

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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IAS Part 11
Index No.
06-019368

THOMAS HENNESSY, BETTY HENNESSY, JOHN HASLBAUER, BARBARA HASLBAUER, NICHOLAS GAROFALO, ROSEMARY GAROFALO, DWAYNE WOOD, MARIE MAGNUS, DONNA FISCHER, LEE FISCHER, SUMMER FISCHER, TIMOTHY FISCHER, LOUIS PREVET, MARION PREVET, DANIEL AGOSTINELLI, HARRIET AGOSTINELLI, RICHARD CALDERALE, LINDA CALDERALE, RICHARD CALDERALE, CHRISTINE CALDERALE, JASON BUSKE, LAURIN BUSKE, JIM CARNEY, REGINA CARNEY, JUDITH LEONARD, MARK AROCHO, MICHELLE AROCHO, DON MOY, LILLIAN MOY, THOMAS GEIST, JOY GEIST, PASQUALE AIELLO, MARY AIELLO, JAMES VALLAR, JENNIE VALLAR, MICHAEL PECK, SALVATORE MESSANA, CONCETTA MESSANA, MICHAEL SMAR, PATRICIA SMAR and JOHN AND JANE DOES "1-100",

Plaintiffs,

-against-

PETER J. DAWSON, BMG ADVISORY SERVICES, LTD., BRASH MANAGEMENT GROUP, LTD., ETHAN THOMAS CO., INC., TAXX PLUS SERVICES, LTD., LISA DAWSON, BRUCE BAKER, GRAY WINSLOW, 21st CENTURY FINANCIAL SERVICES, INC., FFP SECURITIES, INC., INVEST FINANCIAL CORPORATION, CHARLES MAZZIOTI, GRANITE SECURITIES, LLC, PHH MORTGAGE CORPORATION, FIRST NATIONAL BANK OF LONG ISLAND, COUNTRYWIDE HOME LOANS, INC., HOMECOMINGS FINANCIAL, LLC, WASHINGTON MUTUAL, INC., INDYMAC BANK, CUSTOM CAPITAL CORPORATION, OASIS MORTGAGE, INC., NATIONWIDE LIFE INSURANCE COMPANY, AMERICAN SKANDIA LIFE ASSURANCE COMPANY, FIRST ALLMERICA FINANCIAL LIFE INSURANCE COMPANY, AXA EQUITABLE LIFE INSURANCE COMPANY, and XYZ CORP. "1-10",

Defendants.

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**AFFIRMATION
IN SUPPORT OF
PLAINTIFFS'
MOTION FOR A
PRELIMINARY
INJUNCTION**

Jacob H. Zamansky, being an attorney duly admitted to practice before the Courts in the State of New York, affirms as follows under penalty of perjury:

Nature Of Relief Sought

1. I am the principal of Zamansky & Associates, LLC, attorneys for the Plaintiffs. I submit this Affirmation in support of the plaintiff-mortgage borrowers' motion for preliminary injunction pursuant to CPLR 6301 enjoining and restraining defendants PHH Mortgage Corporation, First National Bank of Long Island, Countrywide Home Loans, Inc., Homecomings Financial LLC, Washington Mutual, Inc. and Indymac Bank (collectively, the "Mortgage Lenders"), which hold Plaintiffs' home mortgage loans and mortgage-secured lines of credit from taking any steps pending the trial in this action from: i) collecting upon these debts; ii) declaring the loans in default; and iii) foreclosing upon the mortgages on the homes of Plaintiffs.

2. The requested Preliminary Injunction is necessary to prevent **24 innocent fraud victims** from incurring additional financial hardship and loss, and facing the prospect of losing their homes and forced "out into the street". The 24 movants are each burdened with oppressive and unconscionable loans which they cannot pay or are struggling to pay, which were procured as the result of a fraudulent "Ponzi" scheme. Eighteen of the movants are over 60 years old (four are over 80 years old), and all 24 movants have had their loan proceeds stolen from them. Granting a preliminary injunction will preserve the *status quo* and

keep them in their homes, while the Court determines whether their mortgage loans should stand.

