

GREGORY WARTMANN  
CLERK OF COURTS  
IN THE COURT OF COMMON PLEAS  
HAMILTON COUNTY, OH



HAMILTON COUNTY, OHIO  
2003 MAY -5 P 3:12

EMC MORTGAGE CORPORATION,  
EMC,

v.

ROBERT M. BACKMAN, et al.,  
Defendant

: CASE NO. A0301972  
:  
: Judge \_\_\_\_\_  
:  
: DEFENDANTS ROBERT M.  
: BACKMAN AND SARA L.  
: BACKMANS' ANSWER AND  
: COUNTERCLAIMS IN RESPONSE TO  
: PLAINTIFF'S COMPLAINT  
:  
: JURY DEMAND ENDORSED HEREON

For their Answer to the Complaint of Plaintiff and Counterclaim-Defendant EMC Mortgage Corporation ("EMC"), Defendants and Counterclaim-Plaintiffs Robert M. Backman and Sara L. Backman ("the Backmans") state as follows:

**FIRST COUNT**

1. In response to the allegations set forth in Paragraph 1 of the First Count of EMC's Complaint, the Backmans admit that they were parties to a Promissory Note referenced in such allegation. The Backmans are without knowledge or information sufficient to form a belief as to whether EMC was the owner and holder of the Promissory Note, and therefore deny the same. The Backmans deny the remaining allegations set forth in Paragraph 1 of EMC's First Count.

**SECOND COUNT**

1. In response to the allegations set forth in Paragraph 1 of the Second Count of EMC's Complaint, the Backmans restate their responses *supra*, as if fully restated herein. Further responding, the Backmans admit that they were parties to a Mortgage Deed referenced in Paragraph 1 of EMC's Second Count. The Backmans are without knowledge or information

sufficient to form a belief as to whether EMC was the owner and holder of the Mortgage Deed. The remaining allegations of such paragraph set forth legal conclusions to which no response is required, and therefore are denied. The Backmans further aver that the Mortgage Deed speaks for itself.

2. In response to the allegations set forth in Paragraph 2 of the Second Count of EMC's Complaint, the Backmans deny that the conditions in the Mortgage Deed have been broken by reason of default in payment and that the same "has become absolute." The Backmans admit that they have an interest in the premises referenced in such paragraph. The Backmans are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations set forth in Paragraph 2 of EMC's Second Count, and therefore deny the same.

3. In response to the allegations set forth in Paragraph 3 of the Second Count of EMC's Complaint, The Backmans respond that the Mortgage Deed speaks for itself.

4. In response to the allegations set forth in Paragraph 4 of the Second Count of EMC's Complaint, the Backmans admit that they have an interest in the premises. The Backmans are without knowledge or information sufficient to perform a belief as to the truth of the remaining allegations set forth in Paragraph 4 of EMC's Second Count, and therefore deny the same.

5. The Backmans state that any allegations not specifically admitted herein are denied.

**SECOND DEFENSE**

6. EMC's Amended Complaint may fail to the claim upon which relief may be granted.

**THIRD DEFENSE**

7. EMC's claims may be barred by its own breach of contract.

**FOURTH DEFENSE**

8. All of EMC's claims may be barred by EMC's unclean hands, waiver, and estoppel.

**FIFTH DEFENSE**

9. All of EMC's claims may be barred by accord and satisfaction.

**SIXTH DEFENSE**

10. EMC's claims may be barred by the Parole Evidence Rule and/or the Statue of Frauds.

**SEVENTH DEFENSE**

11. EMC's claims may be barred due to its own fraudulent conduct.

**EIGHTH DEFENSE**

12. EMC has failed to mitigate its damages, if any.

**NINTH DEFENSE**

13. EMC's claims may be barred due to its own contributory/comparative negligence.

**TENTH DEFENSE**

14. EMC's claims, in whole or in part, may be barred due to EMC's violations of the Fair Debt Collection Practices Act.

**ELEVENTH DEFENSE**

15. EMC's claims may be barred due to laches.

**TWELFTH DEFENSE**

16. EMC's claims may be barred due to failure of consideration.

**THIRTEENTH DEFENSE**

17. EMC's claims may be barred due to Defendant's payments for debt due EMC which were accepted by EMC.

**FOURTEENTH DEFENSE**

18. Any amounts allegedly owed EMC are subject to set-off of the amounts held by EMC in escrow.

**FIFTEENTH DEFENSE**

19. The Backmans give notice that they intend to rely upon utilize such other defenses as they become available or apparent during the course of discovery and hereby reserve the right to amend their answer to assert such defenses.

