

Bankruptcy Court Trial Practice Symposium

Hon. Frank J. Bailey

U.S. Bankruptcy Court (D. Mass.); Boston

Patrick P. Dinardo

Sullivan & Worcester LLP; Boston

Hon. Joan N. Feeney

U.S. Bankruptcy Court (D. Mass.); Boston

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**TRIAL PRACTICE SYMPOSIUM:
EVERYTHING YOU ALWAYS WANTED TO KNOW
ABOUT
COMPLAINTS AND DISPOSITIVE MOTIONS**

Presenters:

Hon. Frank J. Bailey

Patrick P. Dinardo

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Julia Frost-Davis

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SIGNIFICANT DECISIONS ON PLEADING STANDARDS

Supreme Court of the United States

Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007).

Ashcroft v. Iqbal, 556 U.S. 662 (2009).

Courts of Appeals

Anderson News, L.L.C. v. American Media, Inc., 2012 WL 1085948 (2d Cir. 2012).

Artuso v. Vertex Pharmaceuticals, Inc., 637 F.3d 1 (1st Cir. 2011).

Carasso, U.S. ex rel. V. General Dynamics C4 Systems, Inc., 637 F.3d 1047 (9th Cir. 2011).

Patterson v. Novartis Pharmaceuticals Corp., 451 Fed. Appx. 485 (6th Cir. 2011).

United States ex rel. Lemmon v. Envirocare of Utah, Inc., 614 F.3d 1163, 1167 (10th Cir.2010).

Am. Dental Ass'n v. Cigna Corp., 605 F.3d 1283, 1288–89 (11th Cir.2010).

Reger Dev., LLC v. Nat'l City Bank, 592 F.3d 759, 764 (7th Cir.2010).

United States ex rel. Grubbs v. Kanneganti, 565 F.3d 180, 185 (5th Cir.2009).

United States District Courts

Deutsche Bank Trust Co. Americas v. Doral Financial Corp., 2012 WL 234667 (D. P.R. 2012).

Juarez v. U.S. Bank Nat. Ass'n ex rel., 2011 WL 5330465 (D. Mass. 2011).

Karim v. Bank America, N.A., 2011 WL 4457212 (D.R.I. 2011).

Bennett v. Roark Capital Group, Inc., 738 F. Supp. 2d 157 (D. Me. 2010).

Significant Decisions, continued

United States Bankruptcy Courts

In re P and P “Quick-Services, Inc., 2012 WL 1597208 (Bankr. D.R.I. 2012).

In re Claudio, 463 B.R. 190 (Bankr. D. Mass. 2012).

In re Motors Liquidation Co., 462 B.R. 494 (Bankr. S.D.N.Y. 2012).

In re Financial Resources Mortg., Inc., 454 B.R. 6 (Bankr. D.N.H. 2011).

In re Ridley, 453 B.R. 58 (Bankr. E.D.N.Y. 2011).

In re Tronox, Inc., 429 B.R. 73 (Bankr. S.D.N.Y. 2010).

In re May, 2011 WL 4102805 (Bankr. D. Mass. 2011).

In re Bettano. 440 B.R. 13 (Bankr. D. Mass. 2010).

In re C.R. Stone Concrete Contractors, Inc., 434 B.R. 208 (Bankr. D. Mass. 2010).

In re Ong-Maguire, 2010 WL 2775062 (Bankr. D. N.H. 2010).

In re Karagianis, 2009 WL 4738188 (Bankr. D.N.H. 2009).

In re Hanley, 2009 WL 2827952 (Bankr. D. Mass. 2009).

Tips and Traps for Motion Hearings - Hon. Joan N. Feeney

Bankruptcy Judges prepare for hearings. We read the scheduled motions, memoranda, complaint usually the day before the hearing. You can assume that we have read everything that has been filed. If you are the moving party, and an opposition has been filed reply to the points made in the oppositions. If you are an opposing party, address why the relief requested should not be granted. We often have questions about the facts, background and legal theories being advanced. During the hearing I will explore with counsel the strengths and weaknesses of their respective positions by asking questions. I usually make a list of those questions. Please answer the questions. It is not an efficient use of time to have a speech prepared for a hearing and lecturing is frowned on. . In fact that is not good preparation.

Prepare for hearings. Don't wing it. Research the facts and law applicable to your case. Figure out the elements of your proof and how you are going to make your argument. The best preparation is to anticipate the judge's questions and have an answer ready. There are usually strict time constraints in motion hearings. I usually schedule two or three motions every 15 minutes so you have very little time to get your best points across. Use your time efficiently by highlighting your top three points. Know your judge. Find out his or her views on an issue. Sit in the audience and observe other hearings.

Don't act at the last minute. If you have to file something at the last minute, label it an emergency and don't file pleadings in open court. They are of no use to us and often will prevent a decision that day and cause delay

Be civil. Don't jump up and interrupt during your opponent's presentation. Don't use the language or facial expressions or body language of disrespect.

UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF MASSACHUSETTS

_____)	
In Re:)	Case No. No. 12-12345
ROCK M. TOUGHGUY)	Chapter 13
Debtor)	
_____)	
ROCK M. TOUGHGUY)	Adv. Proc.
Plaintiff)	No. 12-6789
v.)	
FRONTRUNNER BANK, SUCCESSOR BANK, N.A.)	
AS TRUSTEE ON BEHALF OF THE HOLDERS)	
OF ASSET-BACKED CERTIFICATES, SERIES)	
2006-OOPS-007, ACME LOAN SERVICING, INC.,)	
CLOSED YESTERDAY MORTGAGE BROKERS LLC,)	
DEWEY CHEATHAM and MICHAEL H. SHAM III)	
Defendants)	
_____)	

AMENDED COMPLAINT AND JURY DEMAND

This action concerns plaintiff Rock M. Toughguy's efforts to save his home at 12 Downbeat Street, Eastborough by the Sea, Northeastern County, Massachusetts (the "Property") from the defendants' scheme to strip him of his home equity. Toughguy was having problems maintaining his home mortgage payments when he was contacted by mortgage broker Dewey Cheatham. Cheatham brokered a refinancing deal for a new mortgage using a straw buyer which he claimed would enable Toughguy to stay in his home, rehabilitate his credit rating, and pay off his debts. Instead, Toughguy finds now himself without title to his residence, facing foreclosure on the new mortgage, plundered of tens of thousands of dollars of equity value defendants took in the refinancing, having had to file bankruptcy and then this adversary proceeding in order to protect his family and their home.

By this action, plaintiff Toughguy seeks avoidance of the transfer of title to the Property to Sham, rescission of the mortgage placed on the Property, damages, multiple damages, attorneys fees, and other relief to which he is entitled under applicable law.

PARTIES

1. Plaintiff Rock M. Toughguy ("Toughguy") resides at 12 Downbeat Street, Eastborough by the Sea, Northeastern County, Massachusetts. He filed a petition under Chapter 13 of the Bankruptcy Code on April 4, 2012 (the "petition date").

2. Upon information and belief, defendant Frontrunner Bank, N.A. ("Frontrunner Bank") is a federally licensed bank which has its primary place of business at Twelve Too Big To Fail Plaza, Gotham, New York.

3. Upon information and belief, defendant Successor Bank, N.A. as Trustee for the holders of Asset-backed Certificates, Series 2006-OOPS-007 ("Successor Bank") is a federally licensed bank which has its primary place of business at One Too Big To Fail Plaza, Gotham, New York.

