

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF OHIO  
EASTERN DIVISION

IN RE: : Case No. 04-63079  
: :  
JOHN B. & NANCY K. FLEMING, : Chapter 13 (J. CALDWELL)  
: :  
Debtors. : :

---

JOHN B. & NANCY K. FLEMING :  
530 CARRIAGE DRIVE :  
PLAIN CITY, OH 45064, :  
: :

Plaintiffs, :  
: :

V. :  
: :

ADV. PRO. NO. (Electronically  
Assigned)

NATIONAL CITY MORTGAGE :  
ATTN: BANKRUPTCY DEPT. :  
3232 NEWMARK DRIVE :  
MIAMISBURG, OH 45342, :  
: :

& :  
: :

Serve also: :  
: :

NATIONAL CITY MORTGAGE :  
c/o LERNER, SAMPSON, & :  
ROTHFUSS :  
120 East 4<sup>th</sup> Street, 8<sup>th</sup> Floor :  
CINCINNATI, OH 45201, :  
: :

Defendant. :  
: :

---

**COMPLAINT**

**I. NATURE OF ADVERSARIAL PROCEEDING**

Come now John B. & Nancy K. Fleming ("Debtors"), through counsel, and bring this Complaint against Defendant National City Mortgage ("NCM") for the purpose of objecting to the Amended Proof of Claim of NCM and to obtain a comprehensible accounting of the Debtors' mortgage loan; to address various violations of the automatic stay; to address

actions taken in contempt of the order confirming the Debtors' Chapter 13 Plan; violation of the federal Bankruptcy Rules requiring that fees sought from the Debtors'/Debtors' estate be disclosed to the Court; illegal/negligent servicing of Debtors' mortgage loan; violation of *11 U.S.C. 506 and 1322*; , breach of contract; and breach of the covenant of good faith and fair dealing in the improper, systematic servicing of the Debtor's mortgage loan. As a result of such conduct, the Debtors seek actual, statutory, and punitive damages related thereto, along with reasonable costs and attorney fees incurred in the prosecution of this action. The Debtors are also seeking equitable relief in the case to deter such conduct in the future.

## II. PARTIES/SERVICE OF SUMMONS

1. The Plaintiffs in this case are the Debtors. The Debtors filed a petition for relief under Chapter 13 of the United States Bankruptcy Code on August 19, 2004, in Case No. 04-63079, which is currently pending before this Honorable Court.

2. NCM is believed to be the owner, holder, and servicer of a consensual first mortgage secured by the Debtors' primary residence located at 530 Carriage Drive, Plain City, OH 43064. The Debtors own this property as joint tenants. See attached "Exhibit A", which along with all other Exhibits hereto, is incorporated by reference.

3. NCM is further believed to be a residential mortgage lender regularly engaged in the business of originating, and/or servicing, residential mortgage loans in Madison County, Ohio. It is believed that NCM is represented in this action by the law firm of Lerner,

Sampson, & Rothfuss, LPA, Cincinnati, Ohio, by virtue of the filing of various pleadings in this case.

4. NCM was served a copy of this Complaint, and the Summons thereon, by certified, U.S. Mail, return receipt requested, at the address appearing in its proof of claim, 3232 Newmark Drive, Miamisburg, OH 45342. Counsel for NCM was served through the same means at their principal place of business at 120 E. 4<sup>th</sup> Street, 8<sup>th</sup> Floor, Cincinnati, OH 45201.

### III. JURISDICTION AND VENUE

5. Plaintiff states that this is a "core proceeding" pursuant to 28 U.S.C. 1334(b), and the General Order of Reference entered in this judicial District. Plaintiff further states that the Court has territorial jurisdiction over the Defendant by virtue of its contacts with the State of Ohio, and by virtue of the proof of claim(s), and other documents voluntarily filed in this proceeding. The Court also has supplemental, pendent, and ancillary jurisdiction over any and all state law causes of action asserted herein.

