
MS Bar #4409

Identifying a Predatory Loan: Document Review Checklist

1. Essential Documents

(1) TILA Disclosure
(2) Notice of Right to Cancel
(3) HUD-1 or HUD-1A Settlement Statement
(4) Section 32 (or "HOEPA") Notice
(5) Mortgage Note
(6) Loan Application
(7) Broker Agreement

2. Looking for violations

Truth in Lending

(1) Does the TILA Disclosure accurately and conspicuously display the APR, Finance Charge, Amount Financed, Total of Payments and Payment Schedule?
(2) Check the math. Does everything add up?
(3) Check the Notice of Right to Cancel.

Home Ownership Equity Protection Act

(1) Is this a HOEPA loan?
APR threshold - Check the T-bill rate from the 15th of the month before the date of the loan application. As of December 2002, if it is 8% plus the T-bill rate, the loan is covered by HOEPA.
(2) Fees - Do the HOEPA points and fees exceed 8% of the "total loan amount"?
(3) If this is a HOEPA loan, did the borrower receive the Section 32 notice 3 days before closing?
(4) If this is a HOEPA loan, does it include prohibited terms, i.e. prepayment penalty, balloon, default acceleration?

Mississippi Consumer Loan Broker Act
(1) Is there a written agreement?
(2) Does the broker fee exceed 3% of the loan amount?
(3) Was the broker fee paid outside the closing?

DO YOU HAVE A CASE?

What Your Lawyer Needs to Know About Your Claim Against a Predatory Lender or Servicer

(You probably can complete this questionnaire without assistance. But we recommend you ask someone to help you if anything is not clear. When you finish, give it and the other information requested in it to your lawyer or to us at our address below.)

Prepared by:
Carol Cross Stone
P. O. Box 8299
Biloxi, MS 39535-8299
Telephone: 228-388-9316
Fax: 228-388-4433

INITIAL QUESTIONNAIRE

Please complete and return this questionnaire so that we can decide faster whether or not we can assist you. Even if we can't help, this information may assist another lawyer in doing so.

Date _____

Your Name(s) _____

Street, City and County of Residence _____

_____

Telephone number, including area code: _____

E-Mail address:_____

Important: Date of mortgage _____

Original Amount $_____ Interest Rate _____%

From whom did you borrow money originally?_____

To whom do you make payments now?_____

Total monthly payment $_____ Months behind _____

Total monthly income $_____

Foreclosure status:

Important: Sale date (if scheduled) _____

Important: Value of your home now $_____

Reasons You Believe There May Be a Legal Problem: (attach pages in necessary)

Please list here all other lawyers you have contacted about this problem:

_____

Is any lawyer **now** representing you concerning this problem?_____

We need the following information in all cases:

1. **All medical records that show the borrowers were incapable of making financial decisions at the time the mortgage loan was made.** *An* AUTHORIZATION FOR RELEASE OF MEDICAL RECORDS *is attached so that you may use a copy of it to obtain the records from physicians, counselors, hospitals, and others. Use one for each request for records.*

2. **All records you were given before, at or after the loan closing by the company from whom you borrowed.** *If you do not have them, please use a copy of the same* AUTHORIZATION FOR RELEASE OF FINANCIAL INFORMATION *along with a covering letter in your own words. Send it to whoever has your records.*

We also want the information below <u>if it is pertinent</u>:

3. The worksheet that is attached showing the **HISTORY OF PAYMENTS**. *Complete it if your payments are current or if there is a dispute about how much you owe.*

4. The **QUESTIONNAIRE ABOUT DEBT COLLECTORS** that is attached. *Complete it if you are being harassed by a loan servicer or a debt collector.*

5. The **LOAN QUESTIONNAIRE** that is attached. *Complete it if you believe you were deceived by someone about the loan you received.*

QUESTIONNAIRE ABOUT DEBT COLLECTORS

Attempts to Locate You

1. Did a representative of the debt collector communicate with any person–such as your employer–for the purpose of locating you?

   ___Yes ___No With whom and when?_____

2. In seeking to locate you, did the representative of the debt collector identify the debt collector for whom he or she was working?

   ___Yes ___No ___Not Applicable

3. In seeking to locate you, did the representative of the debt collector state that you owed a debt?

   ___Yes ___No ___Not Applicable

4. In seeking to locate you, did the representative of the debt collector communicate with any such person more than once?

   ___Yes ___No ___Not Applicable

   If so, how many times?_____

5. In seeking to locate you, did the debt collector communicate by post card?

   ___Yes ___No ___Not Applicable

   If so, when?_____

Communication with Your or Others by the Debt Collector

6. Did the debt collector communicate with you at any unusual time or place or a time or place it should have been known was inconvenient to you?

   ___Yes ___No If so, when?_____

7. Did the debt collector communicate with you after it knew you were represented by an attorney with respect to the debt?

   ___Yes ___No If so, when?_____

8. In seeking to locate you after it learned that an attorney represented you, did the debt collector communicate with any person other than your attorney?

___Yes ___No ___ Not Applicable

If so, when?_____

9. Did the debt collector communicate with you at your place of employment although it had reason to know that your employer prohibited you from receiving that type of communication?

___Yes ___No If so, when?_____

10. Did the debt collector communicate with any person–such as your friend or your fellow employee–about the debt?

___Yes ___No If so, to whom and when?_____

11. Did you notify the debt collector in writing that you refused to pay the debt or that you wished the debt collector would cease further communication to you?

___Yes ___No If so, when?_____

12. Did the debt collector nevertheless communicate further with you regarding the debt?

___Yes ___No ___Not Applicable

If so, what did it say and when?_____

13. If the debt collector contacted you after it or the lender had been notified in writing that you wished it to cease further communication with you, what did you say to the debt collector and when?_____

___ Not Applicable

Harassment or Abuse

14. Did the debt collector cause a telephone to ring or engage in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number?

___Yes ___No If so, when and how?_____

15. Did the debt collector place telephone calls without meaningful disclosure of the caller's identity?

___Yes ___No If so, when and how?_____

16. Did the debt collector use obscenity or profanity?

___Yes ___No If so, what was said?_____

17. Did the debt collector use racial, ethnic or other slurs?

___Yes ___No If so, what was said?_____

18. Did the debt collector use other language that would abuse the hearer or reader?

___Yes ___No If so, what was said?_____

19. Did the debt collector engage in name-calling or other derogatory remarks?

___Yes ___No If so, what was said?_____

20. Were telephone calls to you harassing, abusive or misleading in a way that is not otherwise described in this questionnaire?

___Yes ___No If so, how?_____

21. Did the telephone calls cause physical or mental harm to you?

___Yes ___No If so, what was the damage?_____

22. What was the name of the representative of the debt collector with whom you spoke?

_____

23. Do you believe that the representative of the debt collector used an alias?

___Yes ___No Why do you think so?_____

24. Did the debt collector threaten to call your employer unless the debt was paid?

___Yes ___No If so, when and how?_____

25. Did the debt collector falsely represent that your unpaid debt would be referred to attorney for immediate legal action?

___Yes ___No If so, when and how?_____

26. Did the debt collector do more than warn of embarrassment, inconvenience, and expense that might be cause by a lawsuit?

___Yes ___No If so, when and how?_____

27. Did the debt collector do more than warn that a lawsuit might be filed if the debt was not paid?

___Yes ___No If so, when and how?_____

28. Did the debt collector send a letter to you in the name of a person not employed by it?

___Yes ___No If so, when and how?_____

29. Did the debt collector send a letter to you using yellow paper and phrases and typeface indicating falsely that it was a telegram?

___Yes ___No If so, when and how?_____

30. Did the debt collector specifically say in its letters that they were attempts to collect the debt and that any information obtained as a result of them would be used for that purpose?

