

390 B.R. 368, *; 2008 Bankr.

IN RE: DONALD EDWARD **MOFFITT**, and PHYLLIS JOY **MOFFITT**, Debtors; DONALD EDWARD **MOFFITT**, and PHYLLIS JOY **MOFFITT**, PLAINTIFFS VS. AMERICA'S SERVICING COMPANY, DEFENDANT

3:04-bk-22708 E, CHAPTER 13, 3:07-ap-01054

UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF ARKANSAS,
JONESBORO DIVISION

June 18, 2008, Decided

June 18, 2008, Entered

OPINION BY: [AUDREY R. EVANS](#) ▼

[*369] MEMORANDUM OPINION

On February 28, 2007, Plaintiffs/Debtors (the "**Moffitts**") filed a complaint against Defendant, America's Servicing Company ("**ASC**") and [Everhome Mortgage Company](#) ▼ ("Everhome") for actual and punitive damages pursuant to [§§ 105 and 362, 501, 502, 503, 506, 524, 1327 and 1328 of the Bankruptcy Code](#); [Federal Rules of Bankruptcy Procedure 2016, 3001](#) [****2**] and [3007](#); the Court's holding in [In re Edith Smith, 290 B.R. 102 \(Bankr. E.D. Ark. 2004\)](#); the Real Estate Settlement and Procedures Act ("**RESPA**"), [§§ 2605\(e\)\(1\)\(B\)\(2\), 2605\(e\)\(2\)\(C\)\(1\), and 2605\(f\) of Title 12 of the United States Code](#); and [§ 3500.21\(e\)\(3\)](#) of Regulation X. By Agreed Order entered December 14, 2007, separate defendant Everhome was dismissed with prejudice. The **Moffitts** amended their complaint on January 29, 2008, to add claims under the Fair Debt Collection Practices Act, [15 U.S.C. § 1692 et seq.](#) and Arkansas state law.

On December 21, 2007, the **Moffitts** filed a *Motion for Temporary Injunction and Restraining Order* (the "**TRO Motion**") along with a *Certificate of Service* certifying that notice of this motion was provided to all interested parties, including ASC. In response to the **Moffitts'** TRO Motion, the Court entered a *Temporary Restraining Order and Order Setting Date for Hearing on Temporary Injunction* on December 26, 2007. The Court heard the **Moffitts'** TRO Motion on January 14, 2008 (the "**Injunction Hearing**"). Debra J. Reece and Joel G. Hargis appeared on behalf of the **Moffitts**, who were also present. Kimberly D. Burnette appeared on behalf of ASC. Amy Viers appeared [****3**] as a representative of ASC. Following the presentation of evidence and testimony of witnesses, the Court granted a temporary injunction against ASC, and subsequently entered its *Order Granting Preliminary Injunction* on January 23, 2008, enjoining ASC from: (1) contacting the **Moffitts** except by regular monthly mortgage statements showing only true and accurate information as to what is owed by the **Moffitts** on their mortgage; and (2) attempting to collect any arrearages, late fees, or any other amounts exceeding the **Moffitts'** monthly mortgage payments so long as the **Moffitts** continue to make timely mortgage payments. [***370**] The injunction is to remain in effect until a trial on the merits of this adversary proceeding is concluded. The **Moffitts** were also awarded their attorneys' fees and costs, to be determined by a separate order.

This Memorandum Opinion serves to make findings of fact and conclusions of law based on the evidence taken at the Injunction Hearing. Pursuant to [Federal Rule of Civil Procedure 65\(a\)\(2\)](#) (made applicable to bankruptcy proceedings by [Federal Rule of Bankruptcy Procedure 7065](#)), ". . . , evidence that is received on the motion and that would be admissible at trial becomes **[**4]** part of the trial record and need not be repeated at trial." The Court enters this Memorandum Opinion to document the evidence introduced at the Injunction Hearing, which need not be repeated at trial, and to make findings of fact. The Court is not entering a judgment on the merits of the Plaintiffs' Complaint. The Court recognizes that additional evidence may be put on by the parties at the trial on the merits to rebut these findings. See [University of Texas v. Camenisch, 451 U.S. 390, 395, 101 S.Ct. 1830, 1834, 68 L.Ed.2d 175 \(1981\)](#) (holding that the findings of fact and conclusions of law made by a court granting a preliminary injunction are not generally binding at trial on the merits).

NARRATIVE SUMMARY

This opinion is about the **Moffitts**, an older couple, who lived in a home valued at \$ 31,500 by their mortgage creditor, ASC. The **Moffitts** filed a chapter 13 bankruptcy on October 22, 2004. Their chapter 13 plan provided that their mortgage arrearage would be brought current over a period of five years. Prior to filing bankruptcy, Mrs. **Moffitt** (who was employed at a law firm) was hit by a truck, and filed a personal injury lawsuit. When the lawsuit settlement funds were received, **[**5]** the **Moffitts** used the funds to pay off their five-year chapter 13 plan more than three years early. The Chapter 13 Trustee made final disbursements to ASC totaling \$ 9,581.57; an Order was entered directing the **Moffitts** to make their regular monthly mortgage payments directly to ASC (which they did); and the **Moffitts** received a Discharge. The **Moffitts** also used their settlement funds to send a \$ 10,000 check to ASC with written instructions to apply the payment to principal. Because the Trustee's final disbursement should have brought the **Moffitts'** home loan current (paying all allowed fees and costs and catching up prior mortgage payments), the \$ 10,000 should have been applied to principal, the regular monthly mortgage payments should have been routinely applied to principal, interest, and escrow, and the **Moffitts** should have had no trouble with ASC. This is not what happened. Instead, ASC misapplied these payments, failed to record the correct information even though Mrs. **Moffitt** constantly called and talked to ASC's agents, failed to follow her written instructions, failed to communicate with the **Moffitts**, sent mortgage statements that were incomprehensible and frightening, began **[**6]** collection calls, and engaged in a litany of mismanagement of the **Moffitts'** loan which led the **Moffitts** to reopen their bankruptcy case and file a lawsuit against ASC, and ultimately to file for a temporary injunction against ASC asking the Court to enter an Order directing ASC to stop calling them and to send only regular accurate mortgage statements to them. The Court granted this injunction. This Opinion will explain why the injunction was entered, what happened to the **Moffitts**, and what happened to the money they paid ASC. At times, the explanations are complex; as an aid to reading the Opinion, the Court begins with a brief factual overview and attaches an appendix **[*371]** which includes a summary of the statements ASC sent to the **Moffitts**.