6. This matter constitutes a core proceeding, which this Honorable Bankruptcy Judge may hear and determine, pursuant to 28 U.S.C. 157(b)(2)(A), (C), and (O).

7. Venue for this adversary proceeding is proper, and in accord with 28 U.S.C. 1409.

#### IV. STATEMENT OF RELEVANT FACTS SUPPORTING RELIEF REQUESTED

8. The Debtors purchased their residence on February 21, 1997, and gave a note and consensual first mortgage in favor of Unlimited Mortgage Services, Inc. This mortgage was recorded on February 28, 1997, in the Office of the Recorder, Madison County, Ohio. See "Exhibits B & C". This mortgage was immediately thereafter assigned to NCM. See attached "Exhibit D".

9. In 2004, the Debtors began to experience significant financial difficulties due to the inconsistent employment of Debtor/Husband. In order to retain their residence, the Debtors commenced this case on August 19, 2004 to decelerate the subject note, and to reorganize and repay this debt pursuant to *11 U.S.C. 1325 (b)(5)*.

10. The Debtors' Second Amended Chapter 13 Plan (the "Plan") was confirmed by this Court on December 3, 2004 (Doc. # 32). The Plan provided that the Debtors would maintain regular, on-going monthly mortgage payments through the Plan, and liquidate any pre-petition mortgage arrearage through the Plan on a prorata basis with other allowed, secured claims. The Defendant did not object to confirmation of the Plan.

11. On September 16, 2004, NCM filed a sworn proof of claim in this case (Claim # 4-1). This claim set forth a total mortgage balance of \$110,450.32, and a pre-petition mortgage arrearage claim of \$12,868.40. Of this amount, \$1,125.00 was apportioned to "Foreclosure Attorney Fees", \$275.00 to "Post-petition Attorney Fees", and \$104.28 to a "Property Inspection".

12. On October 25, 2004, NCM, through its counsel, filed an Amended Proof of Claim, in this case (Claim # 7-1). The Amended Claim set forth a total mortgage claim

amount of \$110,450.32, and a pre-petition mortgage arrearage claim of \$12,609.38. Of this amount, \$1,125.00 was apportioned to "Foreclosure Attorney Fees", \$275.00 to "Post-petition Bankruptcy Attorney Fees", and \$104.28 for a "Property Inspection".

13. Since the order of relief herein, the Debtors have paid the approximate sum of \$76,785.38 into their plan of reorganization. To date, the approximate sum of \$38,242.98 has been paid to NCM by the Chapter 13 Trustee as and for the regular, on-going mortgage conduit payments provided for in the Plan. The approximate sum of \$9,259.62 has been distributed to NCM toward the pre-petition mortgage arrearage claim. See attached "Exhibit E".

14. In October, 2006, the Debtors sought to re-finance their residence for the purpose of paying off their Chapter 13 Plan in order to rid themselves of two burdensome mortgages, and to obtain a single home mortgage loan with terms more favorable than the higher "blended" rate of interest on their existing mortgages.

15. In October, 2006, the Debtors requested from, and received, a total mortgage payoff statement from NCM. See attached "Exhibit F".

16. The payoff statement received by the Debtors contained the following information:

"These figures are good to November 22, 2006:  
This loan is due for the May 1, 2006 payment.

The current total unpaid Principal Balance is:	\$106,697.17
Interest at 8.00000%:	\$ 5,470.27
Escrow/Impound Overdraft:	\$ 433.23
Pro-rata PMI	\$ 92.44
Unpaid Late Charges:	\$ 56.10
Unpaid Other Fees:	\$ 230.03
Recordation Fees:	\$ 32.00
Inspection Fee:	\$ 15.00
Record/Conveyance:	\$ 0.00
Appraisal Fee:	\$ 125.00
Outstanding Corporate Advances:	\$ 4,967.98

**TOTAL AMOUNT TO PAY LOAN IN FULL**	\$118,119.22
Priority Service Fee:	\$ 40.00.
TOTAL REMITTANCE DUE:	\$118,159.22."

17. The Debtors believed that all charges related to the pre-petition mortgage default were being cured inside their Chapter 13 Plan. Thus, upon receipt of the loan payoff, the Debtors contacted Bankruptcy Specialist II Georgia Carroll, an employee of NCM, who advised the Debtors, "The outstanding corporate advances in the amount of \$4,967.98 is (sic) attorney fees and costs. These were/are bankruptcy and previous foreclosure actions".