**WHEREFORE**, Defendants Robert M. Backman and Sara L. Backman demand that EMC's Complaint be dismissed, with prejudice, and that Defendants be awarded their reasonable costs, including attorneys' fees, and such other relief as this Court deems appropriate.

### **COUNTERCLAIM**

For their Counterclaim against Plaintiff and Counterclaim-Defendant EMC Mortgage Corporation ("EMC"), Defendant and Counterclaim-Plaintiffs Robert M. Backman and Sara L. Backman ("the Backmans") state as follows:

### **GENERAL ALLEGATIONS**

1. The Backmans are married individuals who reside at 9966 Alydar Court, Cincinnati, Ohio.
2. On or around December 18, 1997, the Backmans entered the Promissory Note and Mortgage Deed attached to EMC's Complaint as Exhibits A and B, respectively. Such Promissory Note and Mortgage Deed were executed in conjunction with issuance of a loan to the Backmans for the purchase the property at which the Backmans currently reside. The Promissory Note and the Mortgage Deed had maturity dates of December 20, 2017.
3. In Spring of 2002, the Backmans and EMC entered into various discussions concerning the Backmans' refinancing their property and paying off the Promissory Note and Mortgage Deed.
4. On or around May 24, 2002, EMC, through its agents, informed the Backmans' in writing that the amount necessary to pay-off the Backmans' debt, through June 15, 2002, would

be \$322,453.54. According to EMC, such amount included principal balance, interest due, escrow shortage, "suspense balance," property inspections, and attorney costs.

5. On June 27, 2002, the Backmans' submitted a check in the amount of \$322,879.81 to EMC for full payment of their debt. Because the check was submitted after June 15, 2002 (due to various closing delays), the Backmans' included an extra \$426.27 to cover the per diem costs for the twelve day delay between June 15, 2002 and June 27, 2002.

6. EMC accepted and cashed such check in complete satisfaction of the Backmans' debt. At the time, EMC made no statements that the Backmans' owed EMC anything more than what EMC had quoted the Backmans' on May 24, 2002.

7. However, EMC failed to treat such debt as paid off.

8. In Fall of 2002, EMC, via its debt servicing agency (its "servicer"), asserted that the Backmans' still owed EMC funds. EMC harassed the Backmans' about such alleged debt, with such harassment including, among other things, constant calls to the Backmans forcefully demanding payment of such funds. The calls occurred almost on a daily basis, even though the Backmans' repeatedly denied such debt and EMC knew that the Backmans' were represented by counsel concerning the alleged debt.

9. During such many telephone calls, the Backmans' often requested that EMC verify the validity of such alleged debt and how it was calculated. EMC never adequately responded. Indeed, when EMC did respond, it did so inconsistently, asserting differing amounts and differing reasons for the alleged debt.

10. For example, in the Fall of 2002, on various occasions EMC asserted that approximately \$21,000 was still owed by the Backmans. Then, in a letter dated December 23, 2002, EMC stated that, as of December 20, 2002, the full amount of the debt EMC was seeking to collect was \$6,046.28. Such letter further stated that EMC was the servicer of the Backmans' home loan, and was authorized by the loan's creditor to give notice to the Backmans' that they were allegedly in default upon such loan. The letter further stated, in boldface, that "EMC Mortgage Corporation is attempting to collect a debt, and any information obtained will be used for that purpose." It also noted, among other things, in boldface, various rights federal law granted to the Backmans', including a right to contest such debt in writing and have EMC provide verification of such debt.

11. EMC also threatened to report the Backmans' alleged debt to one or more local or national credit reporting agencies, if the Backmans did not give in to EMC's harassment and pay-off the unsubstantiated, unverified alleged debt.

12. Later, EMC provided a "2002 Annual Tax and Interest Statement" to the Backmans. The statement asserted that the Backmans' had an ending principal balance of \$21,987.60. Significantly, such statement further stated that the Backmans' ending escrow balance was \$23,119.78, which was \$1,132.18 greater than even the amount EMC alleged the Backmans owed to EMC.

