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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

ALAN GARDNER, on behalf of himself
and others similarly situated,

Plaintiff,

v.

GMAC MORTGAGE, LLC, a foreign
corporation,

Defendant.

No. 10-2-36902-3 SEA

AMENDED COMPLAINT FOR
BREACH OF CONTRACT, UNJUST
ENRICHMENT, AND VIOLATIONS
OF THE CONSUMER PROTECTION
ACT

CLASS ACTION PURSUANT TO CR
23(b)(2) OR 23(b)(3)

I. INTRODUCTION

1. Plaintiff, Alan Gardner, on behalf of himself and the class of all those similarly situated, as identified below, brings this action for breach of contract, unjust enrichment, violations of Washington’s Consumer Protection Act, statutory penalties and injunctive relief under Washington State law against defendant GMAC Mortgage, LLC and in support thereof states the following upon information and belief:

II. JURISDICTION AND VENUE

2. Plaintiff Alan Gardner is a resident of Bellingham, Washington.

1 3. Defendant GMAC Mortgage, LLC (“GMAC”) transacts or transacted
2 business within the State of Washington and, at all times relevant hereto, had and has
3 continuous, systematic contacts in and with Washington.

4 4. Defendant does or did business in King County, Washington, and some of the
5 acts and transactions that are alleged took place in King County.
6

7 5. This Court has jurisdiction over the parties and the subject matter of this
8 lawsuit.

9 6. Venue is proper in King County Superior Court.

10 III. FACTUAL ALLEGATIONS

11 7. Defendant is a limited liability company organized and existing under the
12 laws of the State of Delaware, with its principal offices located in Minneapolis, Minnesota.
13 Defendant is or was an originator and a servicer of home loans.
14

15 8. Plaintiff and class members obtained home loans from defendant in
16 connection with the purchase or refinance of real property in Washington, or defendant
17 obtained the servicing rights to class members’ home loans originated by other lenders.
18 Defendant was the servicer of plaintiff’s and the class members’ loans at the time they were
19 paid off, and at the time payoff amounts were requested by plaintiff and class members in
20 order to pay off their loans.
21

22 9. As part of the transactions to obtain the loans, plaintiff and class members
23 signed Promissory Notes for the amounts of the loans and agreed to secure the Promissory
24 Notes by signing Deeds of Trust for the benefit of the lenders.

25 10. Plaintiff signed a Deed of Trust on or about June 21, 2005 pertaining to his
26 real property and naming Mortgage Electronic Registration Systems, Inc. as Beneficiary. A

1 copy of this Deed of Trust is appended as Exhibit A hereto and incorporated by reference
2 herein. The Deed of Trust secured a Promissory Note signed by plaintiff in favor of
3 Homecomings Financial Network, Inc. ("Homecomings"). Paragraph 23 of the Deed of
4 Trust provided, under the section entitled "Reconveyance,"

5
6 Upon payment of all sums secured by this Security Instrument, Lender shall
7 request Trustee to reconvey the Property and shall surrender this Security
8 Instrument and all notes evidencing debt secured by this Security Instrument
9 to Trustee. Trustee shall reconvey the Property without warranty to the
10 person or persons legally entitled to it. Such person or persons shall pay any
11 recordation costs and the Trustee's fee for preparing the reconveyance.

12 11. In or about June 2009, plaintiff decided to refinance his home loan referred to
13 above in Paragraph 10. By that time, GMAC had become the servicer of the loan.

14 12. In order to refinance the home loan, plaintiff was required to pay off the loan
15 and needed to know the amount owed thereon.

16 13. On June 1, 2009, GMAC provided plaintiff a Payoff Statement for the loan.
17 A copy of this Payoff Statement is appended as Exhibit B hereto and incorporated by
18 reference herein.

19 14. In the June 1, 2009 Payoff Statement, GMAC demanded plaintiff pay \$56 as a
20 recording fee. Some but not all of that fee was secured by the Deed of Trust, but a portion of
21 that fee was not authorized or required by the Deed of Trust or other loan documents for
22 plaintiff to pay off the loan in full.

23 15. The June 1, 2009 Payoff Statement warned plaintiff:

24 If the funds received are not sufficient to pay the account in full, we will
25 utilize funds from the escrow account to complete the payoff. If there is not
26 an escrow account, or the funds in the account are not sufficient to pay the
account in full, we will return the payoff funds in the same manner as they
were remitted.