FACTUAL OVERVIEW

The **Moffitts** received a chapter 13 discharge on April 6, 2006. ¹ Prior to the

discharge being entered, the Court entered an Order dated March 27, 2006, stating that ASC's claim had been paid in full, and the **Moffitts** were to begin making their monthly mortgage payments directly to ASC. ² The same day, the **Moffitts** paid their mortgage creditor, ASC, an additional \$ 10,000 with written directions that it be applied to principal. Around **[**7]** the same time, the chapter 13 Trustee (the "**Trustee**") made final disbursements to ASC totaling \$ 9,581.57. Without communicating with the **Moffitts**, ASC recorded the \$ 10,000 payment first, and rather than applying it to the **Moffitts'** mortgage principal, used it to catch up the **Moffitts'** arrearage, pay fees, and pay the **Moffitts'** mortgage ahead a few months. ASC recorded the Trustee payments later that month, using part of it to pay the mortgage ahead a few more months, and put the rest into something called "Trustee Suspense." Mrs. **Moffitt** wrote ASC on April 20, 2006, and again on July 13, 2006, to correct the application of the \$ 10,000, and then called ASC constantly in an effort to sort out the discrepancies and to determine what had happened to the \$ 10,000 principal payment.

Footnotes ¹ The **Moffitts** had previously filed a chapter 13 bankruptcy on June 27, 2000, which was later converted to a chapter 7 in June 2004; they received a chapter 7 discharge on August 26, 2004.

² Everhome was the mortgage servicer when the **Moffitts** filed bankruptcy; the loan was later transferred to ASC. Additionally, according to ASC's representative appearing at the TRO hearing, ASC is a fictitious name for Wells **[**8]** Fargo Bank and not a separate legal entity. ASC's representative testified that ASC was created to distinguish between the loans that Wells Fargo services for clients and those that it services on its own behalf.

Finally, in June 2006, ASC reversed all the applications of the \$ 10,000, the Trustee payments, and the **Moffitts'** regular payments for April, May, June and July. ASC subsequently applied the \$ 10,000 to principal, and reapplied the Trustee payments and the **Moffitts'** April, May and June payments; ASC failed to reapply the July payment. When ASC made the reversals and reapplications, it incorrectly overpaid 14 out of the 18 mortgage payments it reapplied, which resulted in a portion of the July payment remaining in a "suspense" category. ASC then showed the **Moffitts** due for their July mortgage payment in its internal payment history. Consequently, ASC began to apply every mortgage statement that it received from the **Moffitts** to the payment due for the prior month, and the **Moffitts** began getting two statements per month showing them behind and assessing late fees. Though tremendously upset and confused, the **Moffitts** continued to make their regular monthly mortgage payments.

Because **[**9]** the **Moffitts'** many attempts to resolve their mortgage issues with ASC (including writing three letters and repeatedly calling ASC) were unsuccessful, the **Moffitts** reopened their bankruptcy case on July 31, 2006. The **Moffitts** subsequently made a Qualified Written Request ³ upon ASC, and ASC responded in

[*372] December 2006 by providing the **Moffitts** with a payment transaction history on the **Moffitts'** mortgage (the "**Initial Payment History**") and a loan pay-off letter. The **Moffitts** filed their complaint against ASC on February 28, 2007. The complaint alleged that ASC's predecessor, Everhome, had charged unlawful fees and costs to the **Moffitts'** mortgage. The complaint also alleged that ASC had misapplied the Trustee payments, the **Moffitts'** \$ 10,000 payment, and the **Moffitts'** pre- and post-petition payments. The **Moffitts** also alleged in their complaint that they began receiving two mortgage statements per month in August 2006 with varying principal balances.

Footnotes [3](#) A "qualified written request" under the Real Estate Settlement

Procedures Act is defined in [12 U.S.C. § 2605\(e\)\(1\)\(B\)](#) as:

. . . a written correspondence, other than notice on a payment coupon or other payment medium supplied by the servicer, **[**10]** that--

(i) includes, or otherwise enables the servicer to identify, the name and account of the borrower; and

(ii) includes a statement of the reasons for the belief of the borrower, to the extent applicable, that the account is in error or provides sufficient detail to the servicer regarding other information sought by the borrower.

In August 2007, more than a year after ASC failed to credit the **Moffitts'** July 2006 payment, ASC sent the **Moffitts** a letter informing them that there was a sum of money held by ASC that did not equal a full mortgage payment, and requesting that the **Moffitts** remit the difference between that sum and a full mortgage payment. The **Moffitts** did not understand the letter because they had made all their monthly mortgage payments since getting out of bankruptcy. Later in August 2007, ASC began phoning the **Moffitts** and leaving messages for them. On August 22, 2007, ASC ordered an appraisal called a "broker's price opinion," a step taken when an account is 30 days delinquent. The **Moffitts** received another phone message from ASC on October 24, 2007, which they recorded.

On December 21, 2007, the **Moffitts** filed the TRO Motion alleging that ASC, through the August 2007 **[**11]** letter, phone messages, and mortgage statements, was attempting to collect late charges and arrearages that the **Moffitts** did not owe, despite the **Moffitts'** representation by counsel in an ongoing adversary proceeding filed by the **Moffitts** against ASC. The TRO Motion sought to enjoin ASC from contacting the **Moffitts** until a trial on the merits of the **Moffitts'** Complaint could be held and decided. When ASC's counsel was asked by the Court at the Injunction Hearing why it would not agree to a temporary restraining order prohibiting ASC from calling the **Moffitts** until a trial could be held in this matter, ASC's counsel responded:

Your Honor, the company can agree to that. The problem is, you know, I have discussed that with my witness, you can never guarantee anything a hundred

percent. And I just -- we talked about different ways to do it, but the -- you know, the evidence, you know, will show there actually was a stop calls put on this loan. The plaintiffs have that information. I've given it to them. They're aware of that.

There was still a call that was made after that went on there. So that's what I'm so afraid of. And that's what ASC is so afraid of, is that if this restraining order **[**12]** is entered and something happens, a statement goes out with unapplied funds on it or a late charge or another call is made, that we will be hit much, much harder without the information that we want to give the Court today and if the entire information that the debtors gave in their motion is accepted by the Court. We were just unable to accept that the way it was given.

ASC's representative had been working on the **Moffitts's** account since late 2006 or early 2007, before the **Moffitts** filed their Complaint in February 2007. Yet, ASC's representative testified at the Injunction **[*373]** Hearing that until the TRO Motion was filed she did not realize the **Moffitts'** funds had been misapplied and that the **Moffitts** were not actually one month behind in their monthly mortgage payments. ASC's representative also testified that the **Moffitts** bore some responsibility in seeing that ASC applied their payments correctly (despite the **Moffitts** having notated on every check memo line which month's payment they were making).

ASC also acknowledged at the Injunction hearing that the transaction history it provided the **Moffitts** in December 2006 as a response to the Qualified Written Request was inaccurate in some **[**13]** respects. ⁴ The Friday before the Injunction Hearing, ASC provided the **Moffitts** with a new payment history that corrected certain transactions (although it is not clear whether ASC pointed these corrections out to the **Moffitts** or not). The Court refers to this history as the "**Revised Payment History.**" The allocations or transactions made by ASC and described in this Opinion are taken from the payment histories provided by ASC. Unless otherwise noted, both the Initial Payment History and Revised Payment History show the same transactions through December 2006 (only the Revised Payment History records transactions beyond December 2006).