___Yes ___No

If not, which letters were these?_____

31. Did the debt collector falsely represent itself as a credit-reporting agency?

___Yes ___No If so, when and how?_____

32. Did the debt collector use or threaten the use of violence or other criminal means to harm the body, reputation, or property of any person?

___Yes ___No If so, when and how?_____

33. Did the debt collector publish a list of people who allegedly refuse to pay debts?

___Yes ___No If so, when and how?_____

34. Did the debt collector advertise the sale of your debt in order to coerce your payment?

___Yes ___No If so, when and how?_____

Unfair Practices

35. Did the debt collector accept from you a check or money order that was postdated by more than five days?

___Yes ___No

36. If it did accept a postdated check or money order from you, did the debt collector notify you in writing of its intent to deposit the check or money order?

___Yes ___No ___ Not Applicable

37. If so, did it say that it would deposit the check not less than three and not more than ten business days prior to the date it actually made the deposit?

___Yes ___No ___ Not Applicable

38. Did the debt collector threaten or institute criminal prosecution concerning your postdated check or money order?

___Yes ___No

39. Did the debt collector deposit–or threaten to deposit–your postdated check or money order prior to the date on it?

___Yes ___No

40. Did the debt collector make collect telephone calls or cause you to pay telegram or similar charges or fees?

___Yes ___No

41. Did the debt collector communicate with you by post card?

___Yes ___No

42. Did the debt collector use any misleading language or symbol–such as "Revenue Department" or "Circuit Court"– on any envelope when communicating with you by mail or telegram?

___Yes ___No What was it?_____

43. Did the debt collector attempt to collect any amount – such as a late fee or a service charge on a bad check–that was not specifically authorized by the agreement creating the debt or that was not permitted by law?

___Yes ___No

Notice of Your Right to Dispute the Debt

44. Did you receive a written notice from the debt collector containing all of the following information:

*the amount of the debt;

*the name of the creditor to whom the debt was said to owed;

*a statement that unless you, within 30 days after receipt of the notice, disputed the validity of any portion of the debt, it would be assumed to be valid;

*a statement that if you notified the debt collector in writing within the 30-day period that any portion of the debt was disputed, the debt collector would obtain verification of the debt and a copy of such verification would be mailed to you by the debt collector; and

*a statement that, upon your written request within the 30-day period, the debt collector would provide you with the name and address of the original creditor, if it was different from the current creditor.

___Yes ___No If so, when?_____

45. Did you notify the debt collector in writing within the 30-day period that any portion of the debt was disputed?

___Yes ___No ___ Not Applicable

If so, when?_____

46. Did you notify the debt collector in writing within the 30-day period that you requested the name and address of the original creditor?

___Yes ___No If so, when?_____

47. If you did notify the debt collector in writing, did it then cease collection of the debt until it obtained verification of the debt or the name and address of the original creditor?

___Yes ___No

48. Was a copy of the verification, or name and address of the original creditor, mailed to you by the debt collector?

___Yes ___No

49. Was the notice of your rights placed in such was as to be easily readable – and prominent enough to be noticed – by an unsophisticated person?

___Yes ___No

50. Was the notice of your rights overshadowed or contradicted by other messages in the notice?

___Yes ___No If so, how?_____

51. Was the notice of your rights on the front side of the letter or form sent to you?

___Yes ___No

52. Was the notice of your rights in the same size of print as the rest of the letter or notice sent to you?

___Yes ___No

53. Did you intend to dispute the debt but decide not to do so because the notice to you was confusing or misleading?

___Yes ___No If so, why?_____

54. Did the notice suggest to you that you should call – not write – to dispute the debt?

___Yes ___No

55. Did the notice contain language to the effect that your best interest would be served by paying the debt as soon as possible, despite the fact that you had 30 days to challenge its validity?

___Yes ___No

56. Did you receive a follow-up notice encouraging you ro pay – or demanding that you pay the debt within 30 days of the initial notice?

___Yes ___No If so, when?_____

Deceptive Forms

57. Did you receive a letter or other form leading you to believe that a person other than the creditor – say a debt collection agency or a lawyer – was attempting to collect a debt you owe, when in fact the person was <u>not</u> attempting to collect it?

___Yes ___No If so, when?_____

LOAN QUESTIONNAIRE

Name:_____ Date:_____

Solicitation of the Loan Application

1. What are the name and address of the mortgage company that originally helped you get the loan?_____
2. Do you know whether the mortgage company is under investigation or being sued? ___Yes ___No By whom?:_____
3. Do you know others who have borrowed money using this mortgage company and, if so, what are their names, addresses and telephone numbers? ___Yes ___No

   _____
4. How did you learn about the mortgage company? ___Telephone ___Mail ___Door-to-Door ___Radio or Television ___Word of Mouth ___Mortgage Broker
5. Did you have or did you develop a close and personal relationship with the mortgage company? ___Yes ___No
6. Did the mortgage company explain satisfactorily what its role would be? ___Yes ___No
7. Did the mortgage company satisfactorily explain what its charges would be? ___Yes ___No
8. What were you told were the benefits to you of refinancing?_____

   _____
9. What did the mortgage company say about your ability to repay the mortgage loan?

   _____
10. Was it realistic to believe then that you could repay the loan? ___Yes ___No
11. Were there any high-pressure sales tactics? ___Yes ___No
12. If so, what were the tactics?_____
13. What was the interest rate the mortgage company estimated you would pay?_____
14. What was the estimated monthly payment?_____
15. Were you told that the monthly payment would include the cost of the homeowner's insurance and real estate taxes? ___Yes ___No
16. What was the estimated dollar amount of the closing costs? (Alternatively, what was their

estimated percentage of the loan?)_____

17. Were you promised that you would receive cash from the refinancing at the closing?

___Yes ___No

18. If so, how much?_____

19. Did you say that you might hire an attorney for the closing? ___Yes ___No

20. If so, what were you told when you said you might hire an attorney for the closing?

_____

Loan Application

21. Who applied for the loan?_____

22. Did you read and sign the loan application? ___Yes ___No

23. Did you receive a copy of the loan application? ___Yes ___No

24. Now that you have read it, are there any mistakes in it? ___Yes ___No

25. If so, what are the mistakes?_____

26. Were you granted a loan in a higher amount than you requested, and you never received a denial of the lower amount? ___Yes ___No

27. Are you in a class which you believe is protected from discrimination under federal or state law, and if so, which one? ___Yes ___No Class:_____

After the Loan Application and Before the Loan Closing

28. Did you receive, within three business days after the loan application, a "Special Information Booklet" prepared by the Department of Housing and Urban Development?

___Yes ___No

29. Did you receive, within three business days after the loan application, a "Good Faith Estimate" of the amount or range of settlement charges? ___Yes ___No

30. Did you receive the following disclosure not less than three business days prior to the closing of the loan: ___Yes ___No

You are not required to complete this agreement merely because you have received these disclosures or have signed a loan application. If you obtain this loan, the lender will have a mortgage on your home. You could lose your home, any money you have put into it, if you do not meet your obligations under the loan.

