

2. The Plaintiff entered into a loan with NovaStar that is fully secured by equity in his residence. The loan includes more than \$27,500 in settlement charges and an effective rate in excess of 11%. The Plaintiff's loan contains the following disadvantageous terms and structure:

- A teaser interest rate in effect for only two years, after which the rate could only increase, but not decrease;
- A 40-year amortization with a 30-year payment schedule designed to lead to a balloon payment at the end of the thirtieth year;
- Payments designed to be beyond the Plaintiffs' ability to pay following the end of the second year of the loan, in order to require refinance, sale of the residence or foreclosure;
- A large "loan discount fee," in the amount of \$19,200, payable from the proceeds of the loan, without provision of a rate discount or sufficient disclosure; and
- Duplicative costs and closing fees.

3. NovaStar used various strategies to hide these disadvantages of the loan terms from the Plaintiff and others who received loans on similar terms.

4. By virtue of NovaStar's conduct, Plaintiff and the class have been harmed and continue to incur damages and suffer harm due to, among other things, the high monthly payments they are required to pay to keep their homes, loss of home equity, and/or pressure to refinance on disadvantageous terms.

5. Through this action, Plaintiff seeks monetary, declaratory, and injunctive relief on his own behalf and the proposed Class.

JURISDICTION AND VENUE

6. The District Court has original jurisdiction pursuant to 28 U.S.C. §1332(d)(2)(A) because the matter in controversy exceeds the sum or value of \$5,000,000, exclusive of interests

and costs, and is a class action in which a member of the plaintiff class is a citizen of a state different from the Defendant.

7. Venue is proper in this Court pursuant to 28 U.S.C. 1391(b) inasmuch as the unlawful practices are alleged to have been committed in this District, Defendant regularly conducts business in this District, and the named Plaintiff resides in this District.

PARTIES

8. Plaintiff Thomas S. Denman is a homeowner who resides at 11 Atlantic Street, Gloucester, MA 01930.

9. Defendant NovaStar Mortgage, Inc. is a mortgage lender with a principal place of business located at 8140 Ward Parkway, Suite 300, Kansas City, MO 64114. On information and belief, NovaStar Mortgage, Inc. is the retail subsidiary of NovaStar Financial.

10. Novastar does not maintain a place of business within the Commonwealth. Nor does it keep assets within the Commonwealth. As such, the demand requirements of G.L. c. 93A, § 9 do not apply to Novastar.

FACTUAL ALLEGATIONS

11. Plaintiff, Thomas S. Denman is a homeowner who resides with his two children, ages five and eight, at 11 Atlantic Street, Gloucester, MA 01930.

12. Mr. Denman purchased his home with his ex-wife in 1997 for approximately \$149,000 with a purchase money loan from Citizen's Bank.

13. Mr. Denman and his wife refinanced their home several times after purchasing it. In 2006, following his divorce, Mr. Denman refinanced with Freedom Mortgage. The Freedom Mortgage loan was for approximately \$400,000 and had a 30-year fixed rate of 6.5%.

The May 25, 2007 NovaStar Loan

14. On May 25, 2007, Mr. Denman refinanced his home loan with NovaStar.
15. Brad Blair, a loan officer at NovaStar, solicited Mr. Denman after Mr. Denman entered personal information at LendingTree.com.
16. Mr. Blair took Mr. Denman's application over the phone.
17. On information and belief, Mr. Blair inflated Mr. Denman's income on the loan application in order to set up a loan on disadvantageous terms for which Mr. Blair received a substantial commission.
18. NovaStar sent Mr. Denman good faith estimates of the loan terms, which bore no relationship to the loan Mr. Denman ultimately entered into with NovaStar. When Mr. Denman inquired about the loan terms reflected in the estimates, Mr. Blair instructed Mr. Denman to ignore them. He further explained that NovaStar was required to send him something and that the terms were not those that he would end up receiving
19. The day before the closing, Mr. Blair called Mr. Denman to describe the loan terms and arrange the closing. Mr. Blair did not provide Mr. Denman with any documentation and never disclosed that the loan had a balloon feature or that Mr. Denman would be paying any loan discount points. Mr. Blair quoted only the initial interest rate for the transaction without explaining that the initial rate would be in effect for only two years, after which the rate would be much higher.
20. The loan (Loan No. 07-ED6872) was a 30-year, adjustable rate loan with an initial interest rate of 8.050%, but an effective rate of 11.077%.
21. The loan had a two-year fixed rate of 8.050% leading to monthly payments of \$3,355.52. The rate thereafter is to be based on an index and margin, which required research in

the Wall Street Journal's interest rate tables to fully comprehend. Had Plaintiff understood this complex term and done the research he would have learned that as of the date of the transaction, the long-term rate anticipated for his loan was 11.176%. Over thirty years, the effective annual percentage rate of the loan (APR) was therefore 11.077%. Payments on the loan were anticipated to climb to more than \$4,500 after the initial fixed rate period.