18. The Debtors advised their counsel of this fact when inquiring what action was necessary to re-finance their home during the pendency of their bankruptcy case.

19. Upon information and belief, it is believed the NCM has illegally charged various fees, including but not limited to, interest, attorney fees, escrow/impound overdraft fees, inspection fees, unpaid other fees, and outstanding corporate advances to the Debtors' loan without notice to the Debtors, their counsel, the Chapter 13 Trustee, or the Court.

20. The Debtors intend the factual allegations contained in the foregoing paragraphs to be incorporated into each and every Count of the Complaint as if fully re-written.

#### **V. COUNT ONE - OBJECTION TO CLAIM/DEMAND FOR FULL ACCOUNTING**

21. The foregoing statements are herein incorporated as if fully re-alleged.

22. Pursuant to Bankruptcy Rule 3007, and L.B.R. 3007-1, the Debtors hereby object to the allowance of the amended total *and* pre-petition mortgage claim(s) filed by NCM, in this case (Claim # 7-1).

23. The Debtors state that pursuant to relevant, controlling legal precedent in this District, inclusion of "Foreclosure Attorney Fees", "Post-petition Bankruptcy Fees", "Property Inspection Fees" into these claims, is illegal, and such charges should be stricken from the proof of claim(s). *In re Tudor*, 342 B.R. 540, (Bankr. S.D. Ohio 2005); *In re Landrum*, 267 B.R. 577, (Bankr. S.D. Ohio 2001); *In re Lake*, 245 B.R. 282, (Bankr. S.D. Ohio 2000); and *In re Evans*, 336 B.R. 749, (Bankr. S.D. Ohio 2006).

24. In light of these facts, the Debtors hereby request an order from the Court striking these fees from inclusion in both the total mortgage claim, *and* the pre-petition mortgage arrearage claim, and that the Debtors be forthwith provided with a life-of-loan history in "plain English" to ascertain the extent and amount of any illegal fees they have been charged without their knowledge throughout the pendency of this Chapter 13 proceeding.

## VI. COUNT TWO - VIOLATION OF THE AUTOMATIC STAY

25. The above allegations are herein incorporated as if fully re-alleged.

26. The filing of the Plaintiffs' Chapter 13 Petition on August 19, 2004 operated as a formal collection stay applicable to NCM. *11 U.S.C. 362(a)*.

27. At the time NCM demanded payment for pre-petition, and post-petition debts in this case, no exceptions to the automatic stay provisions of 11 U.S.C. 362(a) or (b), were applicable.

28. Since the date of the order of relief, the automatic stay was in full force and effect, and to date remains so. *11 U.S.C. 362(c)(1) and (2)*.

29. NCM had actual notice of the Plaintiff's bankruptcy filing after being noticed by the Clerk in this case. Thereafter, NCM through its counsel, filed a proof of claim. Thereafter, this claim was amended by NCM/its counsel. By demanding payment of pre-petition and post-petition debts directly from the Debtors after receipt of such notice, NCM is attempting to collect these debts in willful violation of *11 U.S.C. 362*. NCM is acting in willful defiance of the automatic stay provisions by demanding payment for a pre-petition debt. NCM is further attempting to collect a post-petition debt from property of the estate without notice, nor Court approval. Finally, NCM is attempting to collect illegal, post-petition fees and costs directly from the Debtors, which it/its counsel knows it has no legal right to collect.

