

IN THE CIRCUIT COURT OF RALEIGH COUNTY, WEST VIRGINIA

LLOYD KEITH LILLY and
BARBARA LILLY, individually and
on behalf of all others similarly situated,

Plaintiffs,

v.

CIVIL ACTION NO. 03-C-778-K

BANK ONE NATIONAL ASSOCIATION
COLUMBUS f/k/a BANK ONE WEST
VIRGINIA, N.A. and THOMAS M.
HAZLETT,
HOMECOMINGS FINANCIAL NETWORK,
INC., a corporation, RESIDENTIAL FUNDING
CORPORATION, a corporation, as subsidiary of
GMAC and RESIDENTIAL ASSET SECURITIES
CORP. HOME EQUITY MORTGAGE ASSET
BACKED PASS, through the CERTIFICATE
SERIES 1999 -KS2, a trust, and O. GAY ELMORE,

Defendants.

SECOND AMENDED COMPLAINT

INTRODUCTION

The Defendant lender Bank One refused to properly credit the Plaintiffs' payments, pursue alternatives to foreclosure and then ordered the Plaintiffs' home to be sold in a foreclosure sale despite the Plaintiffs' repeated attempts to resolve the matter. Lis Pendens has been filed in the Office of the Clerk of the County Commission of Raleigh County concurrently with the filing of this Complaint.

The claims on the plaintiffs' first mortgage arise out the practice known as predatory lending,¹ whereby, home-equity lenders and their associates, solicit unsophisticated borrowers and

¹ See HUD-Treasury National Predatory Lending Task Force, Joint Report: Curbing Predatory Home Mortgage Lending, (visited September 30, 2002) <<http://www.hud.gov/library/bookshelf18/pressrel/pr00-142.html>>.

fraudulently persuade them into unwise high-interest mortgage loans. The servicers of the loans then refuse to properly service the consumers loan. In this case, a national lender holding company through its affiliate conspired to exploit, rural and unsophisticated homeowners. They were able to obtain the Plaintiffs' signature to a loan loaded with fees and then the servicer refused to properly service the Plaintiffs' loan by charging them illegal fees, force placing home owners insurance on homeowners property and paying duplicate property taxes and then pursuing foreclosure.

PARTIES

1. Lloyd Keith Lilly and Barbara Lilly are natural persons residing in Cool Ridge, Raleigh County, West Virginia.

2. Second Mortgage. (a) The Defendant Bank One National Association Columbus f/k/a Bank One West Virginia, N.A. ("Bank One") does business at many locations throughout the State. Its principal place of business is at 100 E. Broad Street, Columbus, Ohio 43271-1040.

(b) The defendant Thomas Hazlett is a resident of Ohio County, West Virginia.

3. First Lien. (a) HomeComings Financial Network, Inc. ("HFN" or "Homecomings") is a subsidiary of Residential Funding Corporation and is the servicer of the loans at issue. It has its principal place of business at 8400 Normandale Lake Blvd., Suite 600 Minneapolis, MN 55437.

(b) Residential Funding Corporation ("RFC") is a subsidiary of GMAC with a principal address of 8400 Normandale Lake Blvd., Suite 600 Minneapolis, MN 55437 and which structured this trust holding the loans at issue. All acts of HFN alleged herein are directed by the Defendant RFC.

(c) Residential Asset Securities Corp. Home Equity Mortgage Asset Backed Pass through Certificate Series 1999-KS2 ("RAS") is a trust (hereinafter sometimes referred to as "the trust") which structured the securitization and approved the underwriting for the loans through a

pooling and servicing agreement. It has its principal place of business at 8400 Normandale Lake Blvd., Suite 600 Minneapolis, MN 55437. As the holder of said loan, relief relative to the loan is appropriate against this Defendant.

(d) The Defendant O. Gay Elmore, Jr. is an attorney who directs an office for the closing of subprime loans at 122 Capitol Street, Charleston, Kanawha County, West Virginia.

PART I - BANK ONE LOAN

FACTUAL ALLEGATIONS

4. The Plaintiffs entered into a second mortgage with the Defendant Bank One on October 12, 2000.

5. The loan was a home equity line agreement and it had a limit of \$24,500.00.

6. The Plaintiffs made monthly payment on the loan and as of December 2002, the total amount of the loan was \$25,075.30.