Footnotes ⁴ A Qualified Written Request places an obligation on the servicer to review their records and provide an accurate transaction history. See [12 U.S.C. § 2605\(e\)\(2\)](#) (requiring a mortgage servicer upon receipt of a Qualified Written Request to conduct an investigation with respect to the borrower's account, make corrections if necessary, and provide the borrower with a written explanation or clarification as to why the servicer believes the account information is correct). See also [Payne v. Mortg. Elec. Registration Sys., Inc. \(In re Payne\)](#), [B.R. , 387 B.R. 614, 2008 Bankr. LEXIS 1340, 2008 WL 1961489 \(Bankr. D. Kan. 2008\)](#).

FINDINGS OF **[**14]** FACT

These factual findings are drawn from the record of the TRO hearing, including testimony and exhibits. Several exhibits require brief descriptions here and will be

referred to throughout the Court's findings of fact. Except where otherwise noted, the Court accepts the documentary evidence and testimony as facts.

The Moffitts' Mortgage Payments

Plaintiffs' Exhibit 1 is comprised of a copy of the **Moffitts'** cleared checks and deposits from March 24, 2006, through September 18, 2006, and a bank account history from September 18, 2006, through January 11, 2008. This exhibit illustrates that the **Moffitts** made monthly mortgage payments to ASC each month between April 2006 and January 2008. The Court finds the payments made by the **Moffitts**, as listed on Appendix A attached to this Opinion, accurately reflect the payments made by the **Moffitts** on their mortgage.

Mortgage Statements

The **Moffitts** received 38 mortgage statements between April 2006 and December 2007 (a 21 month time period), and those statements were introduced as Plaintiffs' Exhibit 5. The Court finds that the statements presented incomplete, inaccurate, and incomprehensible information; some are described in detail in this Opinion

[**15] to document the information that the **Moffitts** had been receiving about their mortgage. Copies of the first statement and last statement are attached to this Opinion as Appendix B. Further, tables reflecting the information on all 38 statements are attached to this Opinion as Appendix C. The Court prepared the tables' form for the purpose of reader convenience. Because each table contains the *exact* information provided in the ASC statements, they are at times confusing and difficult to follow. The statements are numbered for reference in chronological order according to the "principal balance as of" date, which is [*374] probably the date the statement was generated, according to ASC's representative, Amy Viers. (There was no evidence as to when the statements were actually received, and Ms. Viers could not say for sure when the statements were generated, but believed the "principal balance as of date" was probably when they were generated.) Ms. Viers testified that a statement is generated whenever a payment is received or late charges assessed.

March 27, 2006 through July 31, 2006: The First Four Months Post-Discharge

On March 27, 2006, the Court entered an Order directing the **Moffitts** to [**16] make their regular monthly mortgage payments directly to ASC beginning April 1, 2006. The March 27, 2006 Order also stated that ASC had been paid \$ 14,409.13, the full amount of its claim. Upon request at the Injunction Hearing, the Court took judicial notice of the March 27, 2006 Order. ⁵ The Court also takes judicial notice that the March 27, 2008 Order was sent to ASC's Bankruptcy Department, X7801-014, 3476 Stateview Boulevard, Fort Mill, SC 29715, as reflected on the Order. Also, Mrs. **Moffitt** faxed a copy of this Order to ASC. She testified that on March 30, 2006, she called ASC, got a fax number, and then faxed ASC a letter with the copy of the March 27, 2006 Order attached. A copy of Mrs. **Moffitt's** fax and confirmation of receipt was admitted as Plaintiffs' Exhibit 2. The purpose of the letter was to give written instructions concerning application of a \$ 10,000 check she was mailing and to inquire about an escrow overage. Her faxed letter reads as follows: Per our phone conversation yesterday, I am sending you a copy of the Order issued by Judge Audrey Evans of the United [sic] Bankruptcy Court Eastern & Western District of Arkansas, showing that our arrearage has now been paid [**17] in full.

From what I read, I assume that we will be sent a statement for the April payment that is due on our home sometime this month, I understand that it is due on the 1st, but we did not receive the order until yesterday. I will be sending a payment today for the April statement and will simply put our loan # on the check and indicate that it is for the April payment. I also sent out a check yesterday for \$ 10,000.00 to be paid directly to the principal and expect to be sending another check within 2 months to pay our balance in full.

I am also enclosing a copy of a letter that we received showing that we had an escrow overage of \$ 2747.28. I called on 2/22/2006 to find out about this and was told that as soon as our arrearage had been paid that we would be issued a check for this overage. Our arrearage has now been paid and we were wondering when we might expect the check for the overage?

Mrs. **Moffitt** testified that she made this \$ 10,000 payment on principal in an effort to pay her home mortgage down as quickly as possible since she had become disabled as a result of the accident. She also noted on the check memo line "to be pd to principal." The check Mrs. **Moffitt** sent for her **[**18]** April payment also noted on the memo line that it was for that month's payment, as did all checks that Mrs. **Moffitt** sent to ASC.

Footnotes **5** The Court takes judicial notice of the case docket and all documents filed in a bankruptcy case. See [Fed. R. Evid. 201](#); [In re Henderson, 197 B.R. 147, 156 \(Bankr. N.D. Ala. 1996\)](#) ("The court may take judicial notice of its own orders and of records in a case before the court, and of documents filed in another court.") (citations omitted); see also [In re Penny, 243 B.R. 720, 723 n.2 \(Bankr. W.D. Ark. 2000\)](#).

[*375] The Trustee filed a *Certification of Final Payment and Application for Issuance of Order of Discharge* ("**Certification of Final Payment**") on April 5, 2006, and the **Moffitts** received a Chapter 13 discharge on April 6, 2006. ⁶ The Bankruptcy Noticing Center sent ASC a copy of the discharge order on April 8, 2006. The **Moffitts** also faxed ASC a copy of their discharge order on April 20, 2006, with a letter that once again noted their arrearage had been paid in full, that their April payment had been made and cleared their bank, and that they had made a \$ 10,000 principal payment that had also cleared their bank. Mrs. **Moffitt** inquired again about their escrow **[**19]** overage. A copy of Mrs. **Moffitt's** fax and confirmation of receipt was admitted as Plaintiffs' Exhibit 3, and her faxed letter reads as follows: I am sending you a copy of our discharge from Chapter 13 bankruptcy. Our arrearage has been paid and our mortgage is now current. I also sent a check # 2606 for our April payment and a check # 2604 for \$ 10,000.00 to be paid on the principal. Both of these checks have already been paid according to our bank.

Our question is according to the letter that we received from ASC (I am sending a copy of the letter along with this fax) we have an overage of \$ 2747.28 in our

escrow account and were told that we would receive a check for this amount. Can you please let us know when we might expect to receive this check?

Mrs. **Moffitt** testified that she sent this fax to ASC because ASC "kept saying that [the **Moffitts**] were not discharged from bankruptcy." Mrs. **Moffitt** testified that ASC did not contact her about the overage, and also failed to apply the \$ 10,000 check to principal. Mrs. **Moffitt** testified that she had called ASC repeatedly about applying the \$ 10,000 to principal and ASC would not do it. The Court finds Mrs. **Moffitt's** testimony credible and **[**20]** accepts it as fact.