30. Demanding payment of a pre-petition debt directly from the Debtors post-petition, and the collection of unpaid other fees, inspection fees, appraisal fees, outstanding corporate advances which include undisclosed post-petition attorney fees, is a violation of *11 U.S.C. 362(a)(1), (3), (4), (5), and (6)*.

31. The collection of a pre-petition debt directly from the Debtors post-petition represents a willful violation of the automatic stay provisions stated above. Such action was taken with actual knowledge of the stay in this case, and constitutes a violation of *11 U.S.C. 362(h)* as the term "willful" has been interpreted by this Court.



32. Plaintiffs are entitled to recover from NCM all actual damages, including reasonable attorney fees, costs and expenses, incurred by the Plaintiffs for NCM's willful violation of the stay provisions referenced above. *See former 11 U.S.C. 362(h)* (which is now *11 U.S.C. 362(k) under BAPCPA*).

33. Plaintiffs are further entitled to recover punitive damages from NCM for the willful violation of the automatic stay provisions referenced above, pursuant to *11 U.S.C. 362(h)*. Punitive damages are warranted in this case as NCM has intentionally violated the automatic stay by attempting to collect a pre-petition debt directly from the Debtors, and by attempting to collect unauthorized post-petition fees set forth above after having received actual notice of the Order of Relief herein.

34. Debtors state that it is obvious that the possibility of actual damages being awarded to the Debtors did not deter NCM's from knowingly and intentionally violating federal law. The Debtors suggest that to motivate NCM to henceforth comply with these laws, and to prevent it from engaging in a pattern of systematic, institutional, organized theft from not only the Debtors herein, but from other debtors in this District, the imposition of punitive damages in this case is appropriate.

35. The Debtors, upon information and belief, state that NCM may have attempted to collect illegal, pre-petition, and post-petition fees and charges from other Debtors who may have re-financed, or attempted to re-finance a home, during the midst of a Chapter 13 proceeding in this District. The Debtors request this Honorable Court to exercise its equitable powers under *11 U.S.C. 105* to require NCM to disclose the Chapter 13 cases in which it has issued a "loan payoff" as part of a Court-authorized re-finance transaction, in the past 5 years.

**VII. COUNT THREE - CONTEMPT OF CONFIRMATION ORDER - 1327(a)**

36. The above allegations are herein incorporated as if fully re-alleged.

37. The Debtors proposed their Chapter 13 Plan to all creditors at the time the case was filed. The Court confirmed the Debtors' Second Amended Plan on December 2, 2004 (Doc. # 32). NCM did not object to confirmation of the Debtors' Second Amended Chapter 13 Plan.

38. On November 17, 2005, the Debtors' filed a motion to modify their Chapter 13 Plan (Doc. # 52). NCM was properly noticed of such modification. On December 28, 2005, the Court entered an order modifying Debtors' Chapter 13 Plan (Doc. # 54). NCM did not object to the Debtors' post-confirmation modification of their Chapter 13 Plan.

39. On June 2, 2005, NCM filed a motion for relief from the automatic stay as it applied to the Debtors' residence (Doc. # 38). An Agreed Order resolving this Motion was entered by the Court on June 24, 2005 (Doc. # 41). The Court should note that the sum of \$650.00 was allowed NCM for attorney fees in having to bring this motion, and said fees were properly requested and allowed in an Amended Supplemental Proof of Claim filed with the Court (Claim #17, amending Claim # 16).

40. On March 17, 2006, NCM filed a Notice of Default for the Debtors failure to abide by the terms of the Agreed Order resolving the motion for relief from the stay (Doc. # 60). This Notice was either improvidently filed, or filed in error, and immediately thereafter withdrawn (Doc. # 61).

41. The record is otherwise devoid of any notice or attempt of NCM, or their counsel, to request payment of any attorney fees or other costs from property of the Debtors' estate, or directly from the Debtors.