7. In May of 2003, the Plaintiffs began to receive letters from the Defendant Hazlett stating that his client Bank One had instructed him to sell their property and the sale was set for June 19, 2003.

8. (a) On June 13, 2003, counsel for the Plaintiffs contacted the Defendant Hazlett to inform him that the Plaintiffs were represented by counsel and also to demonstrate the payments that the Plaintiffs had been making to the Defendant Bank One.

(b) Defendant Hazlett was sent receipts showing that the Plaintiffs had paid a payment of \$1,282.70 on May 7, 2003 and a payment of \$260.00 on June 6, 2003.

9. The Plaintiffs' home was not sold on June 19, 2003 and the Plaintiffs made their July payment of \$260.00.

10. (a) In the beginning of August, the Plaintiffs were again told that their home was to be foreclosed upon. Plaintiffs through counsel again contacted the Defendant Hazlett and corporate counsel for the Defendant Bank One and assured them that payments had been made and shortfalls, if any, take care of.

(b) Plaintiffs were shocked to learn that their property had been sold to Bank One in a foreclosure sale on August 19, 2003.

CLAIMS FOR RELIEF

COUNT I - BREACH OF DUTY OF GOOD FAITH

11. The Plaintiffs incorporate paragraphs four through ten by reference.

12. The Defendants failed to deal with the plaintiffs fairly and in violation of their duty of good faith and fair dealing implied in every contract that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the benefit of their contract.

13. Defendant Bank One specifically breached its duty by:

- (a) Refusing to properly credit the Plaintiffs' payments;
- (b) illegally accelerating the note; and
- (c) pursuing foreclosure in lieu of other legal remedies.

WHEREFORE, the plaintiffs respectfully prays for the following relief:

- (a) Appropriate declaratory and equitable relief that any sale be set aside;
- (b) Actual and punitive damages;
- (c) For such other relief as may be deemed reasonable and just.

COUNT II - ILLEGAL PURSUIT OF FORFEITURE

14. The Plaintiffs incorporate paragraphs four through ten by reference.

15. The Defendant Bank One insisted on pursuit of forfeiture of the equity of a borrower's home without pursuing remedies at law and for nonexistent or minor amounts due.

16. This procedure and practice is in violation of the basic principle of law which prohibits the pursuit of forfeiture only as a last resort" "Equity abhors a forfeiture."

WHEREFORE, Plaintiffs respectfully pray for the following relief:

- (a) Declaratory relief that defendant Bank One illegally pursued forfeiture under the circumstances of this case;
- (b) That the illegal sale be set aside;
- (c) Such other relief as may be appropriate.

COUNT III - DEBT COLLECTION VIOLATIONS

17. The Plaintiffs incorporate paragraphs four through ten by reference.

18. The defendants' attorneys charged illegal attorney fees in violation of *West Virginia Code* §§46A-2-127 & 128.

19. The defendants employed unfair and unconscionable collection tactics in violation of *West Virginia Code* §46A-2-128.

WHEREFORE, plaintiffs respectfully prays for judgment against the defendant:

(a) That the plaintiffs be awarded her actual damages and civil penalties of \$3,600 for each violation pursuant to *West Virginia Code* §§46A-2-101(1) & 106.

(b) That the plaintiffs be awarded attorneys fees, costs and such other relief as the Court may deem appropriate and just.

PART II - RFC LOAN

FACTUAL ALLEGATIONS

The Asset Securitization Predatory Lending Model

20. The recent joint Department of Housing and Urban Development (“HUD”)/ Department of Treasury Report on subprime predatory lending by the HUD-Treasury National Predatory Lending Task Force attributes in great measure the significant growth of predatory lending to the use of asset securitization. See HUD-TREASURY TASK FORCE REPORT ON PREDATORY LENDING at 39-41 (2000) (available at <www.hud.gov/pressrl/treasrpt.pdf>). Asset securitization has enabled subprime lending to expand exponentially over the last decade. See id.; see also Keith Wofford & David Burkhalter, *Predatory Lending and Home Equity Securitizations*, MOODY’S INVESTORS SERVICE at 1-3 (April 28, 2000) (Ex. J.)