1 The Payoff Statement further provided, "The reconveyance/satisfaction of mortgage will be
2 forwarded to the county recorder's office after receipt of payoff funds."

3 16. Plaintiff paid the \$56 recording fee required by the June 1, 2009 Payoff
4 Statement, some of which was neither permitted nor secured by the Deed of Trust.
5 Specifically, defendant's cost to record the Deed of Reconveyance, which it was permitted
6 by the Deed of Trust to charge the plaintiff, was only \$42. The excess \$14 of the recording
7 fee was neither permitted nor secured by the Deed of Trust.
8

9 17. GMAC engaged in similar practices and transactions with members of the
10 class, as described herein.

11 18. Plaintiff's Deed of Trust contains a provision requiring him to give written
12 notice of, and the opportunity to resolve, any complaints he has concerning Homecoming's
13 actions under the Deed of Trust or alleging that Homecomings breached any provision of, or
14 any duty owed by reason of, the Deed of Trust. Such provision is invalid as being against
15 public policy and is both procedurally and substantively unconscionable. The Deed of Trust
16 also does not provide that notice is to be given to a servicer of the home loan. However,
17 without acknowledging the validity of the provisions, plaintiff provided Homecomings and
18 GMAC the required written notice and opportunity to take corrective action by a letter sent
19 on September 17, 2010, a copy of which is attached hereto as Exhibit C and which is
20 incorporated by reference herein. Neither Homecomings nor GMAC has taken corrective
21 action in response to this written notice.
22
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24 **IV. CLASS ALLEGATIONS**

25 19. Plaintiff seeks to represent a class consisting of all persons who, within the
26 applicable statute of limitations, paid off loans to defendant and were charged fees, except

1 fees for the actual costs to record the deeds of reconveyance and the Trustee's fee for
2 preparing the reconveyances, which they paid to or for the benefit of defendant in connection
3 with paying off a loan secured by a Deed of Trust on real property in the state of Washington
4 where the Deed of Trust contained the following or substantially similar language:

5
6 Upon payment of all sums secured by this Security Instrument, Lender shall
7 request Trustee to reconvey the Property and shall surrender this Security
8 Instrument and all notes evidencing debt secured by this Security Instrument
9 to Trustee. Trustee shall reconvey the Property without warranty to the
10 person or persons legally entitled to it. Such person or persons shall pay any
11 recordation costs and the Trustee's fee for preparing the reconveyance.

12 Plaintiff brings this action on behalf of himself and all other persons similarly situated
13 pursuant to Superior Court Civil Rule 23(b)(2) or, alternatively, Civil Rule 23(b)(3). The
14 class that plaintiff seeks to represent is composed of potentially thousands of individuals.

15 20. Joinder of all members of the class as defined herein is impractical.

16 21. There are common issues of law and fact affecting the class with respect to the
17 application of the law pertaining to plaintiff's contract, unjust enrichment, and Consumer
18 Protection Act claims, and the determination of restitution and damages, because of
19 defendant's conduct.

20 22. Plaintiff's claims alleging violations of the Consumer Protection Act,
21 RCW 19.86, breach of contract, and unjust enrichment are typical of the claims of the class
22 since plaintiff and all class members sustained damages arising from defendant's wrongful
23 conduct in violation of law as stated in this Complaint.

24 23. Plaintiff will fairly and adequately protect the interests of the class and has
25 claims typical of the claims of all members of the class. Plaintiff does not have interests that
26 are antagonistic to or in conflict with those of the members of the class that plaintiff seeks to
represent.

1 24. The interests of the class are adequately represented by plaintiff and his
2 counsel. Plaintiff has retained counsel competent and experienced in class and consumer
3 litigation.

4 25. This action seeks to enjoin the practices at issue and provide for equitable
5 restitution of fees illegally collected and incidental damages.