31. Were you provided with any other written statements prior to the loan closing?

___Yes ___No

32. If so, what were they?_____

At the Loan Closing

33. Are the date on the loan documents accurate? ___Yes ___No
34. Who was present at the loan closing?_____
35. Where did the loan closing take place?_____
36. Were any of the signatures on the loan documents forged? ___Yes ___No
37. When you attempted to read the documents you were signing, were you encouraged or instructed not to do so? ___Yes ___No
38. If you were promised cash at the closing, did you receive any? ___Yes ___No
39. If so, was it the amount of cash you were promised? ___Yes ___No
40. Were any creditors paid off at the closing without your permission? ___Yes ___No
41. Were any loan proceeds not paid to your creditors as they were supposed to be? ___Yes ___No
42. Did anyone receive cash at the closing without your permission? ___Yes ___No
43. Was the interest rate what you were told it would be? ___Yes ___No
44. Was the monthly payment what you were told it would be? ___Yes ___No
45. Were you told orally that you had the right to cancel? ___Yes ___No
46. Was there an attorney present at the closing? ___Yes ___No
47. What did the closing agent say the closing costs were for?_____

_____

48. Were you told that the closing costs were reasonable and necessary? ___Yes ___No
49. What payments did the mortgage broker receive at the closing?_____

_____

50. Were the services actually performed so as to earn these payments? ___Yes ___No
51. Are the charges reasonable and necessary? ___Yes ___No
52. Was the notary public present when you signed the documents? ___Yes ___No

After the Closing

53. Was you pre-existing mortgage paid off? ___Yes ___No
54. Were other creditors actually paid as the settlement state indicates? ___Yes ___No

55. Were you required to buy a new homeowner's insurance policy? ___Yes ___No

56. If so, how much did it cost each month versus your existing insurance policy?

_____

57. When you fell behind in payments, were you told to stop transmitting payments unless they were for the full amount owed? ___Yes ___No

58. When you fell behind in monthly mortgage payments, did the mortgage company refinance the mortgage and add on more fees? ___Yes ___No

59. Have you payments been credited properly? ___Yes ___No

60. Have you been assessed late or other charges that you believe are improper? ___Yes ___No

61. Has the escrow account been properly handled? ___Yes ___No

62. Has your loan been transferred to a different lender and, if so, who? ___Yes ___No

Name and address: _____

63. Were you told in writing that you loan would be transferred? ___Yes ___No

Evidence

64. Do you know of any relationship or connection between the mortgage company and any subsequent owner of your loan? ___Yes ___No

65. If so, what is the relationship or connection? _____

66. Is there reason to believe that the bad acts of the mortgage company were known to the company that purchased your loan from it? ___Yes ___No

67. Is there a relationship or connection between any of the other individuals or companies that we might sue? ___Yes ___No

68. If so, what is the relationship or connection? _____

69. Is there any evidence you have that we have not asked for above? ___Yes ___No

70. If so, what is it? _____

_____

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

In Re: JOHN SMITH and JANE SMITH — **Chapter 13**
Case No: 07-00000 ERG

JOHN and JANE SMITH — **PLAINTIFFS**

VERSUS — **ADVERSARY NO. _____**

ABUSIVE MORTGAGE, LLC, HOLDING COMPANY, X COMPANY, Y COMPANY, JOHN DOE 1 AND JOHN DOE 2 — **DEFENDANTS**

COMPLAINT

PRELIMINARY STATEMENT

1. This is an action brought by elderly low income homeowners against a lender with whom they unknowingly entered into an exorbitantly priced mortgage loan. Plaintiffs seek rescission, actual and statutory damages under the Home Ownership and Equity Protection Act of 1994 (hereinafter "HOEPA"), 15 U.S.C. §§1602(aa) and 1639, and the Truth in Lending Act, 15 U.S.C. §§1601 et seq. and 1640(a). In addition, Plaintiffs seek damages under state common law, i.e. breach of implied covenant of good faith and fair dealing; breach of fiduciary duty; unconscionability; unjust enrichment; fraud and misrepresentation, and negligent lending.

2. Plaintiffs, JOHN SMITH and JANE SMITH are natural persons who reside at 1111 Any Street, Gulfport, Mississippi 39501. Defendant Abusive Mortgage, LLC (hereinafter "Abusive Mtg") is a corporation which conducted retail consumer loan operations in Mississippi through numerous branch offices. The loan which is the subject of this lawsuit

was made in Biloxi, Mississippi. Abusive Mtg's principal place of business is located at 9999 Busy Street, Big City, USA. At all relevant times, Abusive Mtg regularly extended consumer credit payable by written agreement in more than four installments or for which a finance charge is imposed.

4. Defendant, Abusive Mortgage, LLC is a foreign corporation doing business in the state of Mississippi. which conducted retail consumer loan operations in Mississippi through numerous branch offices. The loan which is the subject of this lawsuit was made in Biloxi, Mississippi. Abusive Mtg's principal place of business is located at 9999 Busy Street, Big City, USA. Its registered agent for service of process is C.T. Corporation System located in Jackson, Mississippi. At all relevant times, Abusive Mtg regularly extended consumer credit payable by written agreement in more than four installments or for which a finance charge is imposed.

5. Defendant Abusive Insurance Company ("Abusive Ins") is a foreign insurance company doing business throughout the State of Mississippi. Said corporation may be served with process by and through George Dale, Insurance Commissioner, at the Mississippi Department of Insurance, 1001 Woolfolk State Office Building, 501 North West Street, Jackson, Mississippi 39201.

6. Defendant, Wholly Owned Insurance Co. ("Wholly Owned Ins") is a foreign insurance company doing business throughout the State of Mississippi. Said corporation may be served with process by and through George Dale, Insurance Commissioner, at the Mississippi Department of Insurance, 1001 Woolfolk State Office Building, 501 North West Street, Jackson, Mississippi 39201.

7. Defendants John Doe 1 and John Doe 2 are natural persons or individuals who may

been assigned any right by Abusive Mtg or any other party herein and may have participated in any of the actionable activities set forth in this complaint.

8. Defendants, X Company and Y Company are corporations, limited liability corporations, limited liability partnerships, partnerships, or sole proprietorships which may been assigned any right by Abusive Mtg or any other party herein and/or may have participated in any of the actionable activities set forth in this complaint.

JURISDICTION AND VENUE

9. This Court has jurisdiction pursuant to 28 U.S.C. § 1334, and this is a core proceeding pursuant to 28 U.S.C. §§ 157(b)(2)(A), (B), and (K).

FACTUAL ALLEGATIONS

10. Plaintiffs own the home at 12345 Second Street, Biloxi, Mississippi 39530, which is their principal dwelling.

11. On June 24, 2001, Plaintiffs responded to an offer for a loan solicited by Defendant, Abusive Mortgage, LLC for an unsecured loan. Defendant Abusive Mortgage, LLC loaned Plaintiff $6,502.04 at 29.5% interest. The loan consisted of $502.04 for a credit life insurance premium, $50.00 in closing costs and a cash payment to Plaintiffs of $5,950.00.

12. Defendants used this high rate unsecured loan to secure Plaintiffs' trust, and convinced Plaintiffs, that Defendants would make a debt consolidation loan for Plaintiffs that would save them money, be at a lower interest rate, and for a shorter term. Defendants deceived Plaintiffs by presenting a loan consolidation using a presentation Abusive Mtg called the let me pay program. Under the let me pay program, Plaintiffs would make bimonthly payments, instead of monthly payments. Defendants did not explain to Plaintiffs that their monthly payment would actually be larger. Defendants also did not explain to Plaintiffs that

there

13. On July 19, 2005, Plaintiffs entered into a consumer credit transaction with Abusive Mtg in which Abusive Mtg extended consumer credit which was subject to a finance charge and which was initially payable to Abusive Mtg.

14. As part of the July 19, 2005 consumer credit transaction, Abusive Mtg acquired a security interest, namely a deed of trust in 12345 Second Street, Biloxi, Mississippi, which is used as the principal dwelling of the Plaintiffs.

15. In order to avoid giving Plaintiffs an advance look at the cost of the credit transaction, Abusive Mtg split Plaintiffs' loan into two transactions, falsely structuring one loan as an "open-end" loan. The closed end loan had a principal balance of $59,900.00. The open-end loan had a principal balance of $6,502.00.