3. Annexed hereto as **Exhibit A** in support of this motion are Affidavits of Hardship from the individual Plaintiffs whose mortgage loans are at issue. In short, the Plaintiffs are burdened with monthly mortgage payments which they cannot pay, or are struggling to pay, based upon their incomes. Plaintiffs are suffering from severe hardship simply trying to make the monthly mortgage payments.

4. Annexed hereto as **Exhibit B** in support of this motion is an Expert Affidavit of Merits from a real estate attorney with 18 years' experience handling real estate closings for mortgage lenders and borrowers. His expert conclusions are that the Plaintiffs' mortgages were unsuitable and that there were indicia or warnings signs of potential fraud at their closings such that he would not have closed on their mortgage loans.

5. The following is a list of the dates, amounts and lenders for the respective loans and mortgages at issue for which the subject preliminary injunction is sought:

Plaintiff	Lender	Mortgage Broker	Date	Amount
Hennessy	PHH	CCC	7/7/2005	\$283,500
Haslbauer	FNBLI		2/11/2003	\$75,000
Wood	FNBLI		6/9/2003	\$150,000
Prevet	Countrywide	CCC	12/7/2005	\$375,750
Agostinelli	Homecomings	Oasis	6/28/2006	\$468,000
Calderale	Countrywide	CCC	9/1/2005	\$231,000
Calderale	PHH	CCC	11/15/2005	\$320,000
Buske	PHH	CCC	11/23/2005	\$184,000
Carney	Washington Mutual		12/7/2005	\$336,000
Arocho	Countrywide	CCC	8/5/2004	\$330,000

Geist	IndyMac	CCC	5/8/2003	\$280,000
Aiello	PHH	CCC	9/16/2005	\$303,000

Summary of Third Amended Complaint

6. On or about March 20, 2007, Plaintiffs served and filed its Third Amended Complaint (“Complaint”). The Complaint set forth, in great detail, a description of defendant Peter Dawson’s (“Dawson”) fraudulent “Ponzi” scheme, his mortgage loan fraud, and the Mortgage Lenders’ active and direct assistance in the fraud. Dawson solicited Plaintiffs to take out mortgages loans on homes which were mostly paid off in full, misappropriated the loan proceeds by depositing them into his “Disbursement Account”, and, then, paid their monthly loans for a period of time. In short, he stole their money for himself and continued his “Ponzi” scheme until the funds ran out. A copy of the Third Amended Complaint without exhibits is annexed hereto as **Exhibit C**.

7. The Third Amended Complaint alleges that the Mortgage Lenders assisted in Dawson’s fraud by extending unsuitable loans to Plaintiffs who were elderly or retired and lacked sufficient income and ability to repay the mortgages, without engaging in sufficient due diligence to qualify and approve them for the loans. At the closings, the Mortgage Lenders, through their attorneys or mortgage broker agents, issued loan proceeds checks in many instances directly to Dawson or his company’s “Disbursement Account” (or knew that the loan proceeds were being turned over to him). The Mortgage Lenders were, in many instances, represented by an attorney who had been **indicted for mortgage fraud** or her former junior associate. Plaintiffs had no independent legal representation at the closings, nearly all of which were held at Dawson’s office.

By extending these loans, the Mortgage Lenders have earned, and stand to earn over time, enormous finance and interest charges on these loans.

8. As a result of the foregoing, the Ninth Cause of Action seeks a declaratory judgment declaring that the mortgage loans procured by Dawson are legally void and unenforceable because they were procured by fraud and/or they are unsuitable or unconscionable, and seeks a permanent injunction preventing any action to collect or foreclose on the loans. The Tenth Cause of Action seeks to hold the mortgage lenders and brokers liable for the damages of the stolen loan proceeds based on their aiding and abetting Dawson's fraud.