4. Upon information and belief defendant Acme Loan Servicing, Inc. ("Acme Servicing") is a South Dakota corporation with a place of business at One Main Street, Dustbowl, South Dakota.

5. Closed Yesterday Mortgage Brokers LLC ("Closed Yesterday") is a Massachusetts LLC with a place of business at Six Washington Street, Eastborough by the Sea, Massachusetts.

6. Dewey Cheathem ("Cheathem") resides in Massachusetts and has a place of business at Six Washington Street, Eastborough by the Sea, Massachusetts.

7. Michael H. Sham III (“Sham”) resides at Seven Elite Heights, Eastborough by the Sea, Massachusetts.

JURISDICTION AND VENUE

8. This Court has jurisdiction of this complaint pursuant to 28 USC § 1334(b) because it arises in and is related to a case under title 11 of the United States Bankruptcy Code, 11 U.S.C. § 101, *et seq.* (the "Bankruptcy Code").

9. Venue in this district is proper pursuant to 28 U.S.C. § 1409(a) as this proceeding arises in and is related to in a bankruptcy case that is pending in this district.

10. This is a core proceeding, as defined in 28 U.S.C. § 157, relating directly to the property and affairs of the debtor and the administration of the debtor's estate. This Court has jurisdiction of this adversary proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (C), (E), (H), (K) and (O). In the event this matter is found to not be a core proceeding, plaintiff assents to the entry of final judgment by this Court.

STATEMENT OF THE FACTS

11. Rock Toughguy is a self-employed construction worker. He lives at the Property with his wife, Belinda Toughguy, and their children, Betty and Bruce. They have lived at the Property since they were married in 1997. The Property has been in Ms. Toughguy’s family since the Civil War.

12. Early in 2011, the Toughguys were having difficulty making their mortgage payments and paying their family bills. In June 2011 at church, they met Deacon Dewey Cheathem, who worked for Closed Yesterday. Cheathem was a regular member of their church and the Toughguys learned that Cheathem had “helped” others in their congregation.

13. The Toughguys met Cheathem at the office of Closed Yesterday in July 2011. They described how they could not meet their mortgage payments, that they probably had a bad credit rating, and that they were concerned that they would not be able to refinance their home. Cheathem assured them that he and Closed Yesterday had helped most of the people at their church in obtaining refinancing and that he would help them too with his "typical arrangement."

14. At one or two other meetings, and during a brief discussion at church, Cheathem explained that in the "typical arrangement," a friend with good credit, Sham, would co-sign the refinancing, asking only a small fee to borrow on his good credit. He explained that between the money "locked-in" the house that they would "free-up" and the low interest rate that they would qualify for on the refinancing, there would be \$25,000 or more in excess cash to cover other bills and current needs, money would be set aside to make their mortgage payments for a year, and their old mortgage paid-off.

15. It turns out that Cheathem was lying. The closing was scheduled for November 1, 2011. At the closing, Cheathem told the Toughguys that the deal had changed. While Sham would still lend his name to "help out," it was now necessary to put the Property in Sham's name "temporarily" as loan security. Cheathem assured the Toughguys that they could still live there.

16. The Toughguys were angry. The lawyer who was the only other person present started trembling and left the room. Upon information and belief, he made a phone call to defendant Frontrunner Bank and described the "severe risks" that Frontrunner Bank was taking with all the mortgages coming from Closed Yesterday.

17. Cheathem reassured the Toughguys and told them that many of their neighbors had gone through this deal, so it would work for them too. Cheathem reminded them that he would personally hold in escrow the portion of the refinancing set aside to pay their new

mortgage payments for a year. He promised them that because he was going to make their mortgage payments for a year, their credit would be rehabilitated, so they would be eligible for a new loan at the end of the year. At that time, Sham would convey the Property back to them. Cheathem told the Toughguys that the switch in title was just a matter of paperwork and formality and that they would leave the closing with \$10,000 in cash. The Toughguys reluctantly signed the closing documents.

18. The Toughguys signed a quitclaim deed transferring the Property to Sham, a promissory note (the "Note") and a mortgage (the "Mortgage") in favor of Fronrunner Bank, and many other documents. Upon information and belief, the Toughguys did not receive copies of the closing documents.

19. The day after the closing, the Toughguys had second thoughts about the transaction and tried to contact Cheathem. Cheathem returned their calls four days after the closing, reassured them that the deal was a good one for them, reminded them that they had already signed the closing documents, and said that it was a "done deal."

20. The Toughguys later learned that of the \$440,000 in proceeds of the refinancing loan, about \$300,000 went to pay off their original mortgage. Cheathem held \$100,000 in "earned fees and payment escrow," and Sham received \$30,000. The balance of about \$10,000 went to the Toughguys. Shortly after the Note and Mortgage were signed in November, Fronrunner Bank pooled them with other similar instruments and sold them as a "securitized" package to Successor Bank as trustee.

21. In February 2012 Cheathem left Eastborough. His house was foreclosed in March. Three days later the Toughguys received notice that the loan they signed together with

Sham was to be foreclosed also. It turns out that Cheatham never made any mortgage payments from the escrowed funds.

22. The Toughguys have now learned that that many residents in Eastborough were injured by the predatory lending activities of Closed Yesterday and its brokers. A large number of people – as many as fifty – have lost their homes to foreclosure, and an even greater number are struggling to hold on to their homes.

23. Mr. Toughguy called Sham in March to regain title to the Property or at least make payments on the mortgage until he could arrange for financing. Sham refused, saying that the Property was his, and that he was considering selling it.

24. The Toughguys have also been in contact with Acme Servicing, seeking to have the mortgage restructured. Acme Servicing has stonewalled them and mishandled both their written requests for a restructuring and their requests for additional information about the loan and payout terms.

25. The Toughguys have tried to contact defendants Frontrunner Bank, Closed Yesterday, and Successor Bank. None of the defendants would return their calls or otherwise work with them to resolve the issues.

26. The present location of Cheatham and the "escrow fund" he held for the Debtor and his wife are both unknown.

27. Successor Bank noticed the Property for a foreclosure auction on April 4, 2012, and Mr. Toughguy filed his Chapter 13 bankruptcy petition the day before, staying the sale of the Property.

28. On information and belief, Successor Bank commenced foreclosure of the Mortgage without having an original copy of the Note in its possession, and despite the fact that

Fronrunner Bank had never endorsed the Note to Successor Bank as evidenced by the Proof of Claim filed by Acme Servicing on behalf of Fronrunner Bank.

COUNT I - FRAUD

(Against Cheathem, Closed Yesterday, Fronrunner Bank, and Sham)

29. Toughguy incorporates by reference the allegations contained in paragraphs 1-28 above.

30. Defendants Cheathem, Closed Yesterday, Fronrunner Bank, and Sham made material misrepresentations of fact, or, despite their duties to Toughguy, concealed facts, which were material to the transfer of the Property and the new mortgage loan as detailed above.

31. The fraudulent misrepresentations and omissions of defendants Cheathem, Closed Yesterday, Fronrunner Bank, and Sham, as detailed in this complaint, included but were not limited to misrepresenting the need for refinancing, the terms of refinancing, and their intention to perform the promises that they made to Toughguy.

32. Defendants Cheathem, Closed Yesterday, Fronrunner Bank, and Sham made the foregoing fraudulent misrepresentations and omissions with the express intent of inducing Toughguy to convey the Property to Sham and to cooperate in the delivery of the Note and Mortgage which severely injured him.