Footnotes [6](#) The case was closed on June 7, 2006.

Ms. Viers testified that the \$ 10,000 payment was not initially applied to the **Moffitts'** principal balance because the loan was delinquent at the time, and the mortgage dictated that payments first be applied to escrow, then interest, then amortized principal and interest. Although the March 27, 2006 Order stated that ASC had been paid in full (and therefore, the **Moffitts'** mortgage should not have been delinquent), and although the Trustee had already filed a Certification of Final Payment on April 5, 2006, ASC did not record the final trustee payments of \$ 1,045.78 and \$ 8,535.79 until April 26, 2006, according to its payment histories. No evidence was submitted to explain why there would be a delay between the Trustee's Certification of Final Payment, and ASC's recording the payments as received.

Despite the **Moffitts'** discharge, their mortgage statements continued to show them as being in bankruptcy. Specifically, statements 1 (generated April 3, 2006) through 31 (generated August 1, 2007) all included the following:

Important Messages

*This statement is for informational purposes only. Our records indicate that your loan is protected **[**21]** by a bankruptcy plan. The attached coupon reflects the calendar due date, not the contractual due date of the bankruptcy plan. If you have any questions regarding your loan, please contact your bankruptcy attorney or our office.*

Although ASC had received the **Moffitts'** \$ 10,000 principal payment, \$ 9,581.57 in **[*376]** Trustee payments, and three regular mortgage payments of \$ 332.46 each between March 27, 2006, and May 31, 2006 (a total of \$ 20,578.95), the first five statements the **Moffitts** received (dated between April 3, 2006, and May 31, 2006) show a total reduction in principal of only \$ 863.58. Statement 1, generated on April 3, 2006, showed a principal reduction of \$ 418.43, a payment of \$ 782.28 with no explanation as to how it was applied, and two regular mortgage payments received on April 3, 2006. Statement 2, generated on April 26, 2006, showed ASC's receipt of the Trustee payments of \$ 8,535.79 and \$ 1,045.78, with three regular mortgage payments applied. Statement 3, generated on May 3, 2006, showed one application of a regular mortgage payment on May 3, 2006. Statement 4, generated on May 16, 2006, showed that two regular mortgage payments were applied on May 16, 2006. Statement **[**22]** 5, generated on May 31, 2006, showed the application of four regular mortgage payments. The "next payment" indicated on each of these statements ranges from the May 1, 2006, to September 1, 2007. None of these statements reflect that ASC received or applied the **Moffitts'** \$ 10,000 payment. (See tables representing statements in Appendix C.)

After the **Moffitts** received statement 5 generated on May 31, 2006, stating that

their next payment was due September 2007, they received another statement generated June 30, 2006, stating that payment in the amount of \$ 5,984.28 was due on July 1, 2006 (the next day!). Statement 6 also showed three payment reversals and the application of the **Moffitts'** July mortgage payment on June 30, 2006.

In the midst of the transactions described above, Sybil Plover with ASC instructed Mrs. **Moffitt** to write a letter stating that she wanted the \$ 10,000 applied to principal. Although Mrs. **Moffitt** had already faxed written requests on March 30, 2006, and April 20, 2006, neither of which was acknowledged by ASC, she wrote another letter on July 13, 2006, as instructed. Mrs. **Moffitt's** letter to that effect dated July 13, 2006, was admitted as Plaintiffs' Exhibit 4. **[**23]** The tone of this letter reflects her justified frustration and reads, in its entirety, as follows:

I am writing this letter per a request I received today asking me to state in letter form that the check # 2604, written on March 27, 2006, for \$ 10,000.00 on my personal account, to Americas Servicing Company, for account # 1172006772, was to be paid to principal only as I indicated on the check.

This request is one of the most ludicrous things that I have been asked to do in a very long time. Not only did I indicate on the check that this was to be paid to principal only, indicated on the payment coupon that this was to be paid to principal only, I have called Americas Servicing Company about this matter once a week every week since this check was written. Americas Servicing Company as far back as April had informed me that my personal check had been used to pay off my arrearage and paid me ahead several months in payments. This mortgage company informed me in April that they had taken the check that the Bankruptcy Court sent them for \$ 8584.19, along with all the house payments that I have made every month and put them into suspense. They have also repeatedly assured me that they would

[24]** take the check sent by the Bankruptcy Court along with the payments that they had put me ahead and pay the \$ 10,000.00 to my principal as they should have done in the first place.

I have also been repeatedly reassured that my loan was now out of bankruptcy until two weeks ago when I asked why we had not received the check for **[*377]** \$ 2747.28 in surplus escrow, that we had requested be sent to us. I was told then that the bankruptcy department would not release it because there was something still in dispute. Although I have spoken to someone at Americas Servicing Company every week since March, this was the first time that I had heard anything about a dispute, and quite oddly no one could or would tell me what the dispute was about.

Now this request for a letter stating that the check that I sent back in March be paid to principal. I do not know what is going on with this or why Americas Servicing Company seems to be continually stalling us, but I have had more than enough. Not only is this extremely frustrating and physically debilitating, it borders on the criminally reprehensible. This mortgage company is setting [sic] on almost \$ 22,000.00 of my money and as you can see from the statements **[**25]** that I am sending with this letter I only owe \$ 28,589.36 in principal on my home.

Now this is not a threat, but a statement. They have had almost four months to get this matter straightened out and taken care of. I think that I have been more than patient, but my patience has now come to an end. If this matter is not taken care of by the early part of next week, I will send a copy of this letter to Judge Evans at the bankruptcy court, to anyone else that I can think that will listen to me, see what

legal options are available to me of reopening my case, and if there is any legal recourse of suing Americas Servicing Company for their apparent negligence. Mrs. **Moffitt** testified that in addition to writing ASC, she called ASC almost every day, and would get different stories from every person she talked to. Mrs. **Moffitt** explained that ASC had told her at one point that ASC had taken her \$ 10,000 principal payment and paid the bankruptcy claim, then put her some payments ahead, and then took the bankruptcy court checks and put them into a suspense account. Mrs. **Moffitt** explained that she believed that ASC somehow got her a payment behind when they tried to undo their mistake in not applying **[**26]** the \$ 10,000 payment to principal.

Mrs. **Moffitt** testified that she and her friend and former co-worker Rhonda Jones, a paralegal with the Dickerson Law Firm, continued to call ASC about the matter on Mrs. **Moffitts'** behalf until Mrs. **Moffitt** reopened her bankruptcy case. Ms. Jones testified that even though the **Moffitts** had received a discharge, ASC was still showing them in bankruptcy, and had put the Trustee payments in suspense. Ms. Jones testified that she probably called ASC every other day for a while in 2006, and she believes they began to screen her calls. Ms. Jones explained that she kept asking to speak to Sybil because she was the person she had talked to before, but Sybil would not be there and would not call her back. Ms. Jones ultimately recommended that Mrs. **Moffitt** hire an attorney to reopen her bankruptcy case and seek relief through the Bankruptcy Court.