16. Abusive Mtg failed to provide Plaintiffs with a good faith estimate or a HUD-1. Additionally, Abusive Mtg failed and refused to respond to a qualified written request for this loan documentation upon request by Plaintiffs on April 30, 2007. Plaintiffs have limited information about the loans, but a security agreement indicates that on the loan structured as "closed-end", Plaintiffs were charged $4,302.76 in "points," $7,789.95 for credit life insurance and $1740.00 for RELI insurance. The loan payments were much greater than Plaintiffs could reasonably afford to pay and inevitably Plaintiffs were unable to make said payments and were foreclosure was threatened by Defendants. To prevent the loss of their home, Plaintiffs filed for voluntary Chapter 13 bankruptcy on 9/30/2007.

17. The cost and terms of the various insurance products were not disclosed in a conspicuous and clear manner. The life insurance term was inaccurately represented to be sixty months. Plaintiff John Smith was sixty-two years old at the time the loan was taken out. The

insurance terminated at age sixty-five, yet the term of the policy indicated a sixty-month term, but in truth and in fact was less than a thirty-six month term. The term of the RELI insurance was likewise misrepresented. The term of the RELI insurance is which stated as both sixty months and from 07/19/2005 to 07/19/2035, a thirty year period.

18. Abusive Mtg required Plaintiffs to pay off a prior unsecured loan with Abusive Mtg and to consolidate existing unsecured short-term debt into the loan. Abusive Mtg charged Plaintiffs a hidden finance charge in paying off the prior unsecured loan of January 17, 2005 in that it failed to credit Plaintiffs for the closing costs and credit insurance products and charged a prepayment penalty on the payoff of this loan.

19. Further, Defendants required Plaintiffs to purchase credit life and real estate loan insurance. Because of Plaintiffs' ages and health, they were not eligible for credit life insurance, and if eligible, the policy itself ended the term at age sixty-five, less than three years of insurance overage. These insurance products were represented by Defendants as a necessary part of the loan package, with all or some of these insurance products misrepresented by Defendants as a necessary prerequisite for the extension of the credit and receipt of the loan. Credit insurance, for the most part, is unnecessary and overpriced. The price the Plaintiffs paid for this insurance goes for additional profits to the Defendants, rather than for the protection of the Plaintiffs. In this case, Defendants charged Plaintiffs almost $10,000 for credit insurance products. Defendants did not explain or disclose this to the Plaintiffs.

20. Loading of hidden profits to Defendants into the cost of credit insurance was detrimental to Plaintiffs. A comparison with regular term life insurance is telling, the premium for a credit life policy is consistently higher for the exact same coverage afforded under a term

life policy. Defendants did not explain or disclose this to the Plaintiffs.

21. Insurance packing refers to increasing Plaintiffs debt by padding or "packing" the amount financed through the sale of expensive, unnecessary, and often unwanted products, primarily insurance. One of the more subtle mechanisms by which insurance packing is imposed by Defendants is to stretch a loan's term, since the cost of the premiums increase with the term of the loan. Insurance padding has given Defendants excessive collateral and is "unconscionable." Defendants did not explain or disclose this to the Plaintiffs.

22. Defendants represented to Plaintiffs that the insurance was required as part of the loan. The language of the insurance disclosures was ambiguous and confusing with respect to what type of insurance was mandatory. Contrary to law, the Defendants actually required real estate loan insurance and credit life insurance in connection with its loans to Plaintiffs. These insurance products were represented by Defendants as a necessary part of the loan package, with all or some of these insurance products misrepresented by Defendants as a necessary prerequisite for the extension of the credit and receipt of the loan. These insurance products, however, are unnecessary as a matter of law. The premiums for Defendants' insurance products were excessive and/or inflated in comparison to other similar insurance products available in the marketplace. However, only the products with inflated premiums were sold and/or offered by Defendants. Additionally, insurance premiums were inflated falsely due to undisclosed commissions that Defendants received for selling the insurance. In fact, Defendants' employees' compensation and bonuses are tied to the amount of insurance sold directly, and through churning and flipping loans.

23. Through a series of misrepresentations and pattern of fraud, Plaintiffs were made to sign disclosure documents some of which indicated that Plaintiffs knew they had a choice in

whether or not to purchase the credit insurance products, despite the fact that Plaintiffs were truly never given a choice. Each Defendant's actions were consistent with the fraudulent scheme perpetrated on Plaintiffs. Additionally, Defendants fraudulently concealed and misrepresented certain information to Plaintiffs that negate any disclosure documents. Plaintiffs were victims of the above described pattern and practice of wrongful and fraudulent practices.

24. The Plaintiffs obtained a loan through Defendants that was packed with credit life insurance, credit disability insurance, and property insurance. The Plaintiffs had this insurance forced upon them by Defendants under the above circumstances.

25. Defendants failed to disclose the cost of the credit insurance and the term of the insurance in a clear and conspicuous manner and to provide said disclosures in a meaningful sequence. Further, Defendants failed to disclose to Plaintiffs the relationship between Defendant, Abusive Mtg, Abusive Ins, and Wholly Owned Ins. Defendants further failed to disclose that the Defendant, Abusive Mtg received a commission from the sale of the insurance products and Defendant, John Doe, the individual account executive for Defendant, Abusive Mtg, received a bonus and increased compensation.

26. At all times material hereto, Plaintiffs relied on the individual and corporate Defendants to give them financial and tax advice and to advise them as to all finance and insurance requirements.

27. Defendants knew that in making Plaintiffs a loan with such a large loan to value ratio, combined with a prepayment penalty, Plaintiffs would have no choice but to stay in the exorbitantly priced loan, effectively trapping Plaintiffs unless they were willing to give up their home in foreclosure.

28. Defendants imposed late charges on Plaintiffs' loan where Plaintiffs' delinquency was less than fifteen (15) days past due which violates *Miss. Code Ann.* 75-17-27.

29. Defendants have negligently and/or wantonly engaged in a systematic continuing pattern and practice of unjustly enriching itself at the expense of Plaintiffs and other borrowers by charging late fees in a manner that violates Mississippi law.

30. Defendants intentionally, willfully, and/or negligently misrepresented and suppressed the amount it could charge Plaintiffs and other borrowers for late fees and the periods in which it could impose the late charge.

31. Defendants concealed the use of "the Rule of 78ths" to calculate interest and the consequences thereof. The pay-off balance on the loan, however, being refinanced or flipped by Defendants was artificially inflated when the Rule of 78ths was used to calculate the rebate of unearned interest. Both the unearned insurance premiums and unearned interest were calculated when the Rule of 78ths was used by Defendants on refinancing. To the detriment of Plaintiffs, Defendants' use of the Rule of 78ths did not use fractional time intervals. Defendants did not explain or disclose this to the Plaintiffs.

32. The Defendants gave financial and tax advice to Plaintiffs concerning the structure of their loan and the consolidation of the Plaintiffs' other finances. Specifically, Defendants entered into promotions and marketing schemes to make Plaintiffs believe they were "saving" money by refinancing and consolidated other debt. In the loan making process, Defendants itemized Plaintiffs' bills on other documents in order to "show" Plaintiffs that they were "saving" money by consolidating their prior loan with other unsecured debt. Although Defendants were giving Plaintiffs financial advice on how to "manage their finances," Defendants never considered the interest rates or terms of the other accounts that they were

paying off. Plaintiffs paid off accounts with lower interest rates and consolidated them at higher rates. Plaintiffs were not "saving" money, they were just spreading out their debt over time and receiving a lower monthly payment. Plaintiffs were damaged in that they borrowed more money than they needed, they paid excess interest, fees, and costs, they repaid accounts at a higher rate of interest than they should have and the credit insurance premiums were higher as a result of the higher loan balances.

