

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

In re:

**Chapter 7 Bankruptcy
Bky 04-327235 (GFK)
Adv. 04-3338**

Bradley R. Thayer and Judith N. Thayer,

Debtors.

In re:

American Residential Mortgage, LP,

Plaintiff,

v.

Bradley R. Thayer and Judith N. Thayer,

Defendants.

**JOINT ANSWER AND COUNTERCLAIMS
OF BRADLEY R. THAYER AND JUDITH N. THAYER**

Defendants, Bradley R. Thayer and Judith N. Thayer (the “Thayers”), for their joint Answer to the Adversary Complaint of Plaintiff, American Residential Mortgage, LP, a Minnesota limited partnership, admit, deny, and qualify as follows:

The Thayers deny each and every allegation, matter, and thing as set forth in Plaintiff’s Adversary Complaint (the “Complaint”) except as specifically admitted or otherwise qualified herein.

1. As to the allegations contained in Paragraph 1 of the Complaint, the Thayers admit such allegations.

2. As to the allegations contained in Paragraph 2 of the Complaint, the Thayers admit such allegations.

3. As to the allegations in Paragraph 3 of the Complaint, the Thayers admit such allegations.

4. As to the allegations in Paragraph 4 of the Complaint, the Thayers admit such allegations.

5. As to the allegations in Paragraph 5 of the Complaint, the Thayers admit that venue is proper.

6. As to the allegations in Paragraph 6 of the Complaint, the Thayers admit that the Plaintiffs are seeking relief arising under §§ 502(b), 506 and 523(c) of the Bankruptcy Code and they affirmatively allege that such statutory sections speak for themselves and that that Plaintiff is not entitled to the relief provided by such sections.

7. As to the allegations in Paragraph 7 of the Complaint, the Thayers admit such allegations.

8. As to the allegations in Paragraph 8 of the Complaint, the Thayers admit such allegations.

9. As to the allegations in Paragraph 9 of the Complaint, the Thayers admit such allegations.

10. As to the allegations in Paragraph 10 of the Complaint, the Thayers deny such allegations and allege that the new note and mortgage were executed on or about August 25, 2003.

11. As to the allegations in Paragraph 11 of the Complaint, the Thayers admit such allegations.

12. As to the allegations in Paragraph 12 of the Complaint, lack information sufficient to form a belief as to the truth of such allegations and the Thayers returned a check for \$4,093.46 that was uncashed to Plaintiff.

13. As to the allegations in Paragraph 13 of the Complaint, the Thayers lack sufficient information to either admit or deny the first sentence of said paragraph and deny the remaining allegations.

14. As to the allegations in Paragraph 14 of the Complaint, the Thayers deny such allegations and admit that Plaintiff caused a purported assignment from TCF Mortgage Corporation to Plaintiff, Instrument No. 3277617, to be filed on June 24, 2004, and the Thayers specifically deny that such assignment is valid and/or that such assignment transfers no rights; the Thayers lack information sufficient to form a belief as to the authenticity of the alleged assignment.

15. As to the allegations in Paragraph 15 of the Complaint, the Thayers deny such allegations.

16. As to the allegations in Paragraph 16 of the Complaint, the Thayers admit they commenced a Chapter 7 proceeding on May 5, 2004, and deny the remaining allegations and allege that the Thayers are not required to specifically “disclose the TCF Note and TCF Mortgage, now held by ARM” and that the Thayers, in their schedules, estimated the value of Plaintiff’s claims to be at most \$170,000.00 and the Thayers specifically set forth in their schedules that there was a dispute and controversy over whether any debt is owing to Plaintiff or whether any such debt is secured or unsecured.

17. As to the allegations in Paragraph 17 of the Complaint, the Thayers, deny such allegations but admit that the mortgage in question was not recorded.

18. As to the allegations in Paragraph 18 of the Complaint, the Thayers deny such allegations and they specifically deny that Plaintiff can “unwind” a payoff under the authority cited or any other authority.

19. As the allegations in Paragraph 19 of the Complaint, the Thayers are without knowledge or information sufficient to form a belief as to the truth of such allegations and Thayers allege that the bankruptcy schedules in question speak for themselves.

20. As the allegations in Paragraph 20 of the Complaint, the Thayers are without knowledge or information sufficient to form a belief as to the truth of such allegations.

21. As to the allegations in Paragraph 21 of the Complaint, the Thayers allege that the bankruptcy schedules speak for themselves and the Thayers are without knowledge or information sufficient to form a belief as to the truth of such allegations related to the application in question.