42. By attempting to collect both pre-petition and post-petition attorney fees and costs either directly from the Debtors', or from the estate, the Debtors assert that NCM has violated the terms of the Confirmation Order in this case. It is requested that the Court find that NCM be found to have done so with knowledge of terms of such Order, that the Court, pursuant to *11 U.S.C. 105*, impose actual and punitive damages against NCM for such conduct, and to allow the equitable relief requested herein.

#### **VIII. COUNT FOUR - VIOLATION OF BANKRUPTCY RULE 2016**

43. The above allegations are herein incorporated as if fully re-alleged.

44. The Debtors allege that the mere charging of post-petition legal fees and expenses as alleged herein constitutes a gross, intentional violation of Bankruptcy Rule 2016.

45. Rule 2016 of the Federal Rules of Bankruptcy Procedure provides, in relevant part: "An entity seeking interim or final compensation for services, or reimbursement of necessary expenses from the estate shall file an application setting forth a detailed statement of (1) the services rendered, time expended and expenses incurred, and (2) the amounts requested".

46. NCM is an "entity" as defined in *11 U.S.C. 101(15)* as it relates to *11 U.S.C. 101(41)*.

47. NCM sought to collect fees and expenses from the "estate" as that term is defined in *11 U.S.C. 541*, and *11 U.S.C. 1306*.

48. Other than as set forth herein, and the \$650.00 which was disclosed and authorized by the Court in Claim # 17, no other expenses, costs, or attorney fees were disclosed to, nor approved by, this Honorable Court.

49. The Debtors state that no application seeking approval from the Court to charge these fees and costs was filed in this case; that no such fees or costs were detailed, nor disclosed to this Honorable Court; and that such fees and costs are excessive and unreasonable.

50. The Debtors affirmatively state that as a direct and proximate result of the aforementioned violations of the U.S. Bankruptcy Code and Rules, NCM is liable to the Plaintiffs for actual damages, punitive damages, costs, and expenses.

#### **IX. COUNT FIVE - ILLEGAL/NEGLIGENT SERVICING OF DEBTORS' MORTGAGE LOAN**

51. The above allegations are herein incorporated as if fully re-alleged.

52. NCM has a contractual, statutory, and lawful duty under the Debtors' confirmed Chapter 13 Plan to ensure that disbursements received from the Chapter 13 Trustee are accounted for in a proper manner per the terms of the Debtors' note and mortgage, and the confirmed Plan.

53. The Debtors discovered that NCM had failed to discharge this duty when they requested a loan payoff in order to re-finance their residence.

54. In the loan payoff statement received by the Debtors dated October 25, 2006, NCM had included various, undisclosed, illegal charges to the loan, which caused their attempt to re-finance their loan to be frustrated. See Exhibit F.

55. The loan to re-finance the Debtors' residence was denied based upon the "loan-to-value" ratio of their home, which was improperly diluted by the inclusion of almost \$5,213.01 in illegal fees, which were "tacked" to the loan without the Debtors' knowledge, and without disclosing the same to Debtors' counsel, the Chapter 13 Trustee, nor the Court.

56. The Debtors allege that the inclusion of these fees and charges without the knowledge of any party in interest, nor without permission from the Court, constitute a deliberate, intentional attempt to collect these fees in circumvention of the law.

57. As a direct and proximate result of the inclusion of these fees, the Defendant breached the duty owed to the Debtors under the law. Such conduct directly and proximately resulted in the denial of the opportunity to re-finance the residence at a lower rate of interest. As a direct result, the Debtors have suffered significant, proximate, measurable, actual damages. All parties in interest are hereby noticed that the Debtors are expressly reserving the right to amend this pleading to include a separate count pursuant to 11 U.S.C. 524(i), should discovery in this matter support such a claim.

**X. COUNT SIX - VIOLATION OF 11 U.S.C. 506(b) AND 11 U.S.C. 1322(e)**

58. The above allegations are herein incorporated as if fully re-alleged.

59. The Debtors state that the note and mortgage involved in this action set forth the parties' agreement as to how monthly payments are to be applied to the subject loan. See Exhibits B & C.