On July 21, 2006, ASC generated statement 7 which showed the application of four mortgage payments. Although there were insufficient payments to explain a reduction in principal, and although the \$ 10,000 applied to principal was never reflected on a statement, the principal balance on statement 7 was more than \$ 12,000 **[**27]** less than shown on statement 6 (see Table 7 on Appendix C). However, this same statement which reflected the large principal reduction also informed the **Moffitts** that on July 21, 2006, they were a **[*378]** payment behind and \$ 664.92 was due on August 1, 2006. From March 27, 2006, to July 31, 2006, ASC did not send the **Moffitts** a statement which accurately accounted for the funds ASC received from the **Moffitts**. Further, beginning with statement 7 generated on July 21, 2006, ASC began generating two statements per month, with the first statement showing the **Moffitts** a month behind and assessing a late fee. Then, the next statement reflects that the missed payment has been made, applies the missed payment to principal, interest, and escrow, and continues to accrue the late fee on top of the late fees already assessed.

The **Moffitts** reopened their bankruptcy case July 31, 2006.

August 1, 2006 through February 28, 2007: The Next Seven Months

ASC's pattern of sending two statements per month, continually showing the **Moffitts** one month behind, and assessing late fees continued until the TRO hearing (a period of 18 months).

During the Fall of 2006, the **Moffitts** sent ASC a Qualified Written Request. ASC **[**28]** replied by a letter dated December 12, 2006 (Plaintiffs Exhibit 11), in which ASC informed the **Moffitts'** counsel that it was enclosing a Customer Account Activity Statement outlining the transaction history on their loan from May 1, 1999, to the present date, enclosing a copy of the **Moffitts'** mortgage document allowing for the charging of fees to the loan, and enclosing a payoff statement for the loan.

The letter also states that any other information requested and not provided is privileged information that cannot be released. The Customer Account Activity Statement is actually a replica of a payment transaction history on the **Moffitts'** mortgage that covered transactions from October 2004 (not May 1, 1999) through December 2006 (the "**Initial Payment History**"). This history was admitted into evidence as Plaintiffs' Exhibit 9. Ms. Viers testified that she did not personally prepare the Initial Payment History, but that it was manually prepared based on the information in ASC's automated computer system to put the information into a more user friendly format. Ms. Viers stated that a line item entry is made on the history whenever any payment on the mortgage comes in, or anything is assessed **[**29]** against the mortgage or removed from it for any reason.

The Initial Payment History shows that despite Mrs. **Moffitt's** instructions, ASC allocated the **Moffitts'** \$ 10,000 principal payment to 15 mortgage payments totaling \$ 4,894.78 (14 payments of \$ 325.88 and one payment of \$ 332.46 representing the March 2006 payment), a \$ 13.04 late fee, and \$ 4,782.24 in corporate fees ^z on April 3, 2006. After these allocations, \$ 309.94 remained and was placed into "Debtor Suspense" and was later applied to principal along with a pre-existing amount in Debtor Suspense of \$ 108.49 for a total principal reduction of \$ 418.43. The Initial Payment History also provided the following information:

Footnotes ^z Ms. Viers testified that these fees represented foreclosure related fees that were assessed while Everhome serviced the mortgage.

On April 3, 2006, ASC applied the **Moffitts'** April 2006 mortgage payment to principal, interest and escrow.

On April 26, 2006, ASC applied the first Trustee payment of \$ 1,045.78 to three mortgage payments, and put the remaining \$ 48.40 in Debtor Suspense. ASC initially put the \$ 8,535.79 Trustee payment in "Trustee Suspense."

[*379] On May 3, 2006, ASC applied the **Moffitts'** regular mortgage **[**30]** payment for May to principal, interest, and escrow.

On May 16, 2006, \$ 4,768.56 of the \$ 8,535.79 Trustee payment was applied to corporate fees; \$ 677.56 was applied to two mortgage payments.

On May 31, 2006, ASC applied the **Moffitts'** regular mortgage payment for June to principal, interest, and escrow. The same day, \$ 3,049.02 of the \$ 8,535.79 Trustee payment was applied to nine mortgage payments, and the remaining \$ 40.65 was added to Debtor Suspense. The application of the trustee funds and the **Moffitts'** regular mortgage payments (in addition to the \$ 10,000 previously applied) paid the **Moffitts'** mortgage forward through August 2007.

On June 26, 2006, ASC reversed every payment applied since April 3, 2006. ASC reversed a total of 32 mortgage payments (a total of \$ 10,616.12 consisting of 16 payments at \$ 332.46; 14 payments at \$ 325.88; one payment of \$ 389.34; and one payment of \$ 345.10), and the principal payment of \$ 418.43 (out of Debtor Suspense). ASC placed all of these monies in Debtor Suspense.

Meanwhile, on June 23, 2006, the **Moffitts** made their regular July monthly mortgage payment which cleared their bank account on July 3, 2006. On the Initial Payment History, this payment **[**31]** is shown as received on June 30, 2006, and placed into Debtor Suspense rather than being applied as a regular monthly mortgage payment.

On July 7, 2006, ASC reversed the \$ 4,782.24 corporate fee and recorded a \$ 15 property inspection fee.

On July 18, 2006, ASC applied \$ 10,000 to principal.

On July 21, 2006, \$ 5,984.28 was applied to 18 mortgage payments (\$ 332.46 each) covering January 2005 through June 2006. Upon review of the Initial Payment History, the Court found that when the mortgage payments were reapplied, they should have been applied as 14 mortgage payments of \$ 325.88, and four payments of \$ 332.46 for March through June of 2006, totaling \$ 5,892.16 (as they had originally been applied). But by applying 18 payments of \$ 332.46 (totaling \$ 5,984.38) instead, ASC applied \$ 92.12 of the **Moffitts'** July payment to prior payments leaving the **Moffitts'** with approximately \$ 240 (out of their July 2006 \$ 332.46 payment) sitting in suspense. According to Ms. Viers' testimony, ASC does not apply funds to a mortgage payment unless there is enough for a complete mortgage payment. Accordingly, when correcting the application of the **Moffitts'** \$ 10,000 principal payment and the Trustee **[**32]** payments, ASC overpaid 14 prior mortgage payments thereby dipping into the **Moffitts'** regular July mortgage payment and leaving insufficient funds to make that payment. ASC failed to recognize its mistake and began showing the **Moffitts** one month behind, as described above. ⁸

Footnotes ⁸ Despite the **Moffitts** making a Qualified Written Request, filing a lawsuit, and a motion for a TRO, ASC did not find its error. ASC's application of 14 payments at \$ 332.46 instead of \$ 325.88 was not mentioned during the Injunction Hearing. The Court found this error by examining the payment histories.