33. Defendants Cheathem, Closed Yesterday, Fronrunner Bank, and Sham made the referenced material misrepresentations with knowledge of their falsity or with reckless disregard of the truth and with the intention that their misrepresentations should be relied on.

34. Toughguy reasonably relied upon the fraudulent misrepresentations and/or omissions of defendants Cheathem, Closed Yesterday, Fronrunner Bank, and Sham.

35. Toughguy is entitled to rescind the Note and Mortgage on the basis of fraud in the inducement by defendants Cheathem, Closed Yesterday, Fronrunner Bank, and Sham.

36. Toughguy should be excused from tendering the face amount of the Note, because he did not receive value in exchange for executing the Note and Mortgage.

37. As a result of the fraudulent misrepresentations and/or omissions of defendants Cheathem, Closed Yesterday, Frontrunner Bank, and Sham, Toughguy has suffered damages, including the loss of title to his home, for which the defendants are liable.

COUNT II – CONVERSION
(Against Cheathem, Closed Yesterday, and Sham)

38. Toughguy incorporates by reference the allegations contained in paragraphs 1-28 above.

39. By their acts and conduct as detailed herein, defendants Cheathem, Closed Yesterday, and Sham have exercised wrongful purported dominion and control over property owned by Toughguy, including, without limitation, the equity in his house and the substantial proceeds of the refinancing of the mortgage on his house, all to their own use and benefit, depriving Plaintiff of the ownership and use of his Property and the proceeds thereof.

40. As a direct and proximate result of such conversion by defendants Cheathem, Closed Yesterday, and Sham, Toughguy has suffered damages.

41. Defendants Cheathem, Closed Yesterday, and Sham are liable to plaintiff for conversion of his property.

COUNT III – BREACH OF CONTRACT
(Against Cheathem, Closed Yesterday, and Sham)

42. Toughguy incorporates by reference the allegations contained in paragraphs 1-28 above.

43. Defendants Cheathem, Closed Yesterday, and Sham entered into an agreement under which Cheathem and Closed Yesterday would hold certain funds in escrow and pay the

current amounts due under the Note and Mortgage, and Sham would convey the Property back to the Toughguys within one year.

44. The Toughguys performed their obligations under the parties' agreement by conveying title to the Property to Sham, executing the Note and Mortgage, and causing certain fees to be paid to defendants from the proceeds of the financing loan.

45. As detailed above, defendants Cheathem, Closed Yesterday, and Sham have failed to perform their obligations under the parties' agreement.

46. As a result of the breach of contract by defendants Cheathem, Closed Yesterday, and Sham, Toughguy has suffered damages, including the loss of title to his home, for which the defendants are liable.

COUNT IV – BREACH OF DUTY OF GOOD FAITH AND FAIR DEALING
(Against All Defendants)

47. Toughguy incorporates by reference the allegations contained in paragraphs 1-28 above.

48. Defendants owe plaintiff Toughguy a duty of good faith and fair dealing in contractual affairs under Massachusetts law.

49. As detailed in this complaint, defendants have repeatedly violated the duty of good faith and fair dealing owed to Toughguy.

50. Defendants are liable to plaintiff Toughguy for all damages he suffered as the result of their repeated breaches of the duty of good faith and fair dealing.

COUNT V – INTENTIONAL INTERFERENCE WITH CONTRACTUAL RELATIONS
(Against Cheathem, Closed Yesterday, and Sham)

51. Toughguy incorporates by reference the allegations contained in paragraphs 1-28 above

52. As of March 31, 2011, plaintiff Toughguy was party to a note and mortgage contract with the Old Faithful Credit Union, and was in good standing under and in material compliance with the terms of such existing contract.

53. Defendants Cheathem, Closed Yesterday, and Sham caused Toughguy to breach his beneficial contractual relations with the Old Faithful Credit Union by, among others things, conveying title to the Property to Sham, and executing the Note and Mortgage.

54. Defendants Cheathem, Closed Yesterday, and Sham intentionally interfered with the contract between plaintiff Toughguy and the Old Faithful Credit Union.

55. Defendants Cheathem, Closed Yesterday, and Sham intentionally interfered with the contract between plaintiff Toughguy and the Old Faithful Credit Union with the improper motive or purpose of taking the then existing equity in Toughguy's Property.

56. Defendants Cheathem, Closed Yesterday, and Sham have been unjustly enriched by their intentional interference with the contract between plaintiff Toughguy and the Old Faithful Credit Union.

57. As a result of the foregoing interference with contractual relations by defendants Cheathem, Closed Yesterday, and Sham, Toughguy has suffered damages, including the loss of title to his home, for which the defendants are liable.

COUNT VI - FRAUDULENT TRANSFER
(Against Cheathem, Closed Yesterday and Sham)

58. Toughguy incorporates by reference the allegations contained in paragraphs 1-28 above.

59. Defendants Cheathem, Closed Yesterday, and Sham caused Toughguy to transfer the Property to Sham with the actual intent to hinder, delay, or defraud creditors.

60. Toughguy did not receive a reasonably equivalent value in exchange for the transfer.

61. The transfer was of substantially all of Toughguy's assets

62. Toughguy became insolvent at the time of the transfer to Sham, thereby becoming Sham's creditor.

63. As a result of the fraudulent transfer by defendants Cheatham, Closed Yesterday, and Sham, Toughguy has suffered damages, including the loss of title to his home, for which the defendants are liable as provided in Mass. Gen. Laws ch. 109A, § 8, including avoidance of the transfer, recovery of damages, and other relief therein provided.

COUNT VII – VIOLATION OF M.G.L. C. 93A, SEC. 9
(Against Cheatham, Closed Yesterday, and Fronrunner Bank)

64. Toughguy incorporates by reference the allegations contained in paragraphs 1-28 above.

65. Defendants Cheatham, Closed Yesterday, and Fronrunner Bank are persons who were engaged in trade or commerce in the Commonwealth of Massachusetts within the meaning of Mass. Gen. Laws ch. 93A, § 1 at all times relevant to the allegations contained herein.

66. By their acts and practices as detailed in this complaint, the defendants Cheatham, Closed Yesterday, and Fronrunner Bank, individually and collectively, engaged in unfair methods of competition or unfair and deceptive acts or practices in the conduct of trade or commerce in violation of Chapter 93A, § 2. Among other things, defendants planned, executed and/or actively assisted in the perpetration of an abusive "foreclosure rescue" scheme which had as its purpose depriving the plaintiff of the equity in his home.

67. The actions of defendants Cheatham, Closed Yesterday, and Frontrunner Bank, individually or collectively, constitute willful and knowing violations of Mass. Gen. Laws ch. 93A, § 2.

68. Toughguy has suffered the loss of money or property as a result of the use by defendants Cheatham, Closed Yesterday, and Frontrunner Bank, individually or collectively, of unfair methods of competition or unfair and deceptive acts or practices prohibited by Mass. Gen. Laws ch. 93A, § 2.

69. In accordance with Mass. Gen. Laws ch. 93A, § 9, Toughguy is entitled to recover the damages he has sustained as a result of the unfair and deceptive acts or practices of defendants Cheatham, Closed Yesterday, and Frontrunner Bank, plus interest, costs, attorneys' fees and a doubling or trebling of damages awarded.

**COUNT VIII – VIOLATION OF THE CREDIT REPAIR
ORGANIZATIONS ACT (15 U.S.C. § 1679 ET SEQ.)**
(Against Cheatham, Closed Yesterday, and Sham)

70. Toughguy incorporates by reference the allegations contained in paragraphs 1-28 above.

71. The Credit Repair Organizations Act, 15 U.S.C. § 1679B, states in part that:

(a) In general. No person may -- . . .