33. Because interest and credit insurance premiums are time sensitive components of the cost of credit, Defendants stretched the loan term as long as possible to the detriment of the Plaintiffs. The problem is exacerbated by the nature of discount interest. Discount interest is deducted in advance, so the longer the term, the greater the amount deducted, and the higher the effective yield to the Defendants. These facts are not disclosed to Plaintiffs.

34. Defendants' hidden surcharge on refinance is accompanied by increased risk for the borrower. Defendants insisted on and obtained real estate security. The risk in this change is obvious: when Plaintiffs defaulted, their home was at risk of being lost. Defendants' addition of real estate security to a debt also changed the risks in a less conspicuous way, by permitting Defendants to engage in "asset based" lending. Defendants based the loan on the equity in the home rather the borrower's income. As was inevitable, when Plaintiffs could not meet the monthly payments on the refinanced debt from their current income, a cycle of default and late charges began which led to a higher and higher debt and, ultimately, the risk of the loss of their home. This practice of "asset based" lending beyond what a borrower could afford to pay was not disclosed to the Plaintiffs.

35. At all times hereto, the individual unknown Defendants, John Doe 1 and John Doe 2 were the agents for the corporate Defendants and were acting within the line and scope of

their agency in dealing with Plaintiffs. Furthermore, the individual Defendants incurred personal liability because their acts were intentional, reckless, wanton and/or grossly negligent concerning the safety and rights of the Plaintiffs. They were further benefited by their conduct through increased compensation. The individual Defendants made each of the aforementioned representations and/or omissions at the time and place depicted on the loan documents. Other employees of Defendants, whose identities are presently unknown, made those representations to Plaintiffs. Those individual Defendants may be added when their identities are known.

36. The individual Defendants and each of the corporate Defendants' conduct, under the circumstances was intentional and amounts to actual malice.

CAUSES OF ACTION

COUNT I – HOEPA AND TRUTH IN LENDING VIOLATIONS

37. Plaintiffs repeat and reallege all paragraphs 1-36 above as if fully set forth herein.

38. In an attempt to avoid complying with the stricter provisions of HOEPA, Defendant, Abusive Mtg split this loan into two loans, one closed end and one a spurious open-end loan. The characterization of the junior loan as open-end was spurious and in reality there was no expectation that the Plaintiffs would make repeat transactions and use the credit. Plaintiffs did not, in fact, use the credit and could not use the credit since Plaintiffs were loaned more than the limit of credit and then the credit was canceled. In fact, the repayment agreement, itself, contained language which indicated that the loan could be prepaid at any time. Yet, a pre-payment penalty contained within the agreement discouraged paying the loan other than in accordance with the slow amortization schedule. Additionally, this loan amortization further made any expectation that the credit line would or could be used unreasonable.

39. The above-mentioned consumer credit transaction was a high rate mortgage within the meaning of HOEPA, 15 U.S.C. §1602(aa)(1)(B), in that the annual percentage rate at consummation of the transaction exceeded by more than 10 percentage points the yield on Treasury securities having comparable periods of maturity on the 15th day of the month immediately preceding the month in which Abusive Mtg received Plaintiffs' credit application, and the points and fees exceeded eight per cent.

40. Abusive Mtg has engaged in a pattern or practice of extending credit to consumers under high rate mortgages, as defined by 15 U.S.C. §1602(aa), based on the consumer's collateral without regard to the consumers' repayment ability, including their current and expected income, current obligations and employment in violation of 15 U.S.C. §1639(h).

41. Plaintiffs believe and therefore aver that Abusive Mtg required or induced them to borrow substantially more money than they were seeking, and in an amount beyond their ability to repay, based primarily on Abusive Mtg's evaluation of the amount of Plaintiffs' equity in their home.

42. Because the transaction described herein met the HOEPA definition of a high rate mortgage, the transaction was subject to additional disclosure requirements that must be provided three days in advance of the consummation of the transaction. 15 U.S.C. §1639(b).

43. Abusive Mtg did not furnish the required HOEPA disclosures to Plaintiffs three days prior to their settlement nor did it furnish a copy of Plaintiffs' Notice of Right to Cancel at the loan closing. Additionally, Defendant imposed a prepayment penalty prohibited by HOEPA.

44. Abusive Mtg failed to deliver all the "material" disclosures required by the Truth in Lending Act to Plaintiffs in connection with this transaction. In particular, Abusive Mtg failed

to: clearly and conspicuously disclose the cost of the insurance products sold; to accurately disclose the finance charge, the annual percentage rate, and failed to provide notice of the right to cancel the loan; failed to provide notice of the prepayment penalty; and failed to provide Section 32 notice.

45. Because of the violations of HOEPA and TILA listed above, Plaintiffs retained the right to rescind the transaction up to three years after its consummation.

46. On April 26, 2007, Plaintiffs rescinded the transaction by sending a notice of rescission, a true copy of which is attached hereto as Exhibit [A]. Having received no response, Plaintiffs reserved Defendant, Abusive Mtg on November 5, 2007.

47. More than twenty days have passed since Plaintiffs rescinded the transaction and Abusive Mtg has failed to take any action necessary or appropriate to reflect the termination of any security interest created under the transaction, as required by 15 U.S.C.1635(b) and Regulation Z, 226.23(d)(2). In addition, Abusive Mtg has failed to return to the Plaintiffs any money or property given by the Plaintiffs to anyone, including Abusive Mtg, as required by 15 U.S.C. §1635(b) and Regulation Z, 226.23(d)(2).

48. Defendant, Abusive Mtg, has threatened Plaintiffs with foreclosure, forcing them to file bankruptcy and triggering a higher standard of accuracy of disclosures under TILA and HOEPA.

COUNT II - BREACH OF FIDUCIARY DUTIES2

49. Plaintiffs adopt and reallege paragraphs 1-48 as if fully set forth herein.

50. Defendants purported to obtain credit life, credit disability, property and/or real estate loan insurance on behalf of Plaintiffs. Each Defendant owed a fiduciary duty to Plaintiffs to obtain adequate insurance at a fair and reasonable price. Under these circumstances, the

relationship between the parties transcended a normal lender/borrower relationship. This fiduciary duty or confidential relationship arose because the Plaintiffs placed special trust and confidence in their agent and lender to obtain adequate insurance for the purpose contemplated at the prevailing market rate.

51. Defendants had a duty to act in the best interests of Plaintiffs, or at least not to act in a manner, which was directly adverse to the interests of Plaintiffs.

52. Defendants had an affirmative duty to disclose to Plaintiffs that the Defendants directly or indirectly received remuneration for the insurance policies and to refrain from representing to the Plaintiffs that all of the premiums collected were being paid to a disinterested insurance company. Defendants had an affirmative duty to disclose to Plaintiffs that Defendants derive a substantial income through the sale of insurance and have a financial incentive to sell insurance in connection with loans to borrowers. The disclosure form failed to disclose adequately Defendants' sharing of the insurance premiums and the financial connection between Defendants and the Defendants' insurers. Defendants also had a duty to disclose the facts described herein above.

53. Defendants breached their fiduciary duties owed to Plaintiffs by obtaining credit life, credit disability and real estate loan insurance which was inadequate, grossly overpriced, and far in excess of prevailing market rate.

54. Defendants further breached their fiduciary duties owed to Plaintiffs by purporting to charge interest on the inadequate and grossly overpriced insurance premiums at the contract rate.

COUNT III - BREACH OF IMPLIED COVENANTS OF GOOD FAITH AND FAIR DEALING

55. Plaintiffs adopt and reallege paragraphs 1-54 as if fully set forth herein.

56. In every contract, there are implied covenants of good faith and fair dealing. These

implied covenants prevent one party from exercising judgment in such a manner as to evade the spirit of the transaction or to deny the other party the expected benefits of the contract.