13. On February 14, 2003, despite the fact that it had not disclosed the validity or amount of the Backmans' alleged debt, EMC informed the Backmans that it had commenced foreclosure proceedings by turning the case over to counsel, and stated that once such

foreclosure action was initiated, attorney fees and costs would be added to the amount allegedly due.

14. On or around March 13, 2003, EMC filed the instant Complaint. Notably, such Complaint does not identify the basis for its claim that an amount of \$21,887.60 is "due and unpaid."

15. EMC has not paid the Backmans the 2002 ending escrow balance of \$23,119.78, nor has EMC attempted to apply such escrow balance to the Backmans' alleged debt in this matter. Further, EMC has not taken actions consistent with the Backmans complete pay-off of their debt in June of 2002.

**FIRST CLAIM**  
**(Breach of Contract and Return of Escrow Funds)**

16. The Backmans' incorporate the allegations set forth in paragraphs 1 through 14 of their Counterclaim as if fully restated herein.

17. EMC has improperly retained the Backmans' escrow funds, and has not attempted to apply such funds to any debt allegedly owed by the Backmans.

18. As a direct and proximate result of EMC's conduct, the Backmans have been damaged. The withheld funds are rightfully the Backmans, and EMC should be made to return such funds with interest to the Backmans, or, in the alternative, if this Court finds the Backmans owe EMC any debts, such escrow funds should be applied to such debt and the remainder returned to the Backmans.

**SECOND CLAIM**  
**(Breach of Contract -- Failure to Apply Funds to Loan)**

19. The Backmans incorporate the allegations set forth in paragraphs 1 through 17 of their Counterclaim as if fully restated herein.

20. By the conduct described *supra*, EMC has breached its agreement with the Backmans to fully pay-off the Backmans' debt, even though EMC accepted and cashed the Backmans' payment of \$322,879.81.

21. As a direct and proximate result of EMC's actions, the Backmans have been damaged in an amount in excess of \$25,000, as the Backmans have been deprived of use of the \$327,879.81 while also not receiving the benefit of the complete pay-off of their debt.

**THIRD CLAIM**  
**(Promissory Estoppel)**

22. The Backmans incorporate the allegations set forth in paragraphs 1 through 20 of their Counterclaim as if fully restated herein.

23. As a result of EMC's conduct, as described *supra*, EMC is estopped to deny that the Backmans' payment of \$327,897.81 on June 27, 2002 was a full pay-off of, and constituted a termination of, the Backmans' debt.

24. EMC has failed to recognize the full pay-off of such debt, has pursued more debt allegedly owed by the Backmans, and has not returned the Backmans' escrow funds.

25. As a direct and proximate result of EMC's failure, the Backmans have been damaged in an amount in excess of \$25,000.

**FOURTH CLAIM**  
**(Unjust Enrichment)**

26. The Backmans incorporate the allegations set forth in paragraphs 1 through 24 of their Counterclaim as if fully restated herein.

27. As a result of EMC's conduct, as described *supra*, EMC has been unjustly enriched, as it has accepted \$322,879.81 without fully paying off the Backmans' debt, and has also retained the Backmans' escrow funds without either returning such to the Backmans or applying such to any alleged debt owed by the Backmans.

28. As a direct and proximate result of EMC's actions, the Backmans have been damaged in an amount in excess of \$25,000.

**FIFTH CLAIM**  
**(Fraud)**

29. The Backmans incorporate the allegations set forth in paragraphs 1 through 27 of their Counterclaim as if fully restated herein.

30. As a result of EMC's conduct, as described *supra*, EMC committed fraud upon the Backmans.

31. In and around May of 2002, EMC represented to the Backmans that pay-off of the Backmans' debt could be achieved through payment of \$322,453.54.

32. Such representations were material to the Backmans' attempt to pay-off their debt.

33. EMC made such statements falsely or with utter disregard/recklessness as to their truthfulness. Further, EMC made such statements without a future intention to comply with the promise to terminate the Backmans' debt.

34. Such representations were made with the intent to mislead the Backmans.

35. The Backmans relied upon such misrepresentations and paid EMC \$322,879.81 as full payment of their debt.

36. The Backmans were damaged by such reliance, as EMC cashed the Backmans' check, did not terminate the Backmans' debt, has continued to seek more funds from the Backmans, has not granted the Backmans clear title, and has commenced these proceedings.

37. As a direct and proximate result of EMC's conduct, the Backmans have been damaged in an amount in excess of \$25,000. The Backmans also are entitled to punitive damages in excess of \$25,000 for such conduct.