(3) make or use any untrue or misleading representation of the services of the credit repair organization; or

(4) engage, directly or indirectly, in any act, practice, or course of business that constitutes or results in the commission of, or an attempt to commit, a fraud or deception on any person in connection with the offer or sale of the services of the credit repair organization.

72. Defendants Cheatham, Closed Yesterday, and Sham convinced Toughguy that they would repair Toughguy's credit by taking substantial equity from his home.

73. As of the date of filing of this adversary proceeding, the defendants Cheathem, Closed Yesterday, and Sham have not repaired, or made any reasonable effort to repair, Toughguy's credit. Defendants remain in possession of the substantial equity they took from plaintiff's home.

74. Defendants Cheathem, Closed Yesterday, and Sham intentionally made untrue and misleading representations about their credit repair services. These actions constitute fraud or deception in connection with their offer of credit repair services.

75. Furthermore, the Credit Repair Organizations Act, 15 U.S.C. § 1679B, states in part that:

(b) Payment in Advance. -- No credit repair organization may charge or receive any money or other valuable consideration for the performance of any service which the credit repair organization has agreed to perform for any consumer before such service is fully performed.

76. Defendants Cheathem, Closed Yesterday, and Sham received substantial payments, the proceeds of the equity of Toughguy's home, at the November 1, 2011 closing, but have performed none of the repair services for which they received such funds.

77. Defendants Cheathem, Closed Yesterday, and Sham were paid for the performance of a service before any attempt to complete the service was ever made.

78. In addition, the Credit Repair Organizations Act, 15 U.S.C. §§ 1679C-1679E, lays out three separate disclosure requirements that defendants Cheathem, Closed Yesterday, and Sham were supposed to furnish to plaintiff Toughguy. Those statements include information about consumers' rights under state and federal law, a contract outlining the terms and conditions of the credit repair agreement, and a notice of the right to cancel the agreement.

79. On information and belief, none of these disclosures were provided by defendants Cheathem, Closed Yesterday, and Sham to plaintiff Toughguy.

80. Defendants Cheatham, Closed Yesterday, and Sham violated the Credit Repair Organizations Act, 15 U.S.C. §§ 1679C-1679E, by failing to make proper disclosures.

81. The defendants Cheatham, Closed Yesterday, and Sham are liable to plaintiff Toughguy as provided under 15 U.S.C. § 1679, et seq., for their violations of the Credit Repair Organizations Act.

COUNT IX – VIOLATION OF THE BORROWER'S INTEREST STATUTE
(M.G.L. C. 183, SEC. 28C)

(Against Frontrunner Bank and Successor Bank)

82. Toughguy incorporates by reference the allegations contained in paragraphs 1-28 above.

83. The Borrower's Interest Statute, Mass. Gen. Laws ch. 183, § 28C(a), states in part that: "A lender shall not knowingly make a home loan if the home loan pays off all or part of an existing home loan that was consummated within the prior 60 months or other debt of the borrower, unless the refinancing is in the borrower's interest. The "borrower's interest" standard shall be narrowly construed, and the burden is upon the lender to determine and to demonstrate that the refinancing is in the borrower's interest."

84. The abusive title transfer and equity stripping refinancing to which plaintiff Toughguy was subjected was not in his interest as borrower, under the factors set out in Mass. Gen. Laws ch. 183, § 28C(a) or the regulations duly promulgated by the Massachusetts Commissioner of Banks, 209 CMR 53.00.

85. Defendants Frontrunner Bank and Successor Bank are liable to Toughguy under the Borrower's Interest Statute, Mass. Gen. Laws ch. 183, § 28C, for the damages he has suffered as the result of their violation of the statute.

COUNT X – VIOLATION OF THE HOME OWNERSHIP
AND EQUITY PROTECTION ACT ("HOEPA")

(Against Frontrunner Bank)

86. Toughguy incorporates by reference the allegations contained in paragraphs 1-28 above.

87. In the course of extending credit to Toughguy, Frontrunner Bank through its agents violated the requirements of HOEPA and Regulation Z by extending credit based on the value of the Property, rather than on ability to repay the loans based on an evaluation of current and expected income, current obligations, employment status, and assets other than the Property, in violation of HOEPA, 15 U.S.C. § 1639(h), and Regulation Z, 12 C.F.R. § 226.34(4).

88. In the course of extending credit to Toughguy, Frontrunner Bank through its agents violated the requirements of HOEPA and Regulation Z by extending credit without taking any action to verify repayment ability in violation of Regulation Z, 12 C.F.R. § 226.34(4)(ii).

89. Defendant Frontrunner Bank is liable to Toughguy under the provisions of HOEPA for the damages he suffered as the result of its violation of the statute.

**COUNT XI – FOR DECLARATORY JUDGMENT DETERMINING THAT
THE NOTE AND MORTGAGE ARE UNENFORCEABLE (28 U.S.C. § 2201)**
(Against Frontrunner Bank, Successor Bank and Acme Servicing)

90. Toughguy incorporates by reference the allegations contained in paragraphs 1-28 above.

91. There is an actual controversy for which there is not an adequate remedy at law without the declaratory relief sought herein.

92. Successor Bank has initiated foreclosure proceedings in the Massachusetts Superior Court.

93. Toughguy seeks a declaration from this Court that Successor Bank would be unjustly enriched if it forecloses on the Property in light of numerous violations of law by it and

its predecessors in interest and their agents for which it is legally responsible together with the substantial documentary failings and invalidities detailed above.

WHEREFORE, plaintiff Toughguy prays that this Court will:

1. Enter judgment in plaintiff's favor under all Counts of the Complaint in an amount to be determined at trial together with interest and costs and reasonable attorneys' fees;
2. Enter judgment rescinding the Note and Mortgage;
3. Award plaintiff all damages he has suffered and to which he is entitled by law, including multiple damages, reasonable attorneys' fees, costs and an award of punitive damages;
4. Enter a permanent injunction preventing Successor Bank, Acme Servicing or any assignee or successor therefrom from foreclosing on the Property;
5. Award ownership and possession of the Property to plaintiff; and
6. Award plaintiff such further and additional relief as this Court deems just.

Respectfully submitted,

ROCK M. TOUGHGUY

By his attorney,

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N. Less Wellintentioned
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Dated: July 16, 2012

JURY DEMAND

Plaintiff Rock M. Toughguy demands a trial by jury on all Counts of the Complaint so triable.

Trial Practice Symposium Hypothetical 2012

The prospective client, Rock Toughguy, has just arrived at the office of successor counsel. He is extremely upset. He is the debtor in a Chapter 13 bankruptcy case, filed for him in April 2012 by Augustus ("Gus") Slapshot of the Slapshot Law Offices P.C. Rock is trying to save his house, and says Slapshot filed a complaint or something in May "against the people who stole our house." The "thieves" filed a bunch of paper in response and the judge told Gus that the complaint was no good and that if a proper filing was not made soon -- by July 20th he thinks -- the lawsuit will be dismissed. Since then, Rock has not been able to reach lawyer Slapshot by phone, the Slapshot Law Offices voice mailbox is full and will no longer accept messages, and only a few days remain before the dismissal deadline. PACER confirms that an order entered in an adversary proceeding on defendants' motion to dismiss providing for dismissal if a proper complaint is not filed by the 20th.