21. Securitization is similar to issuing a corporate bond, except that the lender does not promise to repay principal and interest to the investor, but rather promises to use the consumers’ loan payments to repay investors. It works like this: The master lender establishes a trust. The trust in turn issues bonds and receives funds from bond investors. The trust uses the funds from investors to buy consumer loans from the lender. Finally, the consumers’ loan payments are used to repay the bond investors.² The rights and obligations of the lender, the trustee, and the

² If, for example, consumers are paying eleven percent interest on a loan and the investors will accept seven percent, the master lender has a prospect of realizing the excess interest known as the yield spread. However, a portion of the yield spread is needed to make the securitization process work. The master lender or the servicer of the master lender will need the yield spread or its own capital to cover unpaid loan payments (*i.e.*, consumer default on a loan obligation). Investors’ bonds are not usually linked to specific consumer loans. Rather, monthly payments by consumers are deposited into a larger pool or trust. After fees for administering and servicing the trust are taken out by the master lender or the servicer, the investors receive their monthly interest and principal in payments according to their share in payments. The master lender will use the excess interest paid by other borrowers or advance its own funds to the investors and then get its money back from late

investors (the true owners of the loan) typically are spelled out in a lengthy contract called a “pooling and servicing agreement” or “PSI.” The bond investors buy a share in the pool of consumers’ loans, but certain mechanisms are in place to protect the investors from risk if the consumers were to default on the loans.

22. Actions of the loan originator are, as a practical matter, directed by the terms and conditions set forth in loan purchase agreements and pooling and servicing agreements, which are drafted by master lender (which can be a holding company for a lender or who can appear as an assignee or servicer on certain documents). See, e.g., England v. M.G. Investments, 93 F. Supp. 2d 718, 722 n. 5 (S.D. W.Va. 2000).

23. Evident from these layers of investment and lending is that many entities and individuals are involved with a single subprime home equity loan. The key is that the primary functions are controlled and directed by a master lender, who directs the process through an originating lender by use of a loan purchase agreement and a trust.

Master Lender RFC/Trust RASC/Servicer HFN Financial

24. The defendant trust and master lender sponsored and/or securitized many series of loan transactions one of which was the named Plaintiffs’ loan. The said Defendant sponsored the securitization steps of which are, upon information and belief, evidenced by a loan purchase agreement and a pooling and servicing agreement developed and coordinated by Defendant RFC; the pooling and servicing agreement directed the servicing by RFC’s affiliate HFN.

Part A – Loan Servicing:

payments or through foreclosure. This is generally referred to as a servicing advance. Investors usually seek out additional protection in case the loan losses use up the reserve. Techniques used to enhance the desirability of the bonds include (1) over-collateralization, (2) insurance from a bond insurance company, (3) senior subordinate structure, where all losses go the lowest rated bonds, and (4) yield supplement funds.

25. The Plaintiffs entered into the loan that is the subject of this action in December of 1998.

26. (a) The Plaintiffs' loan has been serviced by Homecomings since origination in 1998.

(b) The Plaintiffs began to have problems with the servicing of their loan in 2001.

27. (a) As is the case with most such loans, the loan did not call for an escrow account for the taxes or the insurance on their property.

(b) In 2001, the Plaintiffs received an annual statement of taxes due. The Plaintiffs paid their taxes in the amount of \$388.78.

28. (a) In November of 2001, the Defendant HomeComings also allegedly paid \$388.78 for the Plaintiffs' property taxes and began to charge the Plaintiffs \$67.67 a month in escrow payments starting with the Plaintiffs' November 5, 2001 payment. The Defendants also reported that the Plaintiffs' loan had an escrow account deficiency of \$388.78.

(b) Defendant HomeComings represented that the \$67.67 a month had to be escrowed in order to cover the Plaintiffs' 2001 taxes in addition to their taxes for the following year.

(c) The Plaintiffs called Defendant HomeComings to report that they had paid their 2001 property taxes, but HomeComings refused to correct the Plaintiffs' account and continued to charge them \$67.67 each month in escrow payments.