9. The Fourteenth Cause of Action seek to hold the Mortgage Lenders responsible specifically for breaches of Industry standards which require mortgage lenders to "know their customer" and consider the suitability of the borrower, and only qualify and approve borrowers where there is sufficient ability, means and willingness to pay the mortgage. The Fifteenth Cause of Action seeks to hold the mortgage lenders liable for breaches of duties of reasonable care and standards of care in the mortgage lending Industry.

**Plaintiffs Will Suffer Irreparable
Harm Without An Injunction**

9. To date, Plaintiffs are either in default, or reasonably expect to be in default shortly, of their home mortgage loans. Plaintiffs' individual Affidavits of Hardship are annexed hereto as **Exhibit A**. Simply put, Plaintiffs do not have sufficient income to make their monthly loan payments. They never should have been approved or qualified for these loans in the first instance. Plaintiffs have little-to-no cash, savings or funds to make the monthly loan payments. Dawson

stole their loan proceeds and absconded with much of their life's savings and investments.

10. The Plaintiffs who are not yet in default are struggling to make the monthly loan payments. Eighteen of the 24 individual movants are over 60 years of age (four are over 80 years old), and have retired. Most are living on fixed incomes such as social security and pensions, and they lack the income to pay their monthly mortgage loan payments and pay their other necessary living, food expense, medical expenses and taxes.

11. In taking out these mortgage loans, many Plaintiffs were relying upon expected "interest" payments from Dawson who fraudulently solicited them to take the loan and invest with him. This represented a materially flawed premise behind the loans, and Dawson's theft of their loan proceeds has left them without any source of funds to repay the loans. The Mortgage Lenders should never have approved or qualified them for these loans without verification of income, ability, means and willingness to repay the loans.

12. Several Plaintiffs are now in default and have received default notices from the Mortgage Lenders, and it can reasonably be expected that the Mortgage Lenders will imminently begin or commence proceedings to declare them in default and begin to foreclose on the Plaintiffs' homes unless a preliminary injunction is issued. Other Plaintiffs are struggling to make payments that they cannot or can barely afford, and are suffering immensely to do so. They expect to eventually fall into default as their situation is unsustainable.

13. This Court should issue a preliminary injunction to stay or preserve the *status quo* and to freeze their current payment obligations and default status with regard to their mortgage loans, before the mortgage lenders take any and all steps or actions to foreclose upon their loans. Plaintiffs will suffer severe and irreparable harm if they are forced to continue to pay mortgages which they cannot afford, they fall into default and they begin to receive foreclosure notices. If this happens, they could be “forced out into the street”. Plaintiffs were the victims of a horrific fraud which has ruined them financially. They should not fall into homelessness, have their credit ratings destroyed or “starve” while struggling to pay burdensome debts which they cannot afford, while waiting for relief on their claims for redress.

14. In early December 2006, after this lawsuit was filed and served, the undersigned made formal requests from the Mortgage Lenders for voluntary forbearance or a temporary freeze or standstill of their mortgage loans. Annexed hereto as **Exhibit D** are the forbearance letter requests that were sent. **To date, no Defendant has agreed to any voluntary stay or “standstill” which necessitates this Court’s intervention.**

**Plaintiffs’ Have A High Probability Of
Success That Their Mortgages And
Notes Will Be Canceled Due To Fraud**

15. The Plaintiffs have a high probability of success on the merits that this Court will ultimately grant them a declaratory judgment which cancels their mortgages and notes due to the fraud which attended their procurement. A Preliminary Injunction is necessary to preserve the status quo (i.e. keep Plaintiffs

in their homes) pending the outcome of their lawsuit; otherwise, it would render any judgment ineffectual.

16. Plaintiffs will demonstrate that the Mortgage Lenders themselves, or through their attorneys or agents, aided and abetted Dawson's fraud and breach of fiduciary duty; issued unsuitable mortgage loans that should never have been approved; permitted loan proceeds to go to Dawson or his company BMG's "Disbursement Account"; and violated numerous standards of care within the Industry.