In a chaotic conversation, successor counsel is told what happened. Rock and his wife Belinda live with their two children in bucolic Eastborough by the Sea. Their house, which was given to them by Belinda's parents on their wedding in 1997, has an assessed value of \$515,000. Rock and Belinda have had a difficult time recently. Rock is self employed in construction, and is not making as much as he used to. Belinda was laid off from her job in the middle of 2010. They started falling behind on their bills, and were worried that late payments were affecting their credit rating and would prevent the low rate mortgage refinancing that would give them badly needed relief.

Rock and Belinda knew Dewey Cheathem from church where he was highly respected. Cheathem worked for a local mortgage broker, Closed Yesterday. He had helped many other church members with their mortgages. They met with him in July 2011 and explained that they were having a hard time paying their mortgage, thought their credit rating was probably bad, and were afraid they'd never be able to refinance. Cheathem reassured them, and said that he and his firm had helped lots of people out of such situations. Cheathem proposed what he referred to as his "typical arrangement," in which a friend with good credit would co-sign the refinancing, asking only a small fee to use his name. With the excellent interest rate they would get, after paying the friend, there would be \$25,000 or perhaps more in excess cash to cover other bills. The family spent money and ran up new bills in anticipation of refinancing.

At the November 1, 2011 closing, Cheathem said there had to be a little change. His friend -- Michael H. Sham III -- was happy to lend his name and help out, but it would be necessary to put the property in Sham's name temporarily as loan security. The family would still live there, of course. Rock became furious and shouted at Cheathem, Belinda sobbed, and the lawyer who was the only other person present started trembling and left the room. Cheathem calmed Rock and Belinda, said many of their neighbors had done this, and that things would work out "swell" for them too. The deal was simple. Cheathem would protect them by personally holding the net proceeds, and he would use some of that money to pay the new mortgage until the family had good credit and could refinance on their own. They would get \$10,000 in cash right away. Feeling they had no choice, Rock and Belinda went forward with the closing. They signed a deed transferring their home to Sham, a promissory note and mortgage in favor of Frontrunner Bank, and "a pile of other documents." They either

did not get copies of these papers, or cannot find them. They learned later that of the \$440,000 in proceeds of the refinancing loan, about \$300,000 had gone to pay off the old mortgage, \$100,000 in "earned fees and payment escrow" to Cheathem, and \$30,000 to Sham, plus the \$10,000 they received.

In February 2012, Cheathem left Eastborough in the dead of night. Cheathem's house was foreclosed in March. Three days later the Toughguys received notice that the loan they signed together with Sham was to be foreclosed also. When Rock called Acme Servicing in March, he was told that only three payments had been made on the new mortgage. Rock called Sham, who said he did not know what he was talking about. Yes he sometimes took a stake with Cheathem in distressed properties, but these deals were all going bad and he was mad and had no interest in blocking foreclosure. If Rock had something to pay him, and nothing less than \$10,000 would be acceptable to transfer the property back, maybe he could help, otherwise he was burned bad just like them and "sometimes life is unfair." At this point, the children told Rock and Belinda, for the first time, about a conversation they overheard during the break in the closing in November. They had heard the lawyer leave the room, and then heard him place a phone call. The children were not sure who the lawyer had been speaking with, but he was upset, and was trying to get the other person to understand severe risks they were taking with all the mortgages coming out of Closed Yesterday.

Since March, Rock and Belinda have had many conversations with Acme Servicing, and have repeatedly submitted papers, without result. The only response they got were copies of statements of income and expenses, said to have been signed by Rock and Belinda and delivered at closing, which are incorrect, not signed by them, and which they had never seen before. They have called Frontrunner Bank, which says it sold their note and mortgage and can do nothing for them. They tried to contact Closed Yesterday, but the mortgage company's office is now shut and no representative can be found. The present location of Cheathem and the "escrow fund" he held for the Debtor and his wife are unknown. It has become notorious at church and in Eastborough that many residents were injured by the activities of Closed Yesterday and its brokers. Something like fifty people have already lost their homes to foreclosure, and a greater number are struggling to hold on to their homes. Their problems have been covered in the Eastborough Post Gazette, and on local cable television, in a series entitled "Note and Mortgage Purgatory in Eastborough."

Shortly after the note and mortgage were signed, Frontrunner Bank pooled them with other similar instruments and sold them as a "securitized" package to Successor Bank as trustee. Successor Bank noticed the property for a foreclosure auction on April 5, 2012. Rock filed his Chapter 13 bankruptcy petition and sent a Suggestion of Bankruptcy to Acme Servicing one day before the noticed sale, staying enforcement of the note of which he and Belinda were cosigners. Although Acme Servicing has filed a Proof of Claim with an attached copy of that promissory note, the copy does not show an endorsement by Frontrunner Bank to Successor Bank or any other entity.

In May, Gus Slapshot filed an adversary proceeding for Rock Toughguy seeking to have the transfer reversed and the note and mortgage nullified on various bases including Mass. Gen. Laws ch. 93A. In a consolidated motion to dismiss filed for all the defendants, the complaint was objected to as rambling and unintelligible, and

defendants noted that no demand letter had been sent as required by Mass. Gen. Laws ch. 93A, § 9(3). Rock has a copy of a letter Slapshot sent to Acme Servicing in April, requesting a copy of the original note, and believes that no copy was ever provided. From a review of the land records, there has been no assignment of record by the original holder of the note and mortgage to any other person or entity.

JOINT DEFENSE AGREEMENT

PRIVILEGED AND CONFIDENTIAL

This Joint Defense Agreement (the “Agreement”), pertains to an action pending in the United States Bankruptcy Court, entitled Rick M. Toughguy v. Fronrunner Bank, et al., Adversary No. 11-6789, Northern District of Massachusetts, and all underlying claims, whenever asserted (the “Action”). Having independently reviewed the facts, the undersigned counsel and their clients (the “Parties”) find that they have a mutual interest in proceeding together in a common defense. The undersigned counsel and their clients desire to enter into this Agreement in order to share privileged communications (both written and verbal) and attorney work-product to aid each lawyer’s representation of his or her client in the Action. Although such sharing is deemed essential to representing each of the Parties, by entering into this Agreement, the Parties wish to continue to pursue their separate but common interests and do not intend to waive their individual attorney-client privilege or work-product doctrine or any other privilege, protection or immunity.

It is, therefore, agreed as follows:

1. Counsel and their respective clients agree to share and exchange among themselves and their clients, as each counsel deems appropriate, given the unique circumstances and concerns of his or her client, witness statements and interview summaries, memoranda of law, debriefing memoranda, documents, factual materials and summaries, transcript digests, documents, legal strategies, mental impressions, intelligence, confidences, communications and other secrets (hereinafter the “Joint Defense Materials”) for the limited and restricted purpose of assisting counsel in protecting the rights and interests of their respective clients in connection with this Action.

2. Any communications or Joint Defense Materials shared between the parties are within the “common interest” and are, therefore, confidential and protected from disclosure to any third-party by the attorney-client privilege and the work-product doctrine and any other applicable privileges or protections.

3. Any Joint Defense Materials obtained or shared pursuant to this Agreement and information derived therefrom may be used for no other purpose than preparation of a joint defense to the Action or to pursue the Parties’ separate but common interests in the Action.

4. Copies of all documents received from the Plaintiffs, other defendants or third parties pursuant to discovery requests served by any of the undersigned counsel in connection with the Action shall be provided or made available for copying to the other undersigned counsel in the interest of an informed joint defense of the Action.