29. Refusal to Credit Payments. (a) Around this same time, the Plaintiffs began to experience the Defendants failure to properly credit their monthly payments.

(b) Plaintiffs made the following payments:

| | |
|----------|----------|
| 11/05/01 | \$659.07 |
| 12/05/01 | \$659.07 |
| 01/05/02 | \$654.07 |
| 02/18/02 | \$666.06 |
| 03/14/02 | \$702.32 |

(c) Plaintiffs then received communication dated March 15, 2002 that stated they owed \$1,486.91. This amount was false.

The Plaintiffs received another communication on April 19, 2002 saying that they were behind in payments and needed to make arrangements to get caught up.

30. Charges for Duplicative Insurance (a) On May 13, 2002, the Plaintiffs got a letter from the Defendant HomeComings, informing them that insurance had been force placed on their account at a cost \$328.00 year.

(b) The Plaintiffs called the Defendant HomeComings to inform them than they had homeowners insurance through Nationwide, but the Defendant refused to cancel the insurance that had been force placed on the Plaintiffs' property.

31. Charge for Attorney's Fees and Return of Payments. (a) On May 22, 2002, the Plaintiffs' May payment of \$733.00 was returned to them and they were informed that their home had been sent to foreclosure.

(b) At this time, the Plaintiffs called the Defendant to ascertain the amount of money it would take to get their home out of foreclosure. The Plaintiffs were told that they would be required to pay a total of five monthly payments plus attorney fees of \$725.00.

(c) The Plaintiffs sought the advice of counsel in order to save their home from foreclosure and reminded Defendant HomeComings that it was illegal to charge the Plaintiffs \$725 in attorney fees to get their home out of foreclosure.

(d) The Defendant agreed to waive the illegal attorney fees and the Plaintiffs signed a forbearance agreement and paid the Defendant \$3,606.00 on July 8, 2002.

32. Continued Illegal Charges. In the Plaintiffs' Aug, 2002 billing statement, an attorney fee of \$751.30 began to show up labled as "Fees and Expenses."

33. More Charges for Attorney Fees (a) The Plaintiffs continued to make regular monthly payments:

| | |
|----------|------------|
| 09/03/02 | \$720.70 |
| 10/16/02 | \$725.00 |
| 10/28/02 | \$715.70 |
| 12/12/02 | \$725.00 |
| 01/03/03 | \$715.70 |
| 03/03/03 | \$1,450.00 |

(b) On 10/8/02, the Plaintiffs received a certified letter saying that they owed \$1,461.40. This amount was false.

(c) The Plaintiffs then received six Certified letters dated 12/9/02 all saying they owed \$1,436.40. This amount was false.

(d) The Plaintiffs' March 2003 payment of \$1,450.00 was rejected and they were again told that their home had been placed in foreclosure.

(e) When the Plaintiffs called to ascertain the amount they were required to pay to save their home from foreclosure, they were told that they needed to pay four monthly payments plus \$650.00 in attorney fees.

CLAIMS FOR RELIEF

COUNT I - CLASS CLAIM FOR BREACH OF DUTY OF GOOD FAITH AND FAIR DEALING

34. The Plaintiffs incorporate paragraphs 20 through 33 by reference.

35. The Defendant Homecomings has breached its duty of good faith and fair dealing implied in every contract that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the benefit of their contract.

36. Defendant Homecomings, as a matter of intentional and planned business practices, breaches its duty by:

(a) adding charges to the consumers, returning payments and after creating a large deficiency, moving to foreclose on the consumers' home; and

(b) assessing unauthorized charges;

(c) illegally accelerating notes; and

(d) pursuing foreclosure in lieu of other legal remedies.

37. Plaintiffs bring this action on their own behalf and on behalf of all other similarly situated individuals, pursuant to Rule 23 of the *West Virginia Rules of Civil Procedure*. The class consists of all consumer borrowers whose loans were/are serviced by Homecomings Financial anytime after that date four years immediately preceding the filing of this action.

38. The requirements of Rule 23 are satisfied as follows:

(a) The class is so numerous joinder of all members is impracticable;

(b) There are questions of law and fact common to all members of the class; and

(c) The named Plaintiffs' claims are typical of those of the class as a whole.