17. For example, in the case of the Agostinellis, defendant Homecomings' attorney issued its loan proceeds check of \$450,831 directly to BMG's "Disbursement Account". In other instances, checks were issued to Dawson or BMG's "Disbursement Account" or endorsed over to him in front of the Mortgage Lenders' attorney at the closing.

18. In six of the eight mortgage loan closings (excepting the two home equity lines of credit) done in the Long Island-area, the bank or lender's attorney was either Ida D'Angelo or Orlando Morales. Ida D'Angelo has been **indicted** for a **\$10 million mortgage loan fraud** in which she allegedly faked loan applications, forged settlement statements and staged purported fake closings. Morales, who has not yet been indicted, was her junior associate at the time, and he reportedly sent her an internal memorandum inquiring about the "fake closings" they conducted. A copy of the first few pages of her indictment are annexed hereto as **Exhibit E**. A copy of the Morales' memorandum is annexed hereto as **Exhibit F**.

19. To date, it is unknown whether Dawson was working in a conspiracy with the indicted D'Angelo, or with Morales, or whether any "kickbacks" or other illicit payments were being exchanged to facilitate these loan closings. Notwithstanding, Plaintiffs believe that it is no mere coincidence that Dawson—now incarcerated in Nassau County Jail—had a relationship with the indicted D'Angelo.

20. None of the Plaintiffs were represented by their own legal counsel at the closings, and none were provided with their loan closing files.

21. The Plaintiffs had, by law, a three-day right of rescission, which due to the circumstances of the mortgage loan irregularities and the failure of the mortgage lenders and brokers to provide them with disclosures and complete copies of their loan files, has not run. By this action, they hereby exercise their rights to rescind their mortgages.

**The Subject Mortgage Loans Were
"Unsuitable" For Plaintiffs**

22. In this case, Plaintiffs will ask the Court to adopt and impose a "suitability standard" which would require mortgage lenders and brokers only to recommend and provide mortgage loans that were "suitable" to borrowers in light of their financial condition and ability to pay the mortgage. This standard is similar to the "suitability" obligation in the Securities Industry (NASD Rule 2310), also known as the "know your customer" rule (NYSE Rule 347) which governs dealings between investment advisors and stockbrokers and their customers.

23. Under the mortgage suitability rule, banking professionals and mortgage brokers are required to assess whether a borrower has the ability to

pay the loan and whether the mortgage product is suitable for the borrower. In this case, the evidence is clear that the Mortgage Lenders, through their mortgage broker agents and their own underwriters, approved and qualified Plaintiffs for loans that were plainly unsuitable for them. Plaintiffs lacked the income and ability and willingness to repay the mortgage loans at issue, and proceeds were delivered to Dawson or his company for investment. This is demonstrated in their individual Affidavits of Hardship annexed hereto as **Exhibit A**. Therefore, the subject mortgage loans were unsuitable for the Plaintiffs.

24. Annexed hereto as **Exhibit G** is a position paper entitled “A Federal Suitability Requirement for Home Loans” issued by the Northeast –Midwest Institute in November 2006 which describes the suitability standard which the Plaintiffs’ request the Court to impose in this case.

25. Notwithstanding, through expert testimony at trial or a hearing on this motion for a preliminary injunction, Plaintiffs will demonstrate that the Mortgage Lenders and the two defendant mortgage brokers in this case had existing suitability duties arising from their relationships to the Plaintiffs which existed at the time that the mortgage loans were made.

26. At the closings, the mortgage brokers who originated and qualified the borrowers for the Mortgage Lenders received payment ranging from **\$2,000-\$10,000**. Pursuant to §3500.14 (g)(iii) of HUD Regulations promulgated under §2607 of the Real Estate Settlement Procedures Act Regulations, at 24 CFR Ch. XX (4-1-04), Lenders can only legally pay a “duly appointed agent or contractor for services actually performed in the origination, processing or funding of a

loan.” Accordingly, the payments received by the mortgage brokers at the closings establish that they are “agents” of the Lenders.