22. As the allegations in Paragraph 22 of the Complaint, no responsive pleading is required.

23. As to the allegations in Paragraph 23, the Thayers admit that Plaintiff claims to be the current holder of the TCF Note and TCF Mortgage and deny the remainder; the Thayers specifically object to Plaintiff’s claims, including the secured status of such claims, for the reasons set forth herein and the Thayers allege that such claims and the secured status of such claims should be disallowed.

24. As to the allegations in Paragraph 24, the Thayers deny such allegations; further, the Thayers specifically object to Plaintiff's claims, including the claim of secured status, for the reasons set forth herein and the Thayers allege that such claims and the secured status of such claims should be disallowed.

25. As the allegations in Paragraph 25 of the Complaint, no responsive pleading is required.

26. As to the allegations in Paragraph 26, the Thayers deny such allegations.

27. As to the allegations contained in Paragraph 27 of the Complaint, the Thayers are without knowledge or information sufficient to form a belief as to the truth of such allegations and allegations that Plaintiff's allegations in said paragraph are moot.

28. As to the allegation in Paragraph 28, the Thayers deny such allegations.

29. As to the allegation in Paragraph 29, the Thayers deny such allegations.

AFFIRMATIVE DEFENSES

30. The Thayers restate and reallege the allegations contained in Paragraphs 1 –29 above and further allege as follows:

31. The Thayers hereby interpose, without admitting they have the burden of proof, the following affirmative defenses:

FIRST AFFIRMATIVE DEFENSE

32. The Thayers interpose the defense of payment.

SECOND AFFIRMATIVE DEFENSE

33. They Thayers interpose the defense of waiver.

THIRD AFFIRMATIVE DEFENSE

34. The Thayers interpose the defense of discharge in bankruptcy.

FOURTH AFFIRMATIVE DEFENSE

35. The Thayers interpose the defense of laches.

FIFTH AFFIRMATIVE DEFENSE

36. The Thayers interpose the defense of release.

SIXTH AFFIRMATIVE DEFENSE

37. The Theyers interpose the defense of the statute of frauds.

SEVENTH AFFIRMATIVE DEFENSE

38. The Thayers interpose the defense of estoppel.

EIGHTH AFFIRMATIVE DEFENSE

39. The Thayers interpose the defense of unclean hands.

NINTH AFFIRMATIVE DEFENSE

40. The Thayers interpose the defense of contributory negligence.

TENTH AFFIRMATIVE DEFENSE

41. The Thayers interpose the defense of assumption of risk.

ELEVENTH AFFIRMATIVE DEFENSE

42. The Thayers interpose the defense of illegality as the acts and omissions as the Plaintiff violated the Truth in Lending Act 15 U.S.C. § 1635 as well as Regulation Z 12 C.F.R. 226.23 and other applicable provision of TILA and Regulation Z as Plaintiff 1)

specifically failed to delay performance as required by law and, therefore, Plaintiff's claims are barred; and 2) Plaintiff's attempts to "unwind" and/or "assign" and enforce the TCF Note and TCF Mortgage are not provided for by TILA and Regulation Z and the Plaintiff's failure to abide by the delay in performance rule is violative of TILA and Regulation Z as they impermissibly interfere with the Thayers' rescission rights and their right to obtain full, accurate and complete TILA disclosures.

TWELTH AFFIRMATIVE DEFENSE

43. The Thayers interpose the defense of illegality as Plaintiff is not entitled to the relief requested in the Complaint as its acts and omissions are and were in contravention of the Minnesota Consumer Fraud Act Minn. Stat. §§ 325F.68.-70.

THIRTEENTH AFFIRMATIVE DEFENSE

44. Plaintiff's claim and allegations in Counts I and II of the Complaint are moot.

FOURTEENTH AFFIRMATIVE DEFENSE

45. Because of the allegations alleged herein, Plaintiff is not a holder in due course.

FIFTEENTH AFFIRMATIVE DEFENSE

46. The Thayers interpose the defense of recoupment.

SIXTEENTH AFFIRMATIVE DEFENSE

47. The TCF Note is discharged under applicable provisions of the Minn. Stat. § 336.3-601.

SEVENTEENTH AFFIRMATIVE DEFENSE

48. The Thayers interpose the defense of rescission as to the “Canceled Loan” described in the Complaint.

EIGHTEENTH AFFIRMATIVE DEFENSE

49. To the extent that Minnesota law conflicts with provisions of the TILA or Regulation Z relating to this matter, such laws or preempted by federal law.

NINETEENTH AFFIRMATIVE DEFENSE

50. Plaintiff’s claims are barred because of its violations of provisions of the Mortgage Originator and Services Licensing Act, Minn Stat. §58.13 Subd. 1 (19) and other applicable provisions of Minn. Stat. §58 *et seq.*

TWENTIETH AFFIRMATIVE DEFENSE

51. Plaintiff, as a mortgage originator licensed by the Minnesota Department of Commerce, owed the Thayers fiduciary duties and it breached such duties based on the acts and omissions alleged herein.