39. The Plaintiffs have displayed an interest in vindicating the rights of the class members, will fairly and adequately protect and represent the interests of the class, and are represented by skillful and knowledgeable counsel. The relief sought by the named Plaintiffs will inure to the benefit of the class generally.

40. The Defendants have acted or refused to act on grounds generally applicable to the entire class, thereby making final injunctive, declaratory and other relief appropriate for the class as a whole.

41. The Defendants have charged illegal fees to all members of the class.

42. The Defendants have foreclosed upon members of the class who did not pay illegal fees and against whom they were otherwise not entitled to foreclose.

WHEREFORE, Plaintiffs on behalf of themselves and all others similarly situated, respectfully pray that the Court enter judgment in their favor and against the defendants as follows:

(a) The Court enter declaratory judgment that practices are illegal as alleged, and enjoin the Defendants from any further attempt to enforce all or part of the contracts or assert liability thereunder;

(b) Enjoining illegal charges and practices;

(c) Reasonable attorneys fees and the cost of this litigation ; and such other relief as the Court may deem equitable and just.

COUNT II – CLASS CLAIM FOR ILLEGAL PURSUIT OF FORFEITURE

43. The Plaintiffs incorporate paragraphs 20 through 33 by reference.

44. The Defendant Homecomings as a matter of routine seeks to pursue forfeiture of the equity of a borrower's home without pursuing remedies at law and for non existent or minor amounts due.

45. This procedure and practice is in violation of the basic principle of law which prohibits the pursuit of forfeiture only as a last resort. "Equity abhors forfeiture." Bailey v. Savage, 160 W.Va. 235, 236 S.E.2d 203 (1977).

46. Plaintiffs bring this action on their own behalf and on behalf of all other similarly situated individuals, pursuant to Rule 23 of the *West Virginia Rules of Civil Procedure*. The class consists of all consumer borrowers whose loans were/are serviced by Homecomings Financial anytime after that date four years immediately preceding the filing of this action.

47. The requirements of Rule 23 are satisfied as follows:

(a) The class is so numerous joinder of all members is impracticable;

(b) There are questions of law and fact common to all members of the class; and

(c) The named Plaintiffs' claims are typical of those of the class as a whole.

48. The Plaintiffs have displayed an interest in vindicating the rights of the class members, will fairly and adequately protect and represent the interests of the class, and are represented by skillful and knowledgeable counsel. The relief sought by the named Plaintiffs will inure to the benefit of the class generally.

49. The Defendants have acted or refused to act on grounds generally applicable to the entire class, thereby making final injunctive, declaratory and other relief appropriate for the class as a whole.

50. The Defendants have foreclosed upon members of the class who did not pay illegal fees and against whom they were otherwise not entitled to foreclose.

WHEREFORE, Plaintiffs on behalf of themselves and all others similarly situated, respectfully pray that the Court enter judgment in their favor and against the defendants as follows:

(a) declaratory relief that defendant Homecomings may only pursue forfeiture (i) after pursuit of alternative remedies of specific performance or judgment for a sum certain and collection thereon; (ii) after provision of a schedule of when payments were received and credited; and with a listing of each charge added to the account, the date and justification therefor;

(b) such other relief as may be appropriate.

COUNT III - CLASS CLAIM FOR UNAUTHORIZED CHARGES

51. The Plaintiffs incorporate paragraphs 20 through 33 by reference.

52. Defendant HFN, in the course of attempting to collect an alleged claims from the plaintiff class routinely assesses additional charges that are not authorized by agreement or law, in violation of West Virginia Code §§46A-2-127(g) & -128(c).

53. Defendant HFN threatened to add fees and charges, in violation of West Virginia Code §§46A-2-127(g) & -124(f).

WHEREFORE, Plaintiffs on behalf of themselves and all others similarly situated, respectfully pray that the Court enter judgment in their favor and against the defendants as follows:

(a) The Court enter a declaratory judgment that defendant is charging unauthorized charges and enjoin the illegal practices.

(b) Civil penalties of \$3,800 for each violation pursuant to West Virginia Code sections 46A-5-101(1) & -106.

(c) Attorney fees and such other relief as the Court may deem reasonable and just.