22. NovaStar knew or should have known that Plaintiff would not be able to afford loan payments after the first two years of the loan, such that the Plaintiff would be required to either refinance and capitalize all settlement costs in a new loan, sell the property, or face foreclosure.

23. The loan was also designed to amortize over 40 years, but be paid in 30 years – resulting in a balloon payment of \$330,113.21 at the end of the thirty-year term. Novstar knew or should have known that Plaintiff would not be able to make this payment from his income or assets.

24. According to the Settlement Statement, Mr. Denman paid over \$27,500 in settlement charges in connection with the loan, including, without limitation, the following fees paid to NovaStar:

- (1) a \$19,200.00 loan discount fee;
- (2) a \$545.00 underwriting fee; and
- (3) a \$375.00 processing fee.

25. In addition to the settlement costs and fees paid to NovaStar, Mr. Denman paid \$1,600 in title-related charges to the Law Office of Daniel J. Nigro and \$990 in closing-related fees to a company called Creations Title, LLC.

26. On information and belief, some or all of the fees identified in paragraph 24 and 25 are duplicative and/or excessive.

27. The loan closing occurred at a Chuck E. Cheese restaurant with Mr. Denman, his children and a closing attorney for NovaStar in attendance.

28. The closing was completed in less than one hour. NovaStar's attorney refused to answer Mr. Denman's questions concerning the balloon term in the note.

29. Mr. Denman believes and therefore avers that he was not provided with a “discount” of any kind on the rate in the transaction.

30. Mr. Denman was never offered an alternative loan with a higher rate that did not involve payment of discount points. Therefore, he had no opportunity to evaluate whether the “discount” would be advantageous to him.

31. True and correct copies of Truth-in-Lending disclosure and Settlement Statement provided in connection with Loan No. 07-ED6872 are attached hereto and labeled Exhibit 1 and Exhibit 2, respectively.

GENERAL ALLEGATIONS

32. NovaStar routinely structures residential mortgage loans to provide for an artificially low rate and artificially low payments for the first two years. NovaStar knows or should know that the structure of these loans is designed to result in forced refinancings, forced property sales or foreclosures.

33. NovaStar routinely structures loans to require balloon payments that are beyond the ability of homeowners to repay from their income or assets.

34. NovaStar regularly charges “loan discount fees,” without providing a commensurate discount interest rate. Because these points are calculated as a percentage of the

total amount of the loan, discount points typically cost the consumer thousands or tens of thousands of dollars.

35. NovaStar routinely fails to disclose the amount of the rate discount being provided, if any, making it impossible for its customers to determine whether the rate discount is reasonable consideration for the substantial cost of the discount points.

36. When NovaStar markets and sells its loans to new customers, it routinely fails to inform them that the quoted loan amount will be reduced by the substantial cost of discount points. The discount points are therefore hidden until closing.

37. NovaStar routinely issues good faith estimates to borrowers, which bear no relationship to the loan the borrowers qualify for and/or ultimately enter into with NovaStar. These good faith estimates are designed to encourage borrowers to stop shopping for loans on better terms.

38. NovaStar's agents routinely inflate borrowers' incomes in order to originate loans.

39. NovaStar routinely charges its borrowers duplicative and/or excessive settlement-related charges.

40. NovaStar relies on its superior understanding of the mathematics of mortgage transactions to make hidden profits at the expense of unsophisticated homeowners.

41. NovaStar sells loans in the secondary market and therefore recoups the money it lends to cover discount points and other settlement costs virtually simultaneously with making the loan.

42. NovaStar fails to supervise its employees.

43. NovaStar uses commissions to incentivize its loan officers and others to mislead Massachusetts homeowners about the advantages and disadvantages of a NovaStar loan.