57. When Plaintiffs entered into their contract with Defendants for a consumer loan, they reasonably believed that if Defendants procured credit life, credit disability and real estate loan insurance on their behalf, Defendants would procure adequate insurance at the prevailing market rate. Additionally, Plaintiffs reasonably believed and had the right to believe, that if Defendants obtained credit life, credit disability and/or real estate protection insurance for them, an exorbitant rate would not be charged for the insurance premium.

58. However, the Defendants breached the implied covenants of good faith and fair dealing by evading the spirit of the transaction by obtaining inadequate insurance for Plaintiffs and charging an exorbitant and grossly unfair premium which was far in excess of the market rate.

59. Defendants further breached their covenant of good faith and fair dealing by requiring the purchase of the credit insurance presented to Plaintiffs and/or failing to disclose that the credit insurance presented was not required to take out the loan requested. Defendants' requirement that Plaintiffs sign documents with disclosure language that were contrary to the representation made by Defendants, was also a breach.

60. Moreover, by engaging in the misleading and deceptive practices described herein, the Defendants have successfully taken advantage of the Plaintiffs' lack of knowledge and sophistication regarding credit insurance products and lending practices.

61. As a direct and proximate result of Defendant's breach of the implied covenants of good faith and fair dealing, Plaintiffs have been damaged in an amount to be proven at trial.

62. Defendants' misleading and deceptive practices thereby entitle the Plaintiffs to the

recovery of punitive damages.

COUNT IV - FRAUDULENT MISREPRESENTATION AND/OR OMISSION

63. Plaintiffs adopt and reallege paragraphs 1-62 as if fully set forth herein.

64. Defendants made the above-described and the following false, misleading and deceptive representations to Plaintiffs and/or omitted to state material facts in connection with the cost of the credit transaction and the cost and term of the insurance products on behalf of Plaintiffs.

65. At the time Defendants obtained credit life, credit disability and real estate loan insurance on behalf of Plaintiffs, Defendants failed to inform Plaintiffs that they could obtain alternative credit life, disability or real estate loan insurance at a cost much less than the amount that would be charged for insurance procurement by Defendants.

66. Defendants failed to advise Plaintiffs that the credit insurance products charged to Plaintiffs were grossly overpriced and far in excess of the market rate.

67. Defendants failed to advise Plaintiffs that the credit life, credit disability, and real estate loan insurance purportedly obtained on their behalf was wholly inadequate, and that Plaintiffs would have to obtain additional insurance in order to adequately protect their collateral.

68. Defendants represented that the insurance purchased was required by using ambiguous and misleading statements which failed to clearly indicate that this insurance was not required and which highlighted clauses indicating insurance was required (hazard insurance) to confuse Plaintiffs.

69. Defendant failed to accurately reveal: (1) the true annual percentage rate; (2) the true finance charges; (3) an accurate amount financed; and (3) the cost and term of the

insurance to Plaintiffs. Defendants misrepresented the term of the loan and the interest rate.

70. Defendant failed to disclose the relationship between Defendant, Wholly Owned Ins, Defendant, Abusive Mtg and Defendant, Abusive Ins. Plaintiffs allege that Defendant, Abusive Mtg obtained financial benefit from the sale of this insurance product to Plaintiffs. Plaintiffs allege that this financial compensation was hidden interest which should have been disclosed to Plaintiffs so that they could make an informed decision regarding the wisdom of entering into this loan transaction knowing the full amount of interest, including this hidden interest to be paid over the life of the loan. Plaintiffs allege that the acceptance of this undisclosed financial remuneration by Defendants resulted in an unfair increase in the cost of said insurance without disclosure to Plaintiffs.

71. Defendant failed to adequately disclose the prepayment penalty instead highlighting and emphasizing that the loan could be paid off "at any time," without referring to or mentioning the prepayment penalty contained in another section of the agreement.

COUNT V – UNJUST ENRICHMENT5

72. Plaintiffs adopt and incorporate herein by reference each of the preceding paragraphs.

73. At all times material hereto, Defendants have intentionally, negligently and/or wantonly retained money from their borrowers and have unjustly enriched themselves at the expense of Plaintiffs and other borrowers as described herein.

COUNT VI – NEGLIGENT LENDING1

74. Plaintiffs adopt and reallege paragraphs 1-73 as if fully set forth herein.

75. Defendants failed to exercise reasonable care in the creation and sale of this credit to Plaintiffs and failed to properly advise them of the true cost of the credit in making this

loan to Plaintiffs.

WHEREFORE, Plaintiffs pray for the following relief:

a) Rescission of the transaction, including a declaration that the Plaintiffs are not liable for any finance charges or other charges imposed by Defendants;

b) A declaration that the security interest in Plaintiffs' property created under the transaction is void, and an order requiring Defendants to release such security interest;

c) Return of any money or property given by the Plaintiffs to anyone, including the Defendant, in connection with the transaction;

d) Statutory damages;

e) Additional damages pursuant to 15 U.S.C. §1640(a)(4) in the amount of all finance charges and fees paid by Plaintiffs;

f) Forfeiture of return of loan proceeds;

g) Actual and compensatory damages so as to fully and fairly compensate Plaintiffs in an amount to be determined at trial;

h) An award of reasonable attorney's fees and costs;

i) Punitive damages in an amount as to punish Defendant, Abusive Mtg and deter future misconduct;

j) Pre- and post-judgment interest; and

k) Such other relief at law or equity as this Court may deem just and proper.

Respectfully submitted,

JOHN SMITH and JANE SMITH

By: /s/ Robert Gambrell
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IN THE ARBITRATION BETWEEN:

JOHN SMITH and JANE SMITH **CLAIMANTS**

Versus **ARB COMPANY REFERENCE NO. 08-0000**

ABUSIVE MORTGAGE, LLC, HOLDING COMPANY, X COMPANY, Y COMPANY, JOHN DOE 1 AND JOHN DOE 2 **DEFENDANTS**

MEMORANDUM IN SUPPORT OF RULE 18 SUMMARY DISPOSITION OF CLAIM

The elements of a HOEPA claim are found at found at 15 U.S.C. §§1635, 1638 and 1640 *et. seq.*, and 12 CFR 226.23 and 226.32. The Claimants must prove by a preponderance of the evidence that:

1. Abusive Mortgage, LLC [hereinafter "Abusive Mtg"] is a "creditor" subject to the Truth in Lending Act (15 U.S.C. 1601 et seq.);[1]

2. That the loan is subject to a finance charge or is payable by written agreement in more than four installments (not including a down payment); See Exhibit 1-A, Truth in Lending Disclosure Statement; and

3. To whom the obligation is initially payable, either on the face of the note or contract;

[1]"A person regular extends consumer credit if, in any 12-month period, the person originates more than one credit extension that is subject to the requirements of section 226.32 or one or more such credit extensions through a mortgage broker." Reg. Z§226.2(a)(17)(i) footnote 3. Proof that this is a HOEPA loan made through Broker One satisfies this element.

See Exhibit 2, HUD-1;

4. Abusive Mtg's May 17, 2004 loan to the Smiths was a closed-end consumer credit transaction secured by their principal dwelling subject to the Smiths' right of rescission pursuant to TILA; See Exhibit 1, Affidavit of Jane Smith.