27. In undertaking to qualify Plaintiffs for their mortgage loans, the mortgage brokers assumed both contractual and fiduciary obligations owing to Plaintiffs to recommend only suitable mortgage loans, and to qualify them for mortgage loans and products which were suitable and appropriate for them. For example, see **Exhibit C** to the Agostinelli Affidavit, which is their Agreement with Oasis Mortgage, in which Oasis Mortgage represents that it will provide these services:

- “Counseling on my financial capabilities”;
- “Assistance in obtaining information required to complete the mortgage application”; and
- “Assistance in processing the loan application”.

28. Oasis Mortgage breached its duties to the Agostinellis by qualifying them for a \$468,000 loan with no stated income. The Agostinellis earn approximately \$1700 per month in income and must make approximately \$3700 per month in mortgage loan payments. Such a mortgage was plainly unsuitable, and Oasis Mortgage acted as the agent for Homecomings, the mortgage lender, and received payment from Homecomings, for qualifying the Agostinellis for this unsuitable loan.

29. The other defendant-mortgage broker in this case, Custom Capital Corporation, had the same contractual and fiduciary duties which it breached with regards to those Plaintiffs which it qualified for mortgage loans with the Mortgage Lenders.

30. Additionally, the Plaintiffs' Mortgage Lenders had their own suitability obligations under Banking Regulations to engage in, and adopt, "safe and sound" lending policies which prevent abusive or predatory loans to borrowers who lack the ability or means to repay. See Banking Regulations, 12 CFR 30 Appendix A and 12 CFR 34.

31. In his annexed Expert Affidavit of Merits (**Exhibit B**), Leonard Hecht, Esq., an attorney with over 18 years' experience representing mortgage lenders, mortgage brokers and borrowers provides his opinion that lenders do have a suitability obligation to "know their borrower" and that he believes that this obligation was breached repeatedly here.

32. Mr. Hecht also states that if he were representing the lender in circumstances where, as here, the Plaintiffs did not have their own legal representation and he was directed to pay the loan proceeds over to a third-party's "disbursement account", and the borrower did not have sufficient income to make the monthly loan payments, he would not have closed the loan.

33. To date, Plaintiffs have had no access to their files and records which were kept by Dawson. Dawson's files and records have been seized pursuant to Court Order by the Nassau County District Attorney's Office. A copy of the District Attorney's letter regarding access to the files is annexed hereto as **Exhibit H**.

34. This application is made based upon the limited records available to Plaintiffs. We expect that discovery will provide even more evidence to support the claims asserted.

35. Accordingly, for the foregoing reasons, Plaintiffs are confident that they have a high probability of success on the merits on their causes of action for a declaratory judgment declaring their mortgages and loans to be void and canceled. A Preliminary Injunction is needed to preserve the status quo and keep them in their homes, or the ultimate judgment in their favor which is highly probably will be rendered ineffectual and moot.

36. Furthermore, Plaintiffs will suffer irreparable harm and have no adequate remedy at law as they will lose their homes and be out on the street with no funds if an injunction is not granted. The equities clearly tilt in Plaintiffs' favor.

37. On or about December 15, 2006, a prior application for this relief was made by Order to Show Cause. Plaintiffs' withdrew their application at the time in order to develop a fuller evidentiary record.

38. If the Court cannot rule in Plaintiffs' favor based upon these submissions, we respectfully request that the Court order an evidentiary hearing on Plaintiffs' entitlement to the relief they seek.

Conclusion

WHEREFORE, based upon the foregoing, Plaintiffs request that the Court grant them an Order which preliminarily enjoins and restrains the defendant Mortgage Lenders which hold Plaintiffs' loans and home mortgages from taking any steps to: i) collect upon these debts; ii) declare the loans in default; and iii) foreclose upon the homes of Plaintiffs' pending the trial in this action; and for such further and other relief as the Court deems necessary and just.

Dated: March 20, 2007
New York, New York

Jacob H. Zamansky