6 26. This action is also maintainable as a class action because the questions of law
7 and fact common to the members of the class predominate over any questions affecting only
8 individual members and because a class action is superior to other available methods for the
9 fair and efficient adjudication of the controversy. Specifically, all four of the criteria set
10 forth in CR 23(b)(3) have been satisfied in this case. First, the members of the class have
11 little, if any, interest in individually controlling the prosecution of separate actions. Second,
12 plaintiff's counsel is not aware of any other litigation concerning the controversy already
13 commenced by members of the class. Third, it is desirable to concentrate the litigation of
14 these claims in this forum given the judicial resources already expended in this matter and
15 the relationship of defendant to the State of Washington. Fourth, few difficulties will likely
16 be encountered in the management of the class action.

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19 **V. FIRST CAUSE OF ACTION:**
20 **BREACH OF DEED OF TRUST CONTRACT**

21 27. Plaintiff's and class members' Deeds of Trust are contracts, which define the
22 rights of the parties including what charges, if any, defendant may assess upon payoff of the
23 loans. The Deeds of Trust do not permit defendant to assess the fees identified herein in
24 Paragraphs 14 and 16.

1 28. Defendant breached its contracts with plaintiff and the class by requiring
2 plaintiff and members of the class to pay these fees at the time the loans of the plaintiff and
3 the class were paid off.

4 29. As a proximate result of the breaches of contract by defendant, plaintiff and
5 the class members have been wronged in that plaintiff and the class paid the fees referenced
6 herein. Plaintiff and the class are entitled to restitution of fees illegally collected pursuant to
7 said Deeds of Trust and other documents. Plaintiff and the class are also entitled to
8 incidental damages in an amount to be proven at trial.
9

10 **VI. SECOND CAUSE OF ACTION: VIOLATION OF**
11 **THE CONSUMER PROTECTION ACT, RCW CHAPTER 19.86**

12 30. Defendant's practices of requiring plaintiff and class members to pay fees not
13 secured by their Deeds of Trust by including such fees in its loan Payoff Statements
14 delivered to plaintiff and class members constitute unfair and deceptive acts and practices,
15 which are unlawful and are in violation of the Consumer Protection Act of Washington,
16 RCW Chapter 19.86.

17 31. Plaintiff and the class members were required to pay the fees specified by
18 defendant on its Payoff Statements in order for their Deeds of Trust to be reconveyed to
19 them. Defendant's practice of requiring the payment of these fees has the capacity to deceive
20 reasonable consumers into believing that they must pay these fees – that they are, in fact,
21 required to pay these fees – before defendant will reconvey their Deeds of Trust. Therefore,
22 these practices are unfair and deceptive under the Consumer Protection Act.
23

24 32. Pursuant to RCW 19.86.090, plaintiff and the class seek an injunction against
25 defendant to enjoin further violations of the practices alleged herein together with equitable
26 restitution, incidental damages, costs of suit and reasonable attorney's fees. Plaintiff and the

1 class also seek an award of exemplary damages in the amount of three times the amount of
2 restitution paid.

3 **VII. THIRD CAUSE OF ACTION:**
4 **UNJUST ENRICHMENT**

5 33. By charging plaintiff and the class, and by retaining the excess recording fees
6 described herein in paragraphs 14 and 16, defendant was unjustly enriched, for which unjust
7 enrichment plaintiff and the class are entitled to recover judgment.

8 **RELIEF SOUGHT**

9 WHEREFORE, plaintiff requests relief as follows:

10 A. That the Court certify the identified class pursuant to Civil Rule 23(b)(2) or
11 23(b)(3) with plaintiff as the class representative and undersigned counsel as class counsel;

12 B. That the Court enter a judgment in favor of plaintiff and the class against
13 defendant on his class claims, directing equitable restitution of fees illegally collected and
14 awarding damages, including exemplary damages pursuant to RCW 19.86.090;

15 C. That the Court enter an injunction permanently forbidding defendant from
16 committing the practices alleged herein in the future or declare the same unlawful and award
17 incidental damages;

18 D. That the Court award plaintiff and the class their costs, including reasonable
19 attorneys' fees pursuant to RCW 19.86.090 and applicable contracts;

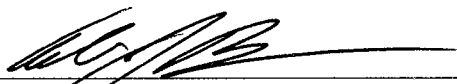
20 E. For pre-judgment interest at the highest allowable rate on all liquidated sums,
21 and post-judgment interest on the entire judgment amount awarded at the highest allowable
22 rate; and

23 F. That the Court award such other and further relief that the Court deems just
24 and equitable.
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1 DATED this 16th day of November, 2010.

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