5. That the "total points and fees" were in excess of eight percent triggering the requirements of HOEPA;

6. That Abusive Mtg failed to give the pre-loan disclosure (Section 32 notice) as required by HOEPA, giving rise to their extended right to rescind the loan; See Exhibit 1, Affidavit of Jane Smith;

7. Claimants rescinded the transaction by sending a notice of rescission to Abusive Mtg; See Exhibit 1-E.

8. That Abusive Mtg failed to comply with its rescission obligations, in violation of TILA.

FACTUAL BACKGROUND

Michael and Jane Smith entered into a mortgage loan with Abusive Mtg on May 17, 2004 in order to consolidate their existing purchase money mortgage and some unsecured debt. The loan was secured by their principal residence. Broker One Mortgage, a now defunct mortgage broker, obtained the loan from Abusive Mtg on behalf of the Smiths. See, Exhibit 1, Affidavit of Jane Smith.

The loan documents provided by Abusive Mtg in discovery on January 31, 2007 stated the following:

Loan principal - $67,418.67

Contract rate - 12.491%

APR - 13.894%

Payment amount - $830.56

Finance charge - $86801.44

Amount financed - $62699.36

Term of loan - 180 months

See Exhibit 1-A, Truth in Lending Disclosure Statement

The HUD-1, Exhibit 2, showed the following disbursements:

George Posey	35000
Ingalls	7038.00
Wash. Mut	1301.00
American General	1036.00
FANB Circle	2737.00
USAG loan	506.00
1999 Jackson Cty Taxes	697.34
1998 Homestead charge	150.00
Document prep fee	125.00
Title Exam or insurance	354.00
Official fees	11.00
Cash to borrower	13689.96
Prepaid Finance charge	4719.31

While not reflected on any of the loan documents prepared by Abusive Mtg, George Money, Abusive Mtg Account Executive, directed the Smiths to pay Broker One $3,185.00 from

the cash loan proceeds. Paul Edge, the Broker One mortgage broker, directed the Smiths to pay additional expenses as follows:

Appraisal	300.00
Merritt Title	100.00

See Exhibit 1, Affidavit of Jane Smith and Exhibit 1D, F, & G, copies of checks.

Abusive Mtg charged such heavy points and fees on their mortgage loan that the loan crossed the line into the high-cost category subject to the protections of the Home Ownership and Equity Protection Act ("HOEPA"), 15 U.S.C. §1639. Even though the mortgage broker handled all communications with Abusive Mtg prior to the closing, including supplying all information for the application, and all documentation, Abusive Mtg failed to account for the mortgage broker fee on the closing documentation. See Exhibit 1, Affidavit of Jane Smith.

Abusive Mtg failed to treat the Smith loan as covered by HOEPA[2], and in fact, denied in their pleadings that this loan is subject to HOEPA. The loan, as a matter of law, however, is subject to HOEPA. Because the loan is subject to HOEPA, the Smiths were entitled to a three-day advance "warning notice prior to consummation of the loan. 15 U.S.C. 1639(a). This was not given by Abusive Mtg. See Exhibit 1, Affidavit of Jane Smith.[3]

HOEPA'S STATUTORY SCHEME

Faced with increasing reports of abusive practices in home mortgage lending, Congress passed HOEPA in 1994 to provide greater disclosure to borrowers involved in "high cost" loans and to prohibit certain loan terms and practices. HOEPA is an amendment to the Truth in Lending

[2]Additionally, several of the fees charged at the settlement of the loan were not bona fide, or for other reasons should have been counted as part of the loan's finance charge. However, since points and fees exceeded eight per cent in calculating the broker's fee and the prepaid finance charge, the additional charges will not be discussed for purposes of this request for a Rule 18 ruling.

[3]The loan contained numerous other disclosure violations, i.e. failure to give notice of rescission, as well as terms prohibited by HOEPA, such as the prepayment penalty. The failure to give the Section 32 notice, alone, is a "material violation" entitling the Smiths to exercise their extended right of rescission.

Act ("TILA"), 15 U.S.C. §1601 *et. Seq.* HOEPA requires lenders to carefully scrutinize loan costs and terms to determine whether their loans are subject to HOEPA's enhanced protections and prohibitions.

HOEPA's statutory scheme is a demanding one. A borrower under a HOEPA loan can seek redress for material violations through TILA's rescission remedy. 15 U.S.C. 1635, 1639(j) & 1641(c). Additionally, a borrower may recover actual damages, statutory damages, attorney's fees, and costs. TILA rescission and damages are in addition to any damages recoverable under state common law causes of action.

HOEPA'S POINTS AND FEES TRIGGER

HOEPA does not impose ceilings on interest rates or fees. Instead, its statutory scheme controls the disclosure and terms of high cost loans to protect borrowers. HOEPA defines certain mortgages as high cost by virtue of a "points and fees" trigger. 15 U.S.C. §1602(aa); Reg. Z, 12 C.F.R. §226.32(a)[4] Where the "total points and fees" exceed eight per cent (8%) of the "total loan amount," the loan is covered by HOEPA.

The "points and fees" trigger was derived from reports to Congress of the fabrication and inflation of fees by mortgage lenders, brokers and settlement agents. In times past, lenders built their overhead into the interest rate. As the mortgage market developed, however, lenders began to break out their overhead by charging "origination fees" which later proliferated and became unbundled into lists of fees charged by every party in the chain from appraisers to brokers to lenders and settlement agents. In the "sub-prime" loan arena, these costs spiraled out of control such that a huge chunk of the borrower's home equity could be dissipated by the laundry list of unbundled origination and settlement costs. The points and fees trigger is a direct reaction of

[4]An alternative method of qualifying as a HOEPA loan is through the APR trigger. 15 U.S.C. 1602(aa); Reg. Z §226.32(a)(1)(i). Claimants' claims do not involve this alternative trigger.

Congress to this phenomenon. The trigger imposes a duty on lenders to scrutinize and monitor the fees and charges imposed on a loan if they want to steer clear of HOEPA liability.

CALCULATION OF POINTS AND FEES TRIGGER

To determine if points and fees make a mortgage a HOEPA loan, one must compare every charge imposed in the transaction to the definition of "points and fees" in regulation Z, 12 C.F.R. §226.32(b):

> *. . . points and fees mean:*
> *(i) All items required to be disclosed under §226i.4 and §226.4(b) [finance charges], except interest or the time price differential;*
> ***(ii) All compensation paid to mortgage brokers; and***
> *(iii) All items listed in section 226.4(c)(7) . . . unless the charge is reasonable, the creditor receives no direct or indirect compoensation in connection with the charge, and the charge is not paid to an affiliate of the creditor.*
> Emphasis added.

15 U.S.C. §1602(aa)(4)(B) specifically provides that "total points and fees" includes "all compensation paid to mortgage brokers." The mortgage broker's fee is also a "finance charge" under 15 U.S.C. §1605(a)(6) for loans closed after September 1996. Section 1605(a)(6) states the "finance charge" must include "borrower paid mortgage broker fees, including fees paid directly to the broker or the lender (for delivery to the broker) whether such fees are paid in cash or financed." Since September 1996, there has been a bright line rule treating borrower-paid broker's fees as a finance charge always. This is irrespective of whether the fees are paid directly to the broker or to the lender to be passed on, whether paid in cash or financed, and whether the creditor requires the use of a broker or retains any of the fees. 15 U.S.C. §1605(a)(6); Reg. Z§226.4(a)(3). See also 61 Fed. Reg. 49237, 49238 (Sept. 30, 1996 effective date). Where the broker and the consumer make fee arrangements independent from the borrower, the creditor has an affirmative duty to obtain the broker information which is already required on the HUD-01 form mandated by the Real Estate Settlement Procedures Act.