On July 24, 2006, ASC reversed the \$ 13.04 late fee, and ASC refunded the **Moffitts** \$ 3,011.87 for an escrow overage. The following day, July 25, 2006, ASC assessed another late fee of \$ 13.04. When the **Moffitts** made their August mortgage payment on July 31, 2006, ASC applied it to the payment due for July. Statement 8 was generated July 31, 2006, showing the application of the payment received on **[*380]** July 31, 2006, the assessment of a late fee, the escrow refund, and the reversal of a previous late fee. The Initial Payment History shows that from this point forward, ASC continued to apply the **Moffitts'** monthly mortgage **[**33]** payments to the payment due for the prior month, continued to assess late fees, and periodically reversed late fees. ⁹

Footnotes ⁹ Ms. Viers testified that ASC periodically reversed late fees to give the

Moffitts the benefit of the doubt because they were in an adversarial relationship with ASC. Until the Injunction Hearing, ASC did not acknowledge that the fees were charged in error because the **Moffitts** were not in fact *late* in making payments.

In addition to the Initial Payment History provided to the **Moffitts** in December 2006 (in response to the **Moffitts'** Qualified Written Request), ASC provided the **Moffitts** with a loan payoff letter dated December 12, 2006, introduced as Plaintiffs' Exhibit 11, along with a loan payoff statement, introduced as Plaintiffs' Exhibit 12. According to the loan payoff statement, the amount necessary to pay the **Moffitts'** mortgage loan in full through January 10, 2007, included: the principal balance due on the loan at \$ 16,996.38, interest due of \$ 291.00, recording fees of \$ 8.00, an inspection fee of \$ 15.00, and attorney fees of \$ 600. [10](#)

Footnotes [10](#) According to Ms. Viers, the recording fee is for releasing the lien in the event the loan was paid off. Ms. Viers was not sure **[**34]** what the attorney fees charge was for, because she did not believe ASC charged attorney fees when a person paid off their loan. Ms. Viers did not think any fees were due and owing at that time, so that the attorney fees charge would not be legitimate.

The **Moffitts** filed their complaint against ASC on February 28, 2007.

August 2007 through December 2007: ASC's Collection Efforts

Almost six months after filing suit against ASC and as ASC continued to send the **Moffitts** two statements per month consistently showing them behind and assessing late fees, the **Moffitts** received a letter from ASC dated August 16, 2007 (admitted as Plaintiffs' Exhibit 6), which stated:

Our records reflect funds in the amount of 243.16 exists in an unapplied account on your mortgage loan. Your monthly mortgage payment is 317.84, therefore an additional 74.68 is required to make a complete payment. Please remit the difference of 74.68 to the following address.

Mrs. **Moffitt** testified that she had no idea where the amounts referenced had come from, and that she had not made a payment of \$ 243.16. [11](#)

Footnotes [11](#) The Revised Payment History (which was not provided to the **Moffitts** until the Friday before the Injunction Hearing) shows **[**35]** that this amount was computed by adding together \$ 133 in Debtor Suspense and \$ 100.16 in Trustee Suspense. These amounts would be what was left over from the

unapplied July 2006 payment after ASC incorrectly reapplied 18 mortgage payments at \$ 332.46 each, instead of 14 payments of \$ 325.88 and four payments of \$ 332.46.

Mrs. **Moffitt** testified that she also received a number of phone messages from ASC left on her answering machine. Mrs. **Moffitt** testified that she received a message from ASC on October 24, 2007, and phoned her attorney Joel Hargis and played the message to him so that it would be on his recording machine. The message stated: [Indiscernible]. Hello, this message is for Donald Edward **Moffitt**. This is Samantha with America Servicing Company. It's very important that we do receive a call back from you. We're here until 9:00 p.m. Eastern Standard Time today. Our toll free number is 888-828-2377. **[*381]** And we do expect to hear from you today. Thank you.

A tape of this message was accepted into evidence with no objection from ASC, and a transcript of the recording was admitted as Plaintiffs' Exhibit 7. Mrs. **Moffitt** testified that it was the last message she received from ASC before **[**36]** the TRO hearing.

In the meantime, the **Moffitts** received eight mortgage statements generated between August 2007 and December 2007. After sending the **Moffitts** 31 statements showing them to be in bankruptcy when they were not, the format of ASC's statements finally changed with statement number 32 generated on August 31, 2007. ¹² The "Important Message" regarding their loan being protected by a bankruptcy plan is removed, and instead of "Next Payment" followed by a date, the statements clearly state when the next payment is due and identifies "overdue payment(s)" and "unpaid late charge(s)."

Footnotes ¹² It took ASC over 17 months to change the **Moffitts'** loan from one in bankruptcy to one out of bankruptcy despite receipt of the Court's order directing the **Moffitts** to pay ASC directly, notice of the **Moffitts'** Discharge (sent by both the Court and the **Moffitts**), and two faxed letters from Mrs. **Moffitt** informing ASC of their discharge.

Statement 37 inexplicably shows two payments due in December 2007; the current month's payment is dated 12/01/07, and the payment listed as overdue is also dated 12/01/07, for a total of \$ 638.50 due on December 1, 2007. ¹³ Statement numbers 33 and 38 contained the following **[**37]** message:
Your monthly mortgage payment has not been received. Please make your payment immediately.

Footnotes ¹³ With respect to the two payments due in December 2007 as reflected

on statement 37, Ms. Viers testified that she had no explanation for why that statement showed an overdue payment due for December 2007 and a current payment due for December 2007.

December 2007: TRO Motion Filed & ASC Discovers its Mistake

The **Moffitts** filed the TRO Motion on December 21, 2007. Although the **Moffitts'** account had been assigned to Ms. Viers' department since at least February 2007 (when the **Moffitts** sued ASC), Ms. Viers did not begin work on the **Moffitts'** loan until August 2007. Further, despite having worked on the **Moffitts'** account since August 2007, Ms. Viers testified that she did not become aware that there was a discrepancy in the **Moffitts'** payments, and that the **Moffitts** believed they were current in their payments, until the middle of December 2007 when the **Moffitts** sought a temporary restraining order. Ms. Viers explained that she understood the **Moffitts'** lawsuit (filed in February 2007) to be about a misapplication of the \$ 10,000 the **Moffitts** had paid on principal, a misapplication of the Trustee **[**38]** funds that had been applied to suspense accounts, and some fees that had been charged to the **Moffitts'** mortgage account. When questioned about why it took the motion for a temporary restraining order to get ASC to figure out what had gone wrong with the **Moffitts'** account, Ms. Viers testified

I have no record that we ever were shown a payment -- this payment discrepancy, that it was ever put out in black and white really what was going on. And that -- and we were never provided even proof of payments to show that all the payments were made in accordance with the order until today. The TRO, like I said, just brought to light that there was a payment discrepancy and made obvious that they felt that they should be current and not be charged the late fees.

[*382] After the **Moffitts'** counsel pointed out that ASC had already created the Initial Payment History (in December 2006) which showed the July 2006 payment going into suspense and not being applied as a regular mortgage payment, Ms. Viers stated, "[i]n looking at this, it's not clear the intentions of the payments and how the mortgagors intended for those to be applied." Ms. Viers was asked how this could be so when Mrs. **Moffitt** sent her payment **[**39]** in with a payment coupon and also noted on her check's memo line that the payment was for her "July payment." Ms. Viers said:

Actually that's -- and I understand -- and that's actually commonplace. A lot of times people will just send in their most recent coupon with their payment, and that's not necessarily where it's intended to be applied.