5. None of the communications or Joint Defense Materials obtained or shared by any of the Parties to the Agreement or information derived therefrom shall be disclosed or revealed to any third-party except as follows:

- a. a Party may disclose Joint Defense Materials or communications, without obtaining consent from the disclosing Party, to its Counsel (including other attorneys, paralegals, and staff members within its Counsel’s law firm), its own officers and directors and any other of its employees or agents, so long as any of the aforementioned persons reasonably need to know the contents of such Joint Defense Materials or communications in order to meet the purpose of this Agreement as set forth in Paragraph 3 above;

b. a Party receiving Joint Defense Materials may communicate that same information to a third-party only with the advance, written consent of the attorney or Party who shared or contributed it; or

c. a Party receiving Joint Defense Materials shall not be deemed to be in breach of this Agreement if that Party communicates information contained or derived from Joint Defense Materials because compelled to do so by a court of competent jurisdiction. Each Party agrees that if it receives any summons, subpoena or similar process, or request to produce information or materials which includes Joint Defense Materials received under this Agreement, it will immediately notify all other parties to the Agreement and provide not less than five (5) business days' notice before production, in order to permit other parties an opportunity to object to such production. If five (5) business days' notice cannot be provided, the party upon which the demand or request is made agrees to bring a motion to stay the proceeding in order to allow provision of five (5) business days' notice to the other parties. Each Party agrees to inform the person or entity seeking the Joint Defense Materials that such materials are privileged and may not be disclosed unless ordered by the Court; and

6. Each Party agrees that, if a request for information is received from any governmental entity which includes any Joint Defense Materials, that Party, or its counsel shall advise the entity that the Joint Defense Materials remain privileged and/or protected under this Agreement and may not be disclosed unless ordered by the Court.

7. Counsel and their respective clients expect that communications and Joint Defense Materials exchanged pursuant to this Agreement will remain confidential and agree that, but for this expectation, no exchange would take place.

8. Each client-signatory understands and acknowledges that it is represented exclusively by its own attorney(s) in the Action. While attorneys representing the other party to this Agreement have a duty to preserve the confidences disclosed to them pursuant to this Agreement, they will not act for any Party other than their own clients in the Action. Each client-signatory understands and agrees that this Agreement itself does not create any attorney-client relationship with the other Parties' attorney(s).

9. Nothing in this Agreement shall be construed to affect the separate and independent representation of each client by its respective counsel according to what its counsel believes to be in his or her client's best interest.

10. This Agreement shall automatically apply to substitute or associated counsel who may appear on behalf of any party. In addition, if a party voluntarily changes or adds counsel for any reason, the new counsel shall immediately become a signatory to this Agreement and, if the former counsel is withdrawing, he or she shall return all Joint Defense Materials to the attorney or party who contributed it (including all copies, summaries or excerpts) or certify that he or she has destroyed them or passed them on to the new counsel after he or she signs this Agreement. The withdrawing counsel shall continue to have the obligation to assert and defend the privilege with respect to information he or she has been given. No party shall be prevented, based on participation in this Agreement, from examining or cross-examining any signatory who testifies in this proceeding.

11. If any party to this Agreement asserts a claim in this litigation or in separate litigation or proceeding against another Party to this Agreement, the Parties hereto agree that each attorney of any Party who has access to or receives any Joint Defense Materials shared or communications shared under this Agreement shall remain nonetheless qualified to continue to represent his or her client in the defense or pursuit of the claim. The Party asserting the claim may use its own Joint Defense Materials in pursuing the claim but may not use Joint Defense Materials or communications received from another Party to this Agreement in pursuing the claim unless otherwise produced or filed in or made public as part of this case. The party defending the claim may not use Joint Defense Materials received pursuant to this Agreement but may use its own Joint Defense Materials. Any conflict of interest arising out of the sharing of Joint Defense Materials under this Agreement is waived. Any right of any Party to move to disqualify any attorney for any Party to this Agreement on the grounds that such attorney has received Joint Defense Materials shared under this Agreement is waived. No oral or written statement qualifying as Joint Defense Material under this Agreement and received by any Party shall be offered as an admission by such receiving Party in any civil, alternative dispute resolution, criminal, administrative or other proceeding arising from that dispute or otherwise. However, nothing in this Agreement shall bar a receiving Party from using in any subsequent dispute any unprivileged Joint Defense Materials obtained through a legitimate discovery mechanism during the course of that dispute. Each receiving Party further agrees to enter into a stipulated protective order in any subsequent proceedings between or among the Parties which protects all Joint Defense Materials and communications from disclosure to third parties, provided, however, that such terms shall not be any more restrictive than those set forth in this Agreement.

12. Although information may not be privileged, the joint defense privilege and work-product doctrine do protect against disclosure of (a) the fact that particular communications or Joint Defense Materials have been shared among parties to this Agreement, (b) the information or Joint Defense Materials shared, and (c) any part of memoranda or other work-product containing or referring to such communications or Joint Defense Materials.

13. Each signatory to this Agreement has the right to terminate its participation at any time. Termination shall be effective upon tendering express written notice to each attorney-signatory and by returning all Joint Defense Materials to the attorney or party who contributed it, including all copies, summaries or excerpts thereof. After such notification, this Agreement shall no longer be operative as to communications with the withdrawing party after such notice is received, but this Agreement shall continue to protect all communications and Joint Defense Materials covered by this Agreement and disclosed to the withdrawing Party prior to receipt of the Party's notification of withdrawal. Termination of a Party's participation under this Agreement shall not operate as a waiver or authorize violation of this Agreement and a terminating party remains bound to maintain the confidentiality of all Joint Defense Materials under this Agreement and information derived therefrom.

14. All Joint Defense Materials (including all copies, summaries or excerpts thereof) upon request at any time and in any event at the conclusion of the Action, including appeals, or any proceeding resulting therefrom, shall either be (a) returned to the attorney or party who provided them or (b) certify that he or she has destroyed them.

15. The obligations of the attorneys and their clients not to disclose Joint Defense Materials, except in accordance with this Agreement, shall not be affected by the return or

destruction of such materials in accordance with paragraph 14 above, or termination of this Agreement.

16. The parties to this Agreement agree that it may be enforced by injunctive relief.

17. This Agreement shall not be subject to abrogation by an assignee, trustee in bankruptcy or other successor in interest to any party hereto. Nor shall such assignee, trustee in bankruptcy or other successor in interest waive or be authorized to waive any privilege or immunity with regard to the Joint Defense Materials shared by or among the parties to this Agreement.

18. This Agreement covers, applies to, and binds the firms, partners, associates and support staff of the undersigned counsel, as well as any consultants, investigators, or experts retained by them in connection with the defense of the Action.

19. To the extent that the Parties have already been in communication with one another or shared Joint Defense Materials regarding the Action, all such communications, disclosures, or exchanges and any Joint Defense Materials shared are subject to this Agreement.

20. This Agreement cannot be modified orally. Modification of this Agreement or addition of other parties as signatories to this Agreement requires that all Parties execute a new agreement.

21. Counsel has fully explained the terms of this Agreement to his or her respective client(s) and is fully satisfied that the client(s) understands the terms, agrees to abide by them, and that the attorney is authorized by the client(s) to execute this Agreement.

22. Any and all notices, requested, demands and other communications required or otherwise contemplated to be made under this Agreement shall be in writing and shall be deemed to have been duly given (i) if delivered by hand, when received, or (ii) if by overnight mail, upon delivery. All such notices, requests, demands and other communications shall be addressed as follows (or to such other address as may be specified in writing and delivered in accordance with this paragraph). Notices shall be sent to counsel for the respective Parties as is set forth in the signature blocks in this Agreement.