In *Cunningham v. Equicredit*, 256 F.Supp.2d 785 (N.D. Ill. 2003) , the lender disguised the broker's fee as a payment to a home improvement contractor, but after the closing, the lender actually paid the fee to the broker. The lender tried to argue that the broker fee was not payable at or before closing. The Court found that the lender and broker deliberately manipulated the closing figures so as to evade the requirements of HOEPA. Further the Court noted that the statute provides *payable* at or before closing, not paid, and found this stated a cause of action based on HOEPA. Numerous cases hold that the broker's fee is counted as a finance charge and as points and fees. See, *Chow v. Aegis Mortg. Corp.* 286 F. Supp.2d 956 (N.D. Ill. 2003) (consumer paid broker fee was a finance charge.); *Cooper v. First Government Mortg. And Investors Corp.*, 238 F. Supp.2d 50 (D.C. D.C. 2002); *McGowan v. Credit Center*, 546 F.2d 73 (5th Cir. 1977) (loan was rescinded under earlier version of TILA for failure to include broker's fee in finance charges.) *In re Webster*, 300 B.R. 787 (W.D.B.R. 2003) (broker's fee included in points and fees requiring rescission under HOEPA for failure to give Section 32 notice).

Once a calculation of the total points and fees is reached, the "total loan amount" is determined by taking the amount financed pursuant to §226.18(b) and deducting any point or fee that is financed and has not already been included in the Finance Charge. Official Staff Commentary to Regulation Z ("OSC"), §226.32(a)(1)(ii).

THE SMITH LOAN MEETS HOEPA'S POINTS AND FEES TRIGGER

For purposes of establishing Claimants' right to a summary ruling on rescission rights under HOEPA, points and fees for the Smith loan are[5]:

Prepaid Finance charge	4719.31*
Broker One Broker Fee	3185.00

[5]There are numerous other charges that count toward points and fees that need not be considered for purposes of the Rule 18 request.

Total Points and Fees	**7094.31**

*Only item included in the Finance Charge by Abusive Mtg

Principal of Loan:	67,418.67
Finance Charges (total points and fees)	-7904.31
Total Loan amount	59514.36
	X .08
HOEPA Trigger	**4761.15**

Since the Smith loan contained points and fees well is excess of the eight percent threshhold combining the prepaid finance charge and broker's fee only ($7904.31), it is a HOEPA loan as defined by 15 U.S.C. §1602(AA)(1)(B).

HOEPA'S DISCLOSURE REQUIREMENTS AND PROHIBITIONS

HOEPA imposes an additional disclosure burden on HOEPA lenders. At least three business days before closing the loan, a HOEPA lender is required to give the prospective borrower a warning notice that includes the APR and the monthly payment on the new loan and a statement that failure to make the payments could result in loss of the home. 15 U.S.C. §1639(a). In addition, a HOEPA loan may not contain certain kinds of prepayment penalties, may not charge increased interest after default, may not negatively amortize, and may not contain certain balloon terms or prepaid payments. 15 U.S.C. §§1639(c)-(g). HOEPA also prohibits certain practices, including the extension of credit based on the equity in the home rather than on the ability to repay the loan. 15 U.S.C. §1639(h).

HOEPA'S REMEDIES

Failure of a lender to give the required "warning" disclosure or to abide by the prohibitions on terms is a "material violations" of TILA. This violation, alone, gives the borrower an extended right to rescind the loan. 15 U.S.C. §§1639(j), 16i35; 12 C.F.R. §§226.32(c) & (d), 226.23(a) and fn. 48. In addition to the rescission remedy under 15 U.S.C. §1635, HOEPA provides aggrieved borrowers enhanced statutory damages under 15 U.S.C. §1640(c).

CONCLUSION

There is no dispute of material fact and justice would best be served by the issuance of a Rule 18 ruling that:

1) the loan in question was HOEPA loan in that it exceeded eight percent in points and fees;

2) the Claimants did not receive a Section 32 notice as required by HOEPA;

3) the Claimants properly exercised their extended right of rescission;

4) Abusive Mtg has failed to respond to the notice of rescission by removing the security interest and should be ordered to do so at this point.

THE HOEPA TENDER AMOUNT

Since this is a loan subject to rescission, Abusive Mtg is required to remove its security interest and Claimants must return the loan proceeds after deducting all payments already made to Abusive Mtg, all finance and other charges. Under 15 U.S.C. 1634(b):

> When an obligor exercises his right to rescind under subsection (a) of this section, he is not liable for any finance **or other charge,** and any security interest given by the obligor, including any such interest arising by operation of law, becomes void upon rescission. [Emphasis added.]

Official Staff Commentary on Regulation Z, Commentary §216.15(d)(2) provides:

1. Refunds to consumer. The consumer cannot be required to pay any amount in the form of money or property either to the creditor or to a third party as part of the occurrence subject to the right of rescission. Any amounts of this nature already paid by the consumer must be refunded. **"Any amount" includes finance charges already accrued, as well as other charges such as broker fees, application and commitment fees, or fees for a title search or appraisal, whether paid to the creditor, paid by the consumer directly to a third party, or passed on from the creditor to the third party. It is irrelevant that these amounts may not represent profit to the creditor.** For example: If the occurrence is a credit extension, the creditors must return fees such as application, title, and appraisal or survey fees, as well as any finance charges related to the credit extension.[Emphasis added.]

Applying the above statute, the following is the HOEPA tender amount is calculated

as follows::

Principal balance - $67,418.67

Less finance charges and other charges -

Document prep fee	125.00
Title exam/insurance	354.00
Recording fee	11.00
Prepaid Finance charge	4719.31
Brokers fee	3185.00
Merritt Title	100.00
Larry Borders	300.00
TOTAL	**8794.31**

Less funds received - 118 payments made through 02/21/05 of $417.78 = **$49,298.04**

Less statutory penalty of $2,000 for failure to rescind - $2,000

Tender amount as of 02/21/2005 - $7,326.32

MECHANICS OF TENDER

Claimants stand ready to tender the above amount (less any additional payments made at the time of tender) upon notice that Abusive Mtg intends to remove its security interest in the property by satisfaction of the deed of trust.

REMAINING CAUSES OF ACTION/DAMAGES

Claimants submit that there are no material facts in dispute, and based upon the law Claimants are entitled to immediate rescission of this loan. This would only leave remaining for adjudication the issue of TILA damages, including actual damages, punitive damages, attorney's fees and costs.

Additionally, Claimants would submit the focus of the hearing would be much narrower and more efficient, leaving primarily the state law causes of action, including:

(1) fraudulent and negligent misrepresentation for misrepresentations by Abusive Mtg:

(A) that the annual percentage rate of the loan was 12.99%

(B) that the loan was in the Smiths' financial best interest and cheaper credit than the credit existing at the time of the loan;

(C) that the loan did not contain a prepayment penalty;

(D) that the finance charge on the loan was underdisclosed;

(E) that it was lawful for the broker was to receive 5% of the loan amount.

(2) conspiracy to breach fiduciary duty; tortious interference with contract; and breach of duty of good faith and fair dealing

Abusive Mtg and Broker One conspired to gouge the Smiths by charging

unreasonable and exorbitant closing costs and representing to the Smiths that the charges were reasonable and the loan was in the Smiths best interest financially;

(3) violation of the Mississippi Consumer Loan Broker's Act - this act limits the broker's fee to three per cent of the loan amount. Broker One charged five per cent. Broker One acted

as an agent for both the lender and the borrower, but failed the lender by acting in the best

interest of the lender, and itself, to the detriment of the Smiths.

CONCLUSION

Claimants respectfully submit that TILA is a strict liability statute. If the points and fees are more than eight per cent, and they clearly were, then the loan is subject to HOEPA rescission. Claimants gave notice of their intent to rescind this loan, and even the rescission amount is not be subject to dispute. The simplification of the issues at trial by a Rule 18 ruling is an efficient and fair means of resolving the rescission issue. This the 23rd day of February, 2007.

Respectfully submitted,

JOHN SMITH and JANE SMITH

_____

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