COUNT IV – CLASS CLAIM FOR ILLEGAL DEBT COLLECTION

54. The Plaintiffs incorporate paragraphs 20 through 33 by reference.

55. The Defendant Homecomings demanded monies that were not due from the Plaintiffs and then placed their account in default.

56. The Defendant Homecomings employed unfair and unconscionable collection tactics in violation of West Virginia Code §46A-2-127(d).

57. Plaintiffs bring this action on their own behalf and on behalf of all other similarly situated individuals, pursuant to Rule 23 of the *West Virginia Rules of Civil Procedure*. The class consists of all consumer borrowers whose loans were/are serviced by Homecomings Financial anytime after that date four years immediately preceding the filing of this action.

58. The requirements of Rule 23 are satisfied as follows:

- (a) The class is so numerous joinder of all members is impracticable;
- (b) There are questions of law and fact common to all members of the class; and
- (c) The named Plaintiffs' claims are typical of those of the class as a whole.

59. The Plaintiffs have displayed an interest in vindicating the rights of the class members, will fairly and adequately protect and represent the interests of the class, and are represented by skillful and knowledgeable counsel. The relief sought by the named Plaintiffs will inure to the benefit of the class generally.

60. The Defendants have acted or refused to act on grounds generally applicable to the entire class, thereby making final injunctive, declaratory and other relief appropriate for the class as a whole.

61. The Defendants have charged illegal fees to all members of the class.

62. The Defendants have foreclosed upon members of the class who did not pay illegal fees and against whom they were otherwise not entitled to foreclose.

WHEREFORE, Plaintiffs on behalf of themselves and all others similarly situated, respectfully pray that the Court enter judgment in their favor and against the defendants as follows:

(a) The Court enter a declaratory judgment that defendant is charging unauthorized charges and enjoin the illegal conduct.

(b) Civil penalties of \$3,800 for each violation pursuant to West Virginia Code §§46A-5-101(1) & 106.

(c) Attorney fees and such other relief as the Court may deem reasonable and just;

COUNT V - JOINT VENTURE, CONSPIRACY, AND AGENCY

63. The Plaintiffs incorporate paragraphs 20 through 33 by reference.

64. At all times relevant hereto, the acts of the other defendants were done as agent for the Defendant RFC.

65. The Defendant holding company and the lender conspired to commit the unlawful acts, or lawful acts by unlawful means, herein alleged; and each is responsible for all acts alleged herein.

66. Each of the Defendants' acts were conducted as a part of said principal-agency relationships between said Defendants.

Part B – Loan Origination

67. The Plaintiffs purchased their home in 1982 for \$39,000.

68. In or around December of 1998, the Plaintiffs were solicited by the a now defunct front lender of the Defendant lender through a newspaper advertisement representing that the Plaintiffs could consolidate their debts and save money with a lower interest loan.

69. (a) The Plaintiffs went to their loan closing at a Beckley office on December 29, 1998.

(b) The Settlement Statement falsely states that the settlement took place in Charleston before Defendant O. Gay Elmore.

(c) No explanation of the details of the transaction were provided.

70. Under applicable West Virginia law, the “principal,” see W. VA. CODE §46A-1-102(36), in the Plaintiffs' loan includes the following:

(a) the net amount paid on behalf of the debtor (i.e. to the consumer and third-party creditors):

Total: \$ 53,115.00

(b) plus additional charges permitted by the chapter, see W. VA. CODE §46A-3-109(a)(5), *i.e.*, reasonable closing costs, see W. VA. CODE §46A-1-102(7):

| | | | |
|-----|---|----|--------------|
| [a] | Title insurance | \$ | 180.00 |
| [b] | Doc. Prep. fee to MG Investments | \$ | 150.00 |
| [c] | Recording fees | \$ | 25.00 |
| [d] | Appraiser fee - Estep Appraisal Service | \$ | 425.00 |
| | Subtotal: | | \$ 780.00 |
| | Total Principal: | | \$ 53,895.00 |

(c) The defendants cannot include in the principal the following charges:

| | | |
|---|----|----------|
| Closing fee to O. Gay Elmore | \$ | 550.00 |
| Administration fee to MG Investments | \$ | 245.00 |
| Lender underwriting fee to MG Investments | \$ | 350.00 |
| Processing fee to MG Investments | \$ | 250.00 |
| Loan origination fee to MG Investments | \$ | 6,160.00 |

The charges listed immediately above fall within the definition of “loan finance charge.” See W. VA. CODE §46A-1-102(26) (“[C]harges . . . imposed directly or indirectly by the lender as an incident to the extension of credit.”).