23. This Agreement may be executed in separate counterparts, each of which shall be deemed to be an original.

[signatures begin on next page]

FRONTRUNNER BANK

By its attorneys,

Dated: _____

FRONTRUNNER BANK

By: _____

Print name: _____

Title: _____

Dated: _____

SUCCESSOR BANK

By its attorneys,

Dated: _____

SUCCESSOR BANK

By: _____

Print name: _____

Title: _____

Dated: _____

ACME LOAN SERVICING, INC.

By their attorneys,

Dated: _____

ACME LOAN SERVICING, INC.

By: _____

Print name: _____

Title: _____

Dated: _____

CLOSED YESTERDAY MORTGAGE
BROKERS LLC

By: _____

Print name: _____

Title: _____

Dated: _____

MICHAEL H. SHAM, III

Dated: _____

DEWEY CHEATHAM

Dated: _____

UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF MASSACHUSETTS

<hr/>)	
In Re:)	
)	
ROCK M. TOUGHGUY)	
)	
Debtor)	CHAPTER 13
)	NO. 12-12345
<hr/>)	
ROCK M. TOUGHGUY)	
)	
Plaintiff)	ADVERSARY
)	NO.
v.)	
)	
FRONTRUNNER BANK, SUCCESSOR BANK, N.A.)	
AS TRUSTEE ON BEHALF OF THE HOLDERS)	
OF ASSET-BACKED CERTIFICATES, SERIES)	
2006-OOPS-007, ACME LOAN SERVICING, INC.,)	
CLOSED YESTERDAY MORTGAGE BROKERS LLC,)	
DEWEY CHEATHAM and MICHAEL H. SHAM III)	
)	
)	
Defendants)	
<hr/>)	

VERIFIED COMPLAINT

NOW COMES Rock M. Toughguy, debtor/plaintiff in this case, and complains of the defendants as follows:

PARTIES AND JURISDICTION

1. Plaintiff Rock M. Toughguy (hereafter "Toughguy") is a natural person who resides at 12 Downbeat Street, Eastborough by the Sea, Northeastern County, Massachusetts (the "property"). He filed a petition under Chapter 13 of the Bankruptcy Code on April 4, 2012 (the "petition date").

2. On the petition date, the internet site of the town of Eastborough says the property was worth \$515,000.

3. Toughguy is a self employed construction worker who works long hours and drives great distances to work to support

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his family and pay his bills. He lives at the property with his wife Belinda and their little children Betty and Bruce.

4. The reason this bankruptcy case had to be filed was a dispute with a mortgagee, as set forth herein, which Toughguy and his wife tried very hard to resolve by themselves.

5. Venue of the bankruptcy case is appropriate in this court pursuant to 28 USC §1408. Venue of the instant complaint is appropriate pursuant to 28 USC §1409.

6. This court has jurisdiction of the bankruptcy case and this complaint pursuant to 28 USC §1334.

7. Pursuant to 28 USC §157, the district court has referred all bankruptcy cases and related proceedings to the judges of this district.

8. This is a core proceeding within the meaning of that statute and the court has jurisdiction to enter a final judgment. If the instant complaint is found to be non-core, the plaintiff assents to the entry of final judgment by this court.

9. Upon information and belief defendant Frontrunner Bank, N.A. is a federally licensed bank which has its primary place of business at Twelve Too Big To Fail Plaza, Gotham, New York. Hereafter, this defendant shall be referred to as "Frontrunner Bank."

10. Upon information and belief defendant Successor Bank, N.A. as Trustee for the holders of Asset-backed Certificates, Series 2006-OOPS-007, is a federally licensed bank which has its primary place of business at One Too Big To Fail Plaza, Gotham, New York. Hereafter, this defendant shall be referred to as "Successor Bank."

11. Upon information and belief defendant Acme Loan Servicing, Inc. is a South Dakota corporation with a place of business at One Main Street, Dustbowl, South Dakota. Hereafter, this defendant shall be referred to as "Acme Servicing."

12. Closed Yesterday Mortgage Brokers LLC is a Massachusetts LLC with a place of business at Six Washington Street, Eastborough by the Sea, Massachusetts. Hereafter, this defendant shall be referred to as "Closed Yesterday."

13. Dewey Cheathem is a natural person with a place of business at Six Washington Street, Eastborough by the Sea, Massachusetts. Hereafter, this defendant shall be referred to as "Cheathem."

14. Michael H. Sham III is a natural person who resides at Seven Elite Heights, Eastborough by the Sea, Massachusetts. Hereafter, this defendant shall be referred to as "Sham."

FACTUAL ALLEGATIONS

15. Rock and Belinda Toughguy are lifelong residents of the Town of Eastborough. They have lived at the property since

they were married in 1997, and were given the home by Belinda's parents, since deceased, who told them to cherish and care for a beautiful home that has been in the family since the Civil War.

16. Everyone knows the economy has been awful since 2008, and the Toughguy family and their dreams have suffered too. Belinda was laid off from her job last year, and while the debtor is the hardest working guy I have ever met he has had to drive farther and search harder for work and work longer and yet longer hours still but has found the ends hard to meet.

17. Debtor and his wife were having a hard time sending the mortgage check every month and keeping food on the table. They sought answers at church, and everyone there said Deacon Dewey Cheathem was the answer to their prayers. The Toughguy family knew Cheathem as an anchor of the church, always there, always helping people, contributing and serving. Cheathem worked for Closed Yesterday, which advertised itself as "Your Eastborough Mortgage Solution."

18. Debtor and his wife met Cheathem at the office of Closed Yesterday in July 2011 and poured out their hearts. They told him they were having a hard time sending the mortgage checks, that their credit rating was probably bad, and that they were afraid they'd never be able to refinance. Cheathem told them to cheer up, to smile, right then, because he and Closed Yesterday had helped lots of people out of such situations. He said most of the people at church had refinanced with them, the Toughguys had heard that, and Cheathem said he would help them too with what he called a "typical arrangement." Cheathem ended the meeting teary eyed. He said it he and the bankers he worked with "almost as brothers" felt "joy" simply to be able to help people improve their lives.

19. At one or two other meetings, and a brief discussion at church, Cheathem explained that in the "typical arrangement" a friend with good credit would co-sign the refinancing, asking only a small fee to use his good name. He explained that with the excellent interest rate they would get on refinancing, after paying Sham, there would be \$25,000 or perhaps more in excess cash to cover other bills and current needs.

20. The debtor and his wife, full of relief, and joy, then pledged \$5,000 to the church and paid a number of problem bills in anticipation of the closing.

21. Unfortunately, at the November 1, 2011 closing their world was turned right upside down. Cheathem said there had to be a little change. While Sham was still happy to lend his name and help out, it would be necessary to put the property in Sham's name temporarily as loan security but the family could still live there. Debtor got angry and shouted at Cheathem, Belinda sobbed, and the lawyer who was the only other person present started trembling and left the room. Cheathem reassured

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Debtor and his wife, held their hands, told them that all they had to fear was fear itself, said that many of their neighbors had done this and things would work out "swell" for them too. Cheathem said Sham was a caring upright decent person, and the deal was simple. The refinancing money after paying the old mortgage would be held by Cheathem personally, and he himself would use that money to pay the new mortgage until the Toughguys had good credit with which to refinance on their own. The Debtor and his wife would get \$10,000 in cash right away, the rest of the cash would be held safe with Cheathem and would not even reach Sham (except for the fees to Cheathem and to Sham), and as soon as the family's credit was "back in the black" Cheathem personally would see that the property went "straight back" in their name. Feeling that they had absolutely no choice, that they were up against the wall and that if they failed to make the \$5,000 pledge the family would be shunned by the church, Debtor and his wife signed on the dotted line which was notarized by Cheathem.