**SIXTH CLAIM**  
**(Conversion)**

38. The Backmans incorporate the allegations set forth in paragraphs 1 through 36 of their Counterclaim as if fully restated herein.

39. As more fully described *supra*, EMC has wrongfully exercised dominion and control over the \$322,879.91 paid by the Backmans, in addition to the Backmans' escrow funds.

40. As a direct and proximate result of EMC's actions, the Backmans have been damaged in an amount in excess of \$25,000.

**SEVENTH CLAIM**  
**(Violations of the Fair Debt Collections Practices Act)**

41. The Backmans' incorporate the allegations set forth in paragraphs 1 through 39 of their Counterclaim as if fully restated herein.

42. EMC is a debt collector under the Fair Debt Collection Practices Act ("the FDCPA").

43. Through its attempt to collect a debt from the Backmans, upon numerous occasions EMC violated the FDCPA.

44. EMC violated the FDCPA by, *inter alia*:

a with the intent to harass the Backmans, repeatedly telephoning the Backmans demanding payment upon the Backmans' alleged debt, although EMC knew such debt was not valid, that the Backmans' disputed such debt, and that the Backmans were represented by an attorney with respect to any such alleged debt.

b making false, deceptive, and misleading representations in connection with the Backmans' alleged debt. Such representations involved, *inter alia*, stating (on or around May 24, 2002) that the amount to pay-off the Backmans' loan was \$322,453.54; stating (once EMC had already accepted the Backmans' payment of \$322,897.81), that a debt was still owed EMC; giving differing, inconsistent statements of the amount allegedly due; and giving evasive, inconsistent, and unresponsive replies to the Backmans' numerous requests for verification of the amount and validity of such alleged debt.

c using deceptive means to attempt to collect such alleged debt, by indicating that EMC was a separate servicer of the "creditors" loans and indicating that EMC was in fact a debt collector working for the "creditors" of the Backmans loan, in an attempt to collect such alleged debt.

d after accepting the Backmans' \$322,879.91 payment, attempting to collect an alleged debt that is not expressly authorized by any agreement signed by the Backmans.

e failing to provide the Backmans any such verification of the alleged debt (either as to its validity or its calculation), although the Backmans repeatedly informed EMC that they disputed such alleged debt and sought verification of it.

45. As a direct and proximate result of EMC's violations of the FDCPA, the Backmans have been damaged in excess of \$25,000 and should be awarded an amount to be determined at trial, including the cost of this action, and its reasonable attorneys' fees.

**WHEREFORE**, the Backmans respectfully request that this Court enter judgment in their favor:

a. (for the Backmans' First Claim) for return of the Backmans' escrow funds, plus interest at the statutory rate, or in the alternative, such escrow funds be applied as a set-off against any amount found to be owed EMC, with the remainder of such funds returned to the Backmans, plus interest at the statutory rate.

b. (for the Backmans' Second Claim) for judgment in excess of \$25,000, plus interest at the statutory rate.

c. (for the Backmans' Third Claim) for judgment in excess of \$25,000, plus interest at the statutory rate.

d. (for the Backmans' Fourth Claim) for judgment in excess of \$25,000, plus interest at the statutory rate.

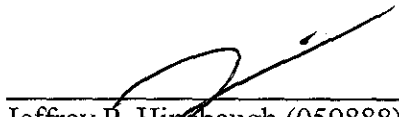
e. (for the Backmans' Fifth Claim) judgment for compensatory damages in excess of \$25,000 and punitive damages in excess of \$25,000.

f. (for the Backmans' Sixth Claim) judgment for compensatory damages in excess of \$25,000 and punitive damages in excess of \$25,000.

g. (for the Backmans' Seventh Claim) judgment in excess of \$25,000, plus interest at the statutory rate, plus the Backmans' costs and attorneys' fees.

Such further relief as this Court deems just and appropriate, including but not limited to the Backmans' costs and attorneys' fees.

Respectfully submitted,




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Attorney for Defendants  
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**JURY DEMAND**

Defendant hereby demands a trial by Jury on all issues so triable.



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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing has been duly served upon the following:, by ordinary U.S. Mail, this 5<sup>th</sup> day of May, 2003.

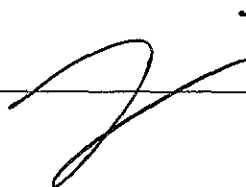
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