TWENTY-FIRST AFFIRMATIVE DEFENSE

52. Plaintiff’s allegations in Count II of the Complaint fails to comport with Federal Rule of Civil Procedure 9(b) as the allegations are not pled with particularity.

TWENTY-SECOND AFFIRMATIVE DEFENSE

53. Plaintiff failed to perfect its assignment prior to the commencement of the Thayers’ Chapter 7 bankruptcy filing and therefore Plaintiff’s claims are unsecured.

TWENTY-THIRD AFFIRMATIVE DEFENSE

54. Plaintiff’s claims fail to state a claim upon which relief can be granted.

COUNTERCLAIMS

55. Defendants, Bradley R. Thayer and Judith N. Thayers, assert the following Counterclaims against Plaintiff, American Residential Mortgage, LP, a Minnesota limited partnership.

56. The Thayers restate and reallege the allegations contained in Paragraphs 1-55 above and further state and allege as follows:

JURISDICTION AND VENUE

57. This Court has jurisdiction over the Thayers' Counterclaims pursuant to 28 U.S.C. §§ 157, 1331, and 1334. This Adversary Proceeding is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(K) and (O); the Court also has jurisdiction over Count IV of the Thayers' Count IV pursuant to 15 U.S.C. § 1640(e) (Truth In Lending Act).

58. To the extent that any of the Thayers' Counterclaims can be construed as a non-core proceedings, the Thayers consent to the entry of a final order or judgment by the Bankruptcy Court.

59. Venue in this matter is proper pursuant to 28 U.S.C. § 1409.

FACTUAL BACKGROUND

60. The Thayers executed a note and mortgage in favor of Plaintiff on or about August 25, 2003.

61. The Thayers rescinded such transaction on August 28, 2003, and Plaintiff received the rescission notice in question on August 29, 2004.

62. Plaintiff failed to delay performance as mandated by the TILA and Regulation Z, and various creditors of the Thayers, including TCF Mortgage Corporation, were paid in full in late August or early September of 2003.

63. In late August or early September of 2003, TCF Mortgage Corporation accepted the payment in question as full satisfaction of any debts owed by the Thayers.

64. TCF Mortgage Corporation executed and delivered a satisfaction of such mortgage in late August or September of 2003.

65. The purported assignment of the note and mortgage in question took place in February of 2004, almost six months after the note and mortgage had been paid and satisfied in full.

66. The Thayers' residence at 9337 Jarrod Avenue, Cottage Grove, Minnesota has been exempted and it is no longer property of the Bankruptcy Estate.

COUNT I

(Disallowance of Claims)

67. The Thayers restate and reallege the allegations contained in Paragraphs 1-66 above and further allege as follows:

68. The Thayers, pursuant to 11 U.S. § 502 and as otherwise provided by the Bankruptcy Code seek an order that the TCF Note and the TCF Mortgage are unenforceable against the Thayers and the property of the Thayers under applicable law and under the terms of such note and mortgage.

69. The Thayers seek an order that Plaintiff's claims the TCF Note and TCF Mortgage are satisfied in full, that the assignment of the TCF Note and TCF Mortgage is invalid or has no force or effect, that the Plaintiff's claims are unsecured, and that Plaintiff's claims be disallowed.

COUNT II
(Declaratory Judgment/Specific Performance)

70. The Thayers restate and reallege the allegations contained in Paragraphs 1-69 above and further allege as follows:

71. The Thayers seek a determination that the TCF Note and TCF Mortgage as described in Paragraph 7 of the Complaint are paid in full and fully satisfied and that the assignment of the TCF Note and Mortgage is invalid and/or that it has no effect and transfers no right to payment and no right to any security interest in the Thayers' residence.

72. The holder of the TCF Note and TCF Mortgage is required to execute, deliver, file a satisfaction of mortgage when a note is paid in full.

73. Plaintiff, the apparent holder of the TCF Note and TCF Mortgage, has failed to file a satisfaction of mortgage that was executed and in late August or September of 2003.

74. Plaintiff, under Minnesota Stat. §§ 507.40 and 507.41 and other applicable law have a duty to file a satisfaction of mortgage when a note secured by a mortgage has been paid and Plaintiffs, have failed to do so.

75. The Thayers seek an order directing Plaintiff to execute and file or to file the pre-existing satisfaction of mortgage for the TCF Mortgage with the Washington County Recorder's Office forthwith.