Ms. Reece asked Ms. Viers:

So ASC doesn't train their people to look on their memo section of the check and the payment coupon to see what date this is supposed to be applied?

Ms. Viers responded:

And those aren't always accurate. Those could be a misunderstanding, there could be a check that was never received. There are a lot of issues that could go into play. Ms. Viers testified that it would have been very difficult for an ASC employee to figure out what had happened to the **Moffitts'** June 2006 payment. However, she acknowledged that "team lead" or supervisor was already working on the **Moffitts'** account doing the reversals and would have had the necessary knowledge and experience to find the problem. Ms. Viers also stated that she believed the **Moffitts** had "some responsibility in seeing that we applied [their payments] in accordance

with her wishes, [**40] and to bring them to our attention if it's not."

January 2008: The Revised Payment History, Communications Record, and Injunction Hearing

On the Friday before the Injunction Hearing held the following Monday, ASC provided the **Moffitts** with the Revised Payment History. The Revised Payment History revised some entries on the Initial Payment History and added transactions occurring between December 2006 (when the Initial Payment History had been created) and January 2008. The Revised Payment History does not reflect that corrections were made to it.

Unlike the Initial Payment History, the Revised Payment History shows the June 30, 2006 mortgage payment initially applied as a regular mortgage payment but then reversed and put in Debtor Suspense on July 5, 2006. Ms. Viers testified that based on the servicing histories she reviewed, this is what she believes actually happened, but that the initial application of the mortgage payment was not manually entered into the Initial Payment History. Ms. Viers recalled correcting the Initial Payment History to make this correction. She acknowledged that whichever is correct, the payment did end up in Debtor Suspense and was never removed. ¹⁴ Ms. Viers [**41] said that she believed the payment was improperly applied because ASC was in the midst of reversing all the mortgage payments it had previously applied. Ms. Viers explained that the reversal process was lengthy and complicated because ASC had to manually reverse each payment, [**383] and that ASC was limited to doing only a certain number of transactions per day on a loan.

Footnotes ¹⁴ A review of the Revised Payment History reflects that only \$ 130.33 of the **Moffitts'** July 2006 mortgage payment ultimately remained in Debtor suspense while \$ 110.16 remained in Trustee Suspense. The Initial Payment History showed \$ 240.49 remaining in Debtor Suspense, and \$ 0 in Trustee Suspense.

The Revised Payment History also reflected that the corporate fees of \$ 4,768.56 recorded on May 16, 2006, was broken into three assessments of \$ 758.25, \$ 3,110.31, and \$ 900.00. Additionally, according to the Initial Payment History, ASC took \$ 3,089.67 out of Trustee Suspense and applied \$ 3,049.02 of it to nine mortgage payments on May 31, 2006, and added the remaining \$ 40.65 to Debtor Suspense. The Revised Payment History shows \$ 3,049.02 coming out of Trustee Suspense leaving a balance of \$ 40.65 in Trustee Suspense with [**42] no money added to Debtor Suspense. The Revised Payment History also shows the reapplication of \$ 5,984.28 to the 18 mortgage payments on July 21, 2006, as \$ 2,327.21 coming out of Debtor Suspense and two separate transfers of \$ 664.93 and \$ 2,992.14 coming out of Trustee Suspense. These changes to the two suspense categories cause those balances to be different, but the collective amount held in suspense is not different on the histories. The principal balances reflected on both histories are the same. Finally, on August 31, 2007, the **Moffitts** made a payment of \$ 319.19, but the Revised Payment History only reflects a payment of \$ 317.84. Ms. Viers testified that the missing \$ 1.35 was actually received and put in Debtor

Suspense as a credit, but that it was not accounted for in the Revised Payment History (which was supposed to have been an accurate record of the **Moffitts'** mortgage payments and the application of those payments).

In addition to the Revised Payment History, ASC also provided the **Moffitts'** counsel with a communications record at some point prior to the Injunction Hearing. The communications record prepared by Ms. Viers is full of abbreviations and is unintelligible to **[**43]** a lay person not familiar with such records. Ms. Viers explained that a "D" indicates that an automated calling system called Davox initially makes the calls -- that is, dials the mortgagor's phone number. If an answering machine or a person answers the telephone, the call is forwarded to an employee's phone line at ASC. Ms. Viers testified that there are always two transactions for every call -- one for the automated dialer and one for the employee. If the line is dead once the representative gets it, it is assumed that the person answering the phone hung up, or that the connection was somehow lost. On the communications record at issue, there were several notations that the mortgagor had hung up, but Ms. Viers could not say for sure whether the mortgagor in fact hung up, or whether the connection was lost.

Ms. Viers testified that calls are initiated when a payment is showing due. For example, if a payment is due on the first of the month, a call may be made to remind the mortgagor that his or her payment is due, although a late fee will not be assessed until the grace period (as defined by the mortgage and note) has expired. Based on the communications record and Ms. Viers' interpretation **[**44]** of its entries, eight calls were made to the **Moffitts** between August 21, 2007, and August 31, 2007. Ms. Viers also testified that the purpose of the calls was to contact the mortgagor, basically what they consider a soft call, just to remind that we show that your account would be one payment past due. That would give the opportunity for any discrepancy to be amended at that time. That would also give to -- late -- if there was a need for a payment plan or a hardship that would need to be done, where that could be arranged at that phone call.

[*384] Ms. Viers also stated that no actual contact was made with the **Moffitts** through these phone calls. One was answered, but the caller was told it was the wrong number.

On September 13, 2007, an entry on the call record states, "permanent call stop call, stop placed on the loan for DOSLIT." Ms. Viers explained that the abbreviation "DOSLIT" stands for the Default Operation Services Litigation Department, and that the stop call entry meant that no calls were supposed to be made to the **Moffitts** after that date. However, on October 22, 2007, a call was made without a dialer and an answering machine picked up.

Ms. Viers testified that while ASC has a policy **[**45]** that no calls are to be made to a mortgagor if there is a call stop on the account, she learned that the call stop had been removed for the **Moffitts'** mortgage. The removal of the call stop was not noted on the communications record, but Ms. Viers explained that the ASC representative would have been looking at a computer screen with a flag on it rather than the notes reflected on the call log. Ms. Viers testified that she believed anyone with access to the servicing system could remove the stop call. She also testified in response to questioning from the Court that the representatives are paid hourly, but that they must make so many contacts per hour and obtain so many promises to pay per hour in order to meet their guidelines and performance levels, and that the representative's performance evaluation is based on meeting certain criteria.

The communications record also indicates that a broker price opinion was ordered on August 22, 2007, and indicated a value of \$ 31,500 for the **Moffitts'** home. Ms. Viers testified that \$ 95.00 of the \$ 243.16 sitting in suspense (and referenced in ASC's August 14, 2007 letter) was ultimately applied to a broker's price opinion charge, and the remainder **[**46]** was applied to principal. Ms. Viers testified that a broker price opinion is a drive-by inspection of the mortgaged property to make sure that someone is living there and to check the condition of the property and make sure there is no major damage to the home. Ms. Viers explained that these price opinions are done when an account is 30 days delinquent.