22. At the closing, the Debtor and his wife signed a quitclaim deed transferring the property to Sham, a promissory note and mortgage in favor of Frontrunner Bank, and "a pile of other documents." The Toughguys did not get copies of these papers, or cannot find them.

23. Later they learned that of the \$440,000 in proceeds of the refinancing loan, about \$300,000 had gone to pay off their original mortgage, \$100,000 in "earned fees and payment escrow" to Cheathem, and \$30,000 to Sham, plus the balance of about \$10,000 which was given to the Debtor shortly after closing.

24. The Debtor has been told that shortly after the note and mortgage were signed in November, Frontrunner Bank pooled them with other similar instruments and sold them as a "securitized" package to Successor Bank as trustee.

25. In February 2012 Cheathem left Eastborough, packing up and moving late on a moonless night. His house was foreclosed in March, which was quite a shock, but three days later the Toughguys received notice that the loan they signed together with Sham was to be foreclosed also.

26. It is now notorious at church and in Eastborough that many residents were injured by the predatory lending activities of Closed Yesterday and its brokers. A large number of people, over fifty it is believed, have lost their homes to foreclosure, and an even greater number are desperately struggling to hold on to their homes and experiencing the same heartless runaround with lenders Frontrunner Bank, Successor Bank and Acme Servicing that the Toughguy family has experienced. These horrors have received feature exposure in the Eastborough Post Gazette and on local cable television, in a series entitled "Note and Mortgage Purgatory in Eastborough."

27. When the Debtor called Acme Servicing in March, he was told that only three payments had been made on the new mortgage.

28. When the Debtor called Sham in March, Sham said he did not know what they were talking about. Sham said yes he sometimes took a stake with Cheathem in distressed properties, but the Cheathem deals were all going sour and he was sour and had no interest in blocking foreclosure. If the Toughguys had something to pay him, and nothing less than \$10,000 would be acceptable to transfer the property back to them, maybe he could help out, otherwise he was burned real bad just like them and "sometimes life is just unfair."

29. Since March, the Debtor and his wife have had many many many many conversations with Acme Servicing's call center, have repeatedly submitted papers, have tried to answer and solve every problem, have had their submissions lost, answers and ideas misunderstood, misconstrued warped spindled and mutilated, and have felt abused mistreated and unappreciated. The only real response they ever got from Acme Servicing were copies of statements of income and expenses, said to have been signed by the Debtor and his wife and delivered at closing, which are not correct, not in their handwriting, which they did not sign, and which they had never seen before. Although this case cries out for compassion and mercy and the Toughguy family should have been helped, nothing was done for them, try try as they might.

30. The Debtor and his wife have placed many calls to Frontrunner Bank, without result. Frontrunner Bank says that it sold their note and mortgage, has no right or interest in them, and can do nothing for them.

31. The Debtor and his wife have also tried to contact Closed Yesterday, but the mortgage company has closed its office and no representative can be found.

32. The present location of Cheathem and the "escrow fund" he held for the Debtor and his wife are both unknown.

33. Successor Bank noticed the property for a foreclosure auction on April 5, 2012, and the Debtor filed his Chapter 13 bankruptcy petition the day before, staying the sale to save the property and see justice done.

34. Although Acme Servicing has filed a Proof of Claim with an attached copy of the mortgage note, that copy does not show an endorsement by Frontrunner Bank to Successor Bank or any other entity. Despite written request by counsel to Debtor, Acme Servicing has not provided a copy of the original note. From a review of the land records, there has been no assignment of record by the original holder of the note and mortgage to any other person or entity.

35. Using the powers of this federal court, a class made up of all the people in Eastborough who have lost their homes to predatory loans made by the defendants should be defined and

declared by this court and relief granted including punitive and compensatory damages under class action law so that defendants will understand that in the United States might is not right.

36. This court should reverse the transfer to Sham from the Debtor and his wife under the law of duress and declare title to be and always have been in this couple as tenants by the entirety.

37. This court should declare the note and mortgage null and void under the laws of misrepresentation, contract, implied duty of good faith and fair dealing, and promissory estoppel, and find that none of Frontrunner Bank, or Successor Bank, or Acme Servicing, or any transferee from these miscreants, can take anything under these wrongful instruments.

38. This court should indeed have its eyebrow raised by the offensive conduct of the defendants, a cabal aligned against the defenseless Toughguys, and grant all possible relief under MGL c. 93A, including multiple damages, and an award of the fees of counsel which are so necessary to see justice done.

39. This court should likewise see the pattern and acts of criminality lurking and sneering in this case and find that the defendants, and each of them, have intentionally violated the Racketeer Influenced and Corrupt Organizations Act, and order relief so that this enterprise ceases to blight this state.

WHEREFORE, Plaintiff respectfully requests this court to provide the requested relief and any other such relief this court deems as just and proper, including but not limited to:

(a) Judgment that none of the defendants possess any sufficient evidentiary indicia that provide standing as a real party in interest to enforce the note;

(b) Judgment that none of the defendants possess any sufficient evidentiary indicia that provide standing as a real party in interest to enforce the mortgage;

(c) Judgment that title to the property is and remains vested in Rock and Belinda Toughguy as tenants by the entirety;

(d) That the defendants' enterprise acted collectively and intentionally through predicate acts that proximately caused injury to the Plaintiff;

(e) All other legal and equitable claims made in the above paragraphs;

(f) All of Plaintiff's reasonable attorneys' fees and attendant costs defending defendants' legally deficient claims in this bankruptcy case; and

(g) All other equitable and legal remedies that this court deems just and proper.

Respectfully submitted,
Rock M. Toughguy
By his attorney,

Augustus Slapshot
Slapshot Law Offices P.C.
666 Washington Street
Eastborough by the Sea, MA 00000
(000) 000-0000
noreply@slapshotlaw.com

VERIFICATION

I, Rock M. Toughguy, plaintiff in this adversary proceeding, declare under the pains and penalties of perjury that I am familiar with the facts of this case, that I have read this Complaint, and that this Complaint is true and correct according to the best of my knowledge, information, and belief.

Rock M. Toughguy

**SELECTED CASES ON THE COMMON INTEREST DOCTRINE
IN BANKRUPTCY PROCEEDINGS**

- In re Leslie Controls, Inc., 437 Bankr. 493, 496-498 (Bankr. D. Del. 2010) (The common interest doctrine allows attorneys representing different clients with similar legal interests to share information without having to disclose it to others).
- In re Hardwood P. G. Inc., 403 Bankr. 445, 459 (WD Texas 2009) (Doctrine is strictly limited to those communications made to further a joint effort with respect to a common legal interest).
- In re Megan-Racine Associates, Inc., 189 Bankr. 562, 572-73 (ND. NY 1995) (Because bankruptcy cases, by their very nature involve common commercial interests, the joint defense privilege is limited to those who share more than a common commercial interest. Parties asserting the privilege must have a common legal interest, e.g. they may be co-parties to litigation or who reasonably believe they could be made party to litigation, though the doctrine is not limited to litigation interests alone).
- SIPC v. Stratton Oakmont, Inc., 213 Bankr. 433, 435 (SDNY 1997) (The joint defense privilege is an extension of the attorney-client privilege).