76. Alternately, the Thayers seek an order and judgment that would have the effect of a satisfaction of mortgage.

COUNT III

(Declaratory Judgment on the Assignability of Certain Claims by
the Chapter 7 Trustee and Questions of Standing)

77. The Thayers restate and reallege the allegations contained in Paragraphs 1-76 above and further allege as follows:

78. There is a dispute over the Chapter 7 Trustee's power to assign claims, which the Thayers listed in their schedules, arising under the Truth in Lending Act and related consumer and common law claims to third parties.

79. The Thayers tendered funds to the Chapter 7 Trustee to purchase such claims and the Defendants, also have or may have, tendered funds to purchase such claims.

80. The Thayers seek a declaration that any assignment of such claims to the Plaintiff by the Chapter 7 Trustee is invalid and of no force and effect because: 1) the claims in question are personal claims and/or are claims which are penal in nature and that such claims cannot be assigned under applicable state and federal law.

81. Further the TILA claim in question cannot be assigned to Plaintiff as Plaintiff is not a consumer or a natural person within the meaning of 15 U.S.C. § 1602(h) and only consumers or natural persons can make claims arising under 15 U.S.C. § 1640 and that, Plaintiff, a creditor within the meaning of 15 U.S.C. § 1602 (f), lacks standing to assert such claims against itself.

82. Further, the Thayers seek a declaration that their tender of funds to the Chapter 7 Trustee operates as an assignment of such claims effective August 27, 2004, and that Defendants had and have standing to make such claims in this action.

COUNT IV

(Violation of Truth-in Lending Act Relief under 15 U.S.C. §1640)

83. The Thayers restate and reallege the allegations contained in Paragraphs 1-82 above and further allege as follows:

84. The Thayers are natural persons and they were, at all times material hereto, consumers as defined under the Truth in Lending Act. 15 U.S.C. § 1602 (h).

85. Plaintiff is a creditor who regularly extends consumer credit within the meaning of 15 U.S.C. § 1602 (f).

86. The Thayers sought and obtained financing from Plaintiff primarily for personal, family or household purposes.

87. Such financing was in connection with the Thayers's primary dwelling.

88. On or about August 25, 2003, the Thayers executed a note and mortgage in favor of Plaintiff.

89. The Thayers, on August 28, 2003, properly and timely mailed an executed notice of cancellation to Plaintiff and rescinded the note and mortgage pursuant to 15 U.S.C. § 1635.

90. Plaintiff received such notice of cancellation on August 29, 2003.

91. The Thayers' loan proceeds were paid out on or about August 29, 2003, notwithstanding Plaintiff's receipt of the Thayers' cancellation notice in violation of 15 U.S.C. § 1635(c), Regulation Z §§ 226.15(c) and 226.23(c), and as otherwise provided by TILA; further the failure to delay performance materially undermined the TILA disclosures provided by Plaintiff in contravention of TILA and Regulation Z.

91. As a result, the Thayers seeks damages and all remedies provided by 15 U.S.C. § 1640(a) or other applicable provisions of TILA and Regulation Z.

92. The Thayers also seeks their attorney's fees, costs and disbursements from Plaintiff as provided by 15 U.S.C. § 1640 (a)(3).

WHEREFORE, Bradley R. Thayer and Judith N. Thayer, pray that the Court grant judgment against Plaintiff, American Residential Mortgage, LP, a Minnesota limited partnership, as follows:

- 1) Ordering and declaring that the TCF Note is paid in full and discharged in full and the purported assignment of the TCF Mortgage and TCF Note to Plaintiff is also invalid and that it transferred no rights against the Defendants or their property;
- 2) Ordering and declaring that the TCF Mortgage is satisfied and that Plaintiff is to provide Defendants with a satisfaction or mortgage or that they file the same within 10 days of the date of the Court's order or that the Court's judgment in this matter act as a satisfaction of mortgage upon filing with the Washington County Recorder's Office;
- 3) Ordering that the Defendants' objections to Plaintiff's claims be sustained and that such claims be disallowed;
- 4) Denying Plaintiff's request for an exception to discharge under 11 U.S.C. § 523(a)(2)(B) and granting an order discharging Plaintiff's claims;
- 5) Declaring Plaintiff's claims against the Defendants or their property to be unsecured;
- 6) Declaring that the purported assignment of the Chapter 7 Trustee to Plaintiff of TILA and related claims are invalid and of no force and effect and that the Defendants' tender of funds to the Chapter 7 Trustee operates as an assignment of such claims effective August 27, 2004, and that Defendants had and have standing to make such claims in this action;
- 7) Awarding the Defendants damages and other relief, including attorney's fees and costs, to the maximum extent provided by TILA and Regulation Z; and
- 8) Such other and further relief as the Court deems just and equitable.

Respectfully submitted,

THE OLIVER GROUP, PLC

Dated: 28 August 2004

/s/ Karl A. Oliver

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**ATTORNEYS FOR BRADLEY THAYER
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