44. By its practices, NovaStar strips equity from Massachusetts homeowners and puts borrowers at risk of foreclosure.

CLASS DEFINITIONS AND CLASS ISSUES

45. Plaintiff brings this action on behalf of himself and a class of all other persons similarly situated, pursuant to Fed. R. Civ. P. 23.

46. The class the Plaintiff seeks to represent consists of all residents of Massachusetts:

- a. who entered into mortgage loan agreements with NovaStar, on or after the date four years prior to the date of the filing of this matter; and
- b. who paid fees itemized by NovaStar as “loan discount fees” or whose initial interest rate was fixed for three years or less and variable for four years or more.

47. The only individual questions concern the identification of members of each class and the computation of relief to be afforded each class member and can be determined by a ministerial examination of the relevant files. Notice can be provided to the class by various means of communication, as identified in the Defendant's computerized databases of customers.

48. Plaintiff's claims are typical of the claims of class members. All are based on the same legal and remedial theories.

49. There are questions of law and fact, which are common to all members of the class, which questions predominate over any question affecting only individual class members.

The principal common issues are:

- a. Whether NovaStar structured disadvantageous transactions designed to hide the true costs and expenses of those loans to consumers by including a low fixed rate in those loans for a limited period of time;

- b. Whether NovaStar deliberately designed loans to be beyond a borrower's ability to pay according to their terms in order to generate settlement fees by sale to investors;
- c. Whether NovaStar charged borrowers “loan discount fees” without providing discounts for such payment in violation of 940 C.M.R. §§ 3.04, 3.05, 3.13, 6.05, 8.04, 8.06 and c. 93A;
- d. Whether NovaStar failed to offer borrowers an alternative loan without the “loan discount fees” for the purposes of allowing borrowers to make an informed decision about whether the payment of discount points would be cost effective in violation of 940 C.M.R. §§ 3.04, 3.05, 3.13, 6.05, 8.04, 8.06 and c. 93A;
- e. Whether NovaStar properly supervised its employees;
- f. Whether Novstar provided inaccurate information about loan terms to customers in the form of bogus “good faith estimates” in order to mislead customers about the available terms of loans in violation of 940 C.M.R. §§ 3.04, 3.05, 3.13, 8.04, 8.06 and c. 93A;
- g. Whether NovaStar’s closing fees are duplicative and excessive; and
- h. Whether NovaStar was unjustly enriched by its conduct.

50. Plaintiff will fairly and adequately protect the interests of all class members in the prosecution of this action and in the administration of all matters relating to claims stated herein. He is similarly situated with, and has suffered similar injuries as, the members of the class he seeks to represent. Plaintiff has retained counsel experienced in handling class action suits involving unfair business practices and consumer law. Neither the named Plaintiff nor his counsel have any interest that might cause them not to vigorously pursue this action.

51. A class action is superior to other available methods for the fair and efficient adjudication of this controversy, in that:

- a. the losses suffered by the class members are such that prosecution of individual actions is impractical or economically unfeasible;
- b. by contrast, the illegal profits obtained by the Defendant as a result of its unlawful practices are substantial;
- c. the form of proof required is such that prosecution of individual actions is impractical or economically infeasible;
- d. in the absence of the class action device, Plaintiff and Class Members would be left without a remedy for the wrongful acts alleged, and the Defendant would be unjustly enriched;
- e. the prosecution of separate lawsuits by individual members of the class would create the risk of inconsistent adjudications with respect to individual class members, which would establish incompatible standards of conduct for the Defendant, making concentration of the litigation concerning this matter in this Court desirable;
- f. the claims of the representative Plaintiff are typical of the claims of the class; and
- g. no unusual difficulties are likely to be encountered in the management of this action as a class action.

35. The class is so numerous as to make it impracticable to join all members of the class as plaintiffs. Based upon the investigation of counsel, the number of class members is estimated to be in excess of 500 persons.