60. The Debtors allege that these security instruments do not provide for the recovery of any post-petition bankruptcy fees and expenses from the Debtors; that the fees/costs charged were unnecessary, unreasonable and/or excessive; and that NCM through its conduct, has breached these contractual terms.

61. The Debtors allege that NCM violated *11 U.S.C. 506* and/or *11 U.S.C. 1322(e)* in knowingly charging these fees and expenses to the Debtors in violation of the terms of the note and mortgage; that such fees and expenses are unnecessary, excessive, unreasonable, and in violation of applicable non-bankruptcy law; and that recovery of any such fees or expenses is not authorized by any applicable state statute.

62. As a direct and proximate result of NCM's intentional conduct described above, NCM is liable to the Debtors for actual damages, punitive damages, reasonable expenses and costs.

## XI. COUNT SEVEN - BREACH OF CONTRACT

63. The above allegations are herein incorporated as if fully re-alleged.

64. The note and mortgage given by the Debtors to Defendant define the method by which monthly installment payments are to be applied to the Debtors' loan.

65. Upon the order of relief herein, the defaulted note was decelerated, and the parties occupied the same relative positions prior to any such default.

66. Confirmation of the Debtors' Chapter 13 Plan binds the parties to the terms of the Plan by which the Debtors would cure this post-petition default; at this point, the parties are again subject to the terms of the note and mortgage, and cannot ignore the same for the singular reason that the Debtors are seeking to cure the default pursuant to *11 U.S.C. 1325(b)* in a bankruptcy proceeding.

67. The Debtors allege that the method of servicing the Debtors' loan throughout the pendency of this Chapter 13 Plan is in contravention of the parties' respective rights under the note and mortgage, and quite plain and simply, constitutes a breach of that contract.

68. As a direct and proximate result of NCM's breach of these contractual provisions, the Debtors have suffered actual damages for which they should be compensated.

69. All parties in interest are hereby noticed that should discovery reveal improper servicing or escrow maintenance of the Debtors' loan, Plaintiffs will seek amendment to the Complaint to include causes of action pursuant to *12 U.S.C. 2506, et. seq.*, and *12 U.S.C. 2609, et. seq.*, respectively.

**XII. COUNT EIGHT - BREACH OF COVENANT OF GOOD AND FAITH AND FAIR DEALING/IMPROPER, SYSTEMATIC, POST-PETITION SERVICING OF DEBTOR'S MORTGAGE LOAN**

70. The above allegations are herein incorporated as if fully re-alleged.

71. The Debtors allege that NCM owes the Debtors a duty to properly receive, apply, and account for all monies distributed by the Chapter 13 Trustee.

72. The Debtors allege that the loan "payoff" received from NCM should be consistent with the Chapter 13 Trustee's distribution records in order to comply with the binding effect and intent of the Chapter 13 Plan, and prevailing Chapter 13 bankruptcy law.

73. The Debtors further allege that NCM has either intentionally and/or has been grossly negligent in properly and accurately accounting/servicing Debtors' loan on a post-petition basis.

74. The Debtors further state that NCM has not taken appropriate steps required of a large, sophisticated, national residential lender, to internally adjust its servicing/accounting ledger system to account for post-petition payments distributed by the Trustee.

75. The Debtors submit that NCM has obviously allowed its pre-petition computer accounting system to control the post-petition servicing of the Debtors' mortgage loan.

76. The Debtors believe that the improper, post-petition administration of their loan violates the U.S. Bankruptcy Code, the terms of the confirmed Chapter 13 Plan, and the spirit of Chapter 13, which allows a Debtor to legally decelerate, and cure a residential mortgage default over time, and emerge with a mortgage loan, which is current. *11 U.S.C. 1325(b)*.