(d) On information and belief certain fees and charges were not reasonable or bona fide.

71. (a) The contract rate of interest is 9.7%.

(b) Application of this rate of interest to the principal does not yield the monthly payment or total payment that the Plaintiffs are being charged.

COUNT VI - PREDATORY LENDING

72. The Plaintiffs incorporate paragraphs 20 through 33 by reference.

73. The Defendants have engaged in a pattern of home equity skimming and predatory lending practices to make unfair loans in order to transfer home equity from borrowers to lenders.

74. The Plaintiffs, are unsophisticated consumer with little understanding of financial matters.

75. The loans left the Plaintiffs worse off than they were with their existing financing, and put them in jeopardy of losing their home.

76. On information and belief, the loan agreements, contained the following unfair terms, which constituted an unfair surprise to the Plaintiffs:

- (a) Excessive fees and costs;
- (b) Finance charges that were represented to the Plaintiffs to be principal, thereby making the interest charges higher than represented and requiring the finance charges to be paid as principal upon refinancing.

77. The loan agreement was induced by unconscionable conduct, specifically, the Plaintiffs were induced into a loan agreement on terms favorable to the lenders, which flipped them into higher principal and subjected them to unconscionable fees.

78. The Defendants included finance charges in the principal, in violation of *West Virginia Code* §46A-1-102(36), and charged interest on top of this prepaid finance charge.

79. The Defendants' conduct in inducing the Plaintiffs into the loan was unconscionable in violation of *West Virginia Code* §46A-2-121.

80. The loan issued to the plaintiffs was unconscionable, under all circumstances alleged, at the time it was made and/or was induced by unconscionable conduct, and therefore is unenforceable under *West Virginia Code* §46A-2-121.

WHEREFORE, the Plaintiffs respectfully request the following relief:

- (a) Actual damages;
- (b) A civil penalty of \$3,800 for each violation, pursuant to *West Virginia Code* §§ 46A-5-101(1) & 106;

- (c) The Court declare that the loan agreement is void and unenforceable pursuant to *West Virginia Code* §46A-5-101(2);
- (d) Reasonable attorney fees and the cost of this litigation pursuant to *West Virginia Code* §46A-5-104; and
- (e) Such other relief as the Court may deem equitable and just.

COUNT VIII – PROFESSIONAL MALPRACTICE AND NEGLIGENCE

81. The Plaintiffs incorporate paragraphs 20 through 33 by reference.

82. Defendant Elmore owed a duty to the Plaintiffs to exercise reasonable care in the performance of his duties as an attorney.

83. Defendant Elmore breached that duty in failing to review the documents to assure compliance with state laws.

84. Defendant Elmore’s breach of that duty proximately caused Plaintiffs to suffer damages.

WHEREFORE, the Plaintiffs respectfully request the following relief:

- (a) equitable relief in the terms of the loan agreements;
- (b) actual and punitive damages; and,
- (c) such other relief as the Court may deem appropriate and just.

COUNT IX – JOINT VENTURE, CONSPIRACY, AND AGENCY

85. The Plaintiffs incorporate paragraphs 20 through 33 by reference.

86. Each Defendant had a pecuniary interest in the loan transaction with the Plaintiffs.

87. The Defendants combined their money, skill, and knowledge to carry out the enterprise, that is the home loan to the Plaintiffs.

88. On information and belief, each Defendant had an agreement – written, oral, constructive, or otherwise – with one another to close the loan.

89. Each of the acts of the Defendants, hereinbefore alleged, were done in furtherance of a joint venture in which each of the acts of each of the Defendants was pursued with a joint purpose.

THE PLAINTIFFS DEMAND TRIAL BY JURY ON ALL ISSUES SO TRIABLE.

**KEITH LILLY and
BARBARA LILLY,
By Counsel**

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