CAUSES OF ACTION

COUNT I: VIOLATION OF CHAPTER 93A

36. Plaintiff repeats and realleges all paragraphs above as if set forth fully herein.

37. NovaStar has violated M.G.L. c. 93A §2 with respect to the Plaintiff and each class member by utilizing terms and practices that were unfair, deceptive, and/or unconscionable. NovaStar's violations included, without limitation:

- a. Structuring disadvantageous transactions designed to hide the true costs and expenses of those loans to consumers by including a low fixed rate in those loans for a limited period of time;
- b. Designing loans to be beyond a borrower's ability to pay according to their terms in order to generate settlement fees by sale to investors and/or early repayment from refinance or sale;
- c. Charging borrowers "loan discount fees" without providing discounts for such payment in violation of 940 C.M.R. §§ 3.04, 3.05, 3.13, 6.05, 8.04, 8.06;
- d. Failing to offer borrowers an alternative loan without the "loan discount fees" for the purposes of allowing borrowers to make an informed decision about whether the payment of discount points would be cost effective in violation of 940 C.M.R. §§ 3.04, 3.05, 3.13, 6.05, 8.05, 8.06;
- e. Failing to properly supervise its employees;
- f. Providing inaccurate information about loan terms to customers in the form of bogus "good faith estimates" in order to mislead customers about the available terms of loans in violation of 940 C.M.R. §§ 3.04, 3.05, 3.13, 8.04, 8.06;
- g. Imposing and/or collecting closing fees that are duplicative and excessive; and
- h. Engaging in loan origination practices designed to unjustly enrich itself.

52. NovaStar's conduct was willful or knowing within the meaning of M.G.L. c. 93A, §2.

53. Plaintiff and Class Members were injured and suffered damages by virtue of NovaStar's violations.

54. NovaStar's refusal to grant relief upon demand was in bad faith, with knowledge or reason to know that the acts or practices complained of violated c. 93A, §2.

COUNT II: UNCONSCIONABILITY AND/OR ILLEGALITY

55. Plaintiff repeats and realleges all paragraphs above as if set forth fully herein.

56. Contract terms that violate the Attorney General’s regulations, 940 C.M.R. § 3.01 *et seq.*, 6.01 *et seq.*, and 8.01 *et seq.* are void or voidable for illegality and unenforceable.

57. Contract terms that violate the Attorney General’s regulations are unconscionable and unenforceable.

58. Contract terms that violate the Attorney General’s regulations are void or voidable as a matter of public policy.

59. The Plaintiff and each member of the class are entitled to relief from unconscionable and/or illegal contract terms including but not limited to cancellation and/or refund of unjustified loan discount points.

COUNT III: UNJUST ENRICHMENT

60. Plaintiff repeats and realleges all paragraphs above as if set forth fully herein.

61. The Defendant has been unjustly enriched at the expense of the Plaintiff and each class member.

62. The Plaintiff and each class member is therefore entitled to equitable remedies for unjust enrichment including, without limitation, restitution and reformation of contract.

COUNT IV: DECLARATORY JUDGMENT

63. Plaintiff repeats and realleges all paragraphs above as if set forth fully herein.

64. Defendants’ actions have caused the Plaintiff and class members actual prejudice. They ask this court to enter declaratory relief concerning the propriety of Defendants’ practices relating to refinancing home mortgage loans.

PRAYER FOR RELIEF

WHEREFORE, the Plaintiff respectfully requests that this Court:

On behalf of the Class:

- a. Certify this case as a class action and certify the named Plaintiff herein to be adequate class representatives and his counsel to be class counsel;
- b. Award damages, including actual damages, statutory damages, and multiple damages, and equitable relief, for Defendant's violations of c. 93A;
- c. Award damages and equitable remedies arising from Defendant's unconscionable and/or illegal contract terms including but not limited to cancellation and/or refund of unjustified points;
- d. Award damages and equitable remedies arising from Defendant's unjust enrichment including, without limitation, restitution and reformation of contract; and
- e. Enter a declaration that the Defendant's lending practices, including, without limitation, its imposition of undisclosed/unjustified "loan discount fees," are improper;
- f. Enter preliminary and permanent injunctive relief to prevent the Defendant from continuing to violate the law and injuring other persons who enter into home mortgage loans in the future;
- g. Award reasonable attorney's fee and costs; and
- h. Enter such other relief at law or equity as this Court may deem just and proper.

JURY TRIAL DEMANDED

Plaintiff demands a trial by jury on all issues so triable.

Respectfully Submitted,
Thomas S. Denman, *et. al.*
By his attorneys,

/s/ Gary Klein
Gary Klein (BBO # 560769)
Elizabeth Ryan (BBO # 549632)
Shennan Kavanagh (BBO #655174)
Roddy Klein & Ryan

727 Atlantic Ave., 2nd floor
Boston, MA 02111
Tel. 617-357-5500 x 15
Fax. 617-357-5030
klein@rodykleinryan.com

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