77. The Debtors allege that as a direct and proximate result of the improper post-petition servicing of their loan, among suffering other financial, emotional, and credit standing-based damages, they have been denied at least one opportunity to re-finance their home loan upon more beneficial terms than those which now exist.

78. The Debtors further believe that they are not the only victims of such post-petition practices of NCM, and encourage the Court to determine the extent to which such administration/servicing practices pervades similar loans in this District.

79. The Plaintiffs finally request that the Court exercise its equitable powers under *11 U.S.C. 105* to order NCM to disclose each case in which it issued a loan payoff statement in a court-authorized attempt to sell or re-finance real property in the Southern District of Ohio, in which it has been involved over the past 5 years.

80. As a result of the conduct alleged above, the Debtors assert that they should recover actual damages, punitive damages, equitable relief, and reasonable costs and fees incurred as a result of having to bring this action.

WHEREFORE, the Debtors respectfully request that the Court make appropriate findings, and thereafter issue an order(s) granting the following legal and equitable relief:

- A. AS TO COUNT ONE - An Order striking all inappropriate fees, costs and charges from both the total mortgage claim, and the pre-petition mortgage arrearage claims; and an Order compelling NCM to forthwith provide the Debtors an intelligible, detailed history of their mortgage loan.
- B. AS TO COUNT TWO - A finding that NCM had actual notice of the automatic stay in the case, and that it's attempt to collect pre-petition and post-petition

fees and costs directly from the Debtors and/or their estate, constitutes a willful violation of 11 U.S.C. 362(a) and (h); that the Debtors be awarded appropriate actual damages, including but not limited to, attorney fees and costs; that the Debtors be awarded punitive damages; and that the Court equitably compel NCM to identify and disclose the terms of all court-sanctioned sale/re-finance transactions occurring in the Southern District of Ohio in the past five (5) years.

- C. AS TO COUNT THREE - That the Court find that NCM violated the Order of Confirmation in this case by attempting to collect post-petition fees and costs directly from the Debtors and/or from their estate; and that the Court find that NCM is liable to the Debtors for actual damages, including reasonable costs and expenses.
- D. AS TO COUNT FOUR - That the Court find that NCM has attempted to collect improper fees and costs directly from the Debtors' and /or their estate by including such amounts in the loan payoff without the Debtors' knowledge, or disclosure or approval by the Court; that the Debtors be awarded damages, including reasonable fees and costs; and that the Court, if appropriate, award the Debtors punitive damages for such conduct.
- E. AS TO COUNT FIVE - That the Court find that NCM has either intentionally and/or negligently applied payments to the Debtors' loan in contravention of the terms of the subject note and mortgage and/or in accord with bankruptcy law; and that the Debtors be awarded their actual damages, including but not limited to reasonable fees and costs.
- F. AS TO COUNT SIX - That the Court find that NCM has either intentionally and/or negligently applied payments to the Debtors' loan in contravention of the terms of the subject note and mortgage and/or in accord with bankruptcy

law; and that the Debtors be awarded their actual damages, including but not limited to reasonable fees and costs.

- G. AS TO COUNT SEVEN - That the Court find that NCM has breached its contractual duty to apply and service Debtors' home loan per the terms of the note and mortgage secured thereby; that the Debtors have been materially damaged as a proximate result of such breach of duty; and that the Debtors be awarded their actual damages, including reasonable costs and fees.
- H. AS TO COUNT EIGHT - That the Court find that NCM has breached its contractual duty to apply and service Debtors' home loan per the terms of the note and mortgage secured thereby; that the Debtors have been materially damaged as a proximate result of such breach of duty; and that the Debtors be awarded their actual damages, including reasonable costs and fees.

/s/ Christopher J. Spiroff

Christopher J. Spiroff (0042247)  
454 East Main Street, Suite 100  
Columbus, OH 43215  
614.224.2104  
Fax: 614.224.2066  
admin@spirofflaw.com  
Case Attorney for Debtors