The communications record shows that the **Moffitts** received eight calls in ten days. Given all the facts leading up to these calls, and specifically, the **Moffitts'** unsuccessful efforts to communicate with ASC during the summer of 2006, the Court finds Ms. Viers' testimony that the calls are the homeowner's opportunity to amend any discrepancy to be disingenuous. The Court finds the collection calls were for the sole purpose of obtaining payments, not to gather information, and that at the time they were made, the **Moffitts** were not behind in their payments.

ASC's Proposed Remedy

Ms. Viers explained that once ASC learned of its mistake in not correctly applying the July 2006 mortgage payment, ASC was afraid to make any adjustments to the loan because it might bring about further "amended actions" and that they wanted to come to Court for **[**47]** the injunction hearing to get the Court's permission to make the necessary adjustments. ASC proposes to bring the **Moffitts'** mortgage account current by making certain reversals and adjustments to complete a payment of \$ 319.25. ASC proposes to: reverse late fees assessed in 2006 of \$ 13.30; reverse late fees assessed in 2005 of \$ 40.65; reverse the \$ 95.00 broker's price opinion charged in 2007; and advance \$ 15.39. These amounts total \$ 164.34. Ms. Viers also said some trustee money and some of the **Moffitts'** money was misapplied to principal, and that "reversals from principal curtailment" and certain fee reversals **[*385]** might be misunderstood. ¹⁵ If allowed to make these changes, Ms. Viers testified that the **Moffitts'** February statement would show no late charges or fees, and they would just owe their February 2008 regular mortgage payment.

Footnotes ¹⁵ It is not clear how ASC intends to make up a full \$ 319.25 payment, as Ms. Viers only listed \$ 164.34 in other reversals and advancements.

The Moffitts' Emotional Distress

Mrs. **Moffitt** testified that when she got her bankruptcy discharge in March of 2006, she was elated to be out of bankruptcy after almost seven years, and to have made the extra \$ 10,000 **[**48]** payment on her mortgage. When she began to get the bi-monthly mortgage statements and late notices, she felt awful and would not answer the phone because she knew she had been making her payments on time. Mrs. **Moffitt** testified that she had a complete nervous breakdown in December, explaining that she could not stand for anyone to talk to her or touch her, and had to have complete quiet around her. She stated:

It -- these people took my money, did not apply it correctly. It was money from my settlement where I was hit. And they -- they did not apply it correctly. They would not apply it correctly. They had the opportunity at anytime to take my home away from me, and that's all that went through my mind was I went through bankruptcy to hang onto this stupid house.

Mrs. **Moffitt** testified that she sought medical care for high blood pressure due to the stress caused by her mortgage troubles. Her medication has been changed twice, and that she was given the medication Paxil for her nerves. She takes two prescriptions for her high blood pressure, but it still spikes when she gets upset. She stated that it is a "daily thing in my mind that tomorrow this might not be my home."

Mrs. **Moffitt** testified [**49] that she could not sleep at night, that she would get up and worry at 1 or 2 o'clock in the morning and go back over her records to make sure she had not missed a payment. Mrs. **Moffitt** testified that she had to hire an attorney and reopen her bankruptcy because despite her numerous attempts, ASC would not apply her payments correctly. She also testified that after she hired Mr. Hargis, she continued to get phone calls from ASC with requests that she call back that day, and that these phone calls felt harassing to her because they kept telling her she was a payment behind.

Mrs. **Moffitt** also explained that she understood that even if the injunction were granted, her lawsuit against ASC would not be over, but said that at least ASC would not be calling her constantly and telling her she owes "five hundred and something dollars this time and 319 the next time, and a different number the next time." She stated that while ASC had not called her since October 2007, she was still getting the statements "where I never know how much money they think I owe."

Mrs. **Moffitt's** husband, Donald, testified that his wife had suffered a lot of stress and worry over their mortgage dispute. He stated that [**50] his wife had "broke down" a few times because she could not get anyone to believe that she had made their mortgage payments, and that she had to increase her heart medication. He also stated that it made him feel angry, frustrated and wore out, and that he would not answer their phone any longer and probably never would.

The Court finds the **Moffitts** testimony in its entirety credible and accepts their testimony as fact. The Court finds Mrs. **Moffitt** suffered physical and emotional harm as a result of ASC's mishandling of [**386] her mortgage account, and Mr. **Moffitt** suffered emotional harm as well.

ANALYSIS

Pursuant to [Federal Rule of Civil Procedure 65](#), made applicable to bankruptcy proceedings by [Rule 7065](#), and pursuant to [11 U.S.C. § 105](#), the Court may enter a preliminary injunction pending a trial on the merits. The Court must consider the following four factors for injunctive relief:

- (1) whether the plaintiff is likely to prevail on the merits;
- (2) whether the plaintiff has shown irreparable injury;
- (3) the balance between the harm suffered by the plaintiff and the harm that would be inflicted on other interested parties by the issuance of a preliminary injunction; and

(4) whether the public **[**51]** interest will be served by issuing a preliminary injunction. See [United Indus. Corp. v. Clorox Co., 140 F.3d 1175, 1179 \(8th Cir. 1998\)](#).

Likelihood of Success on the Merits

Likelihood of success on the merits requires that the movant find support for its position in governing law." [B & D Land and Livestock Co. v. Conner, 534 F.Supp.2d 891, 906 \(N.D. Iowa 2008\)](#). With respect to the requirement that the party seeking an injunction show that he or she is likely to succeed on the merits, the Eighth Circuit has stated:

"[A]t the early stage of a preliminary injunction motion, the speculative nature of this particular ['likelihood of success'] inquiry militates against any wooden or mathematical application of the test. Instead, a court should flexibly weigh the case's particular circumstances to determine whether the balance of equities so favors the movant that justice requires the court to intervene to preserve the status quo until the merits are determined." [United Indus. Corp. v. Clorox Co., 140 F.3d 1175, 1179 \(8th Cir.1998\)](#) (internal citations and quotation marks omitted). [B & D Land and Livestock Co., 534 F.Supp.2d at 906](#) (quoting [United Indus. Corp. v. Clorox Co., 140 F.3d at 1179](#)).

The **[**52] Moffitts'** Complaint alleges that ASC violated RESPA by providing false statements in response to the **Moffitts'** Qualified Written Request. ¹⁶ The **Moffitts** have proven RESPA violations by providing substantial evidence that ASC misapplied their payments and did not accurately respond to a Qualified Written Request. RESPA requires one of three responses to a Qualified Written Request, as recently described by the Bankruptcy Court in Kansas:

First, the servicer shall make the appropriate corrections and send the borrower a written notice of the correction. Second, if the servicer determines the account is not in error, the servicer must provide the borrower with a written response informing the borrower why the servicer believes the account is correct. Third, if the borrower requested information the servicer cannot provide, the servicer shall explain why the information is unavailable or cannot be obtained.