

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

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| FEDERAL TRADE COMMISSION |) | |
| |) | |
| and |) | |
| |) | |
| STATE OF ILLINOIS, <u>ex rel.</u> |) | |
| Attorney General JAMES E. RYAN, |) | |
| |) | |
| Plaintiffs, |) | |
| |) | |
| v. |) | |
| |) | Civil Action No. 02C-5078 |
| OSI FINANCIAL SERVICES, INC., |) | Hon. James B. Zagel |
| an Illinois corporation, and |) | |
| |) | |
| MARK DIAMOND, |) | |
| individually and as an officer of |) | |
| OSI Financial Services, Inc., |) | |
| |) | |
| Defendants. |) | |
| |) | |

AMENDED COMPLAINT
FOR PERMANENT INJUNCTION AND OTHER EQUITABLE RELIEF

Plaintiffs, the Federal Trade Commission (“Commission” or “FTC”) and the State of Illinois, by its undersigned attorneys, allege as follows:

1. This is an action under Sections 5(a)(1), 13(b), and 16(a) of the Federal Trade Commission Act (“FTC Act”), 15 U.S.C. §§ 45(a)(1), 53(b), and 56(a) to secure permanent injunctive relief and other equitable relief, including restitution and disgorgement, against Defendants for engaging in unfair or deceptive acts or practices in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

2. This is an action under the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/1 et seq., to secure a permanent injunction, civil penalties, and other equitable relief, including restitution and disgorgement, against Defendants for engaging in unfair or deceptive acts or practices in violation of 815 ILCS 505/2.

JURISDICTION AND VENUE

3. This court has subject matter jurisdiction over the FTC's claims under 28 U.S.C. §§ 1331, 1337(a), and 1345, and under 15 U.S.C. §§ 45(a)(1) and 53(b), and over the claims of the State of Illinois under 28 U.S.C. § 1367.

4. Venue in this district is proper under 15 U.S.C. § 53(b) and 28 U.S.C. § 1391(b) and (c).

THE PARTIES

5. Plaintiff, the Commission, is an independent agency of the United States government created and given statutory authority and responsibility by the FTC Act, as amended, 15 U.S.C. §§ 41-58. The Commission is charged, *inter alia*, with enforcing Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), which prohibits unfair or deceptive acts or practices in or affecting commerce. The Commission is authorized by Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), to initiate federal district court proceedings to enjoin violations of the FTC Act, and to secure such equitable relief as may be appropriate in each case including, but not limited to, redress and disgorgement.

6. Plaintiff State of Illinois is one of the fifty sovereign states of the United States. James Ryan is the duly elected and qualified Attorney General acting for Plaintiff State of Illinois, and brings this action in his official capacity under the Illinois Consumer Fraud and Deceptive Business Practices

Act, 815 ILCS 505/7. This Court has supplemental jurisdiction over Plaintiff Illinois's claim under 28 U.S.C. § 1367.

7. Defendant OSI Financial Services, Inc. ("OSI") is an Illinois corporation that engages in the business of soliciting, marketing, and brokering mortgage loans. Its offices and principal place of business are located at 2357 North Damen, Chicago, Illinois 60647. OSI transacts or has transacted business in the Northern District of Illinois.

8. Defendant Mark Diamond ("Diamond") is currently the president of OSI, and formerly solicited loans on behalf of Dolphin Mortgage Company ("Dolphin"). At all times material to this Complaint, individually or in concert with others, Diamond has formulated, directed, controlled, or participated in the acts and practices of OSI, including the acts and practices set forth herein. He resides and transacts or has transacted business in the Northern District of Illinois.

DEFENDANTS' BUSINESS PRACTICES

9. Defendant Mark Diamond is a mortgage broker who specializes in brokering loans in the subprime loan market. The subprime market is comprised of persons who are considered to be greater credit risks and, thus, do not meet the strict underwriting standards required to qualify for prime, or "A," credit. Hence, the financing provided to such persons is also commonly referred to as "B/C" or "nonconforming" credit. To compensate for the greater credit risk or perceived greater risk involved in offering financing to the subprime market, Diamond, like other brokers operating in the subprime market, charges its customers broker fees that are substantially higher than those available to borrowers in the "A" market.

10. Diamond targets homeowners with poor or insufficient credit histories or ratings, who

might experience difficulty in securing conventional home equity financing, and offers to arrange mortgage loans for them. Diamond routinely solicits low-income individuals, including elderly persons and individuals who have significant equity in their homes, and who may not otherwise be considering a home equity loan.

11. From at least January 1, 1998 to April 9, 1999, Diamond solicited loans on behalf of Dolphin Mortgage Corporation as a mortgage broker. In approximately March 1999, Diamond severed his relationship with Dolphin and set up his own mortgage brokerage company, OSI Financial Services, Inc. From at least March 31, 1999 to the present, Diamond, acting as President and owner of OSI, has continued soliciting and brokering mortgage loans in the subprime market.

12. Diamond has engaged in numerous deceptive practices and other violations of law to induce consumers to take out mortgage loans. In many instances, Diamond has misrepresented the terms and costs of the mortgage loans. For example, he has represented that the consumer will obtain a loan with a specified monthly payment amount, interest rate, or term of repayment. Instead, in many instances, the consumer has obtained a loan with a significantly higher monthly payment amount or interest rate, or a different term of repayment, than that previously promised. In many instances, Diamond has falsely represented that the monthly payment amount of the new loan would include the payment into an escrow account for property taxes and insurance, when in fact it does not. In some instances, he has falsely represented the amount of cash the consumer will receive out of the loan proceeds to pay off his or her creditors or to pay for needed home repairs. Instead, the consumer has received significantly less cash out of the loan proceeds than that previously promised.

13. A significant number of these mortgage loans have been 15-year loans requiring a large

lump-sum “balloon” payment at the end of the term (“15-year balloon loans”). The 15-year balloon loans have had payment schedules with regular monthly payments of principal and interest that are approximately equal in value and a final payment that is substantially larger than the other payments. Thus, at the end of the term, the consumer will owe a large lump sum payment that is usually greater than 80% of the loan principal.

14. In many instances, Diamond has misrepresented the existence of the balloon payment, in one or more of the following ways:

- A. by representing that the loan’s payment schedule consists only of a specified monthly payment schedule, without disclosing the balloon payment;
- B. by representing that the loan principal would be fully paid off at the end of the loan term, without disclosing the balloon payment; and
- C. by representing that the loan does not contain a balloon payment.

15. Virtually all of the 15-year balloon loans have contained significant prepayment penalties in the event the consumer refinances the loan within the first three years. In many instances, Diamond has misrepresented that the consumer can pay off the loan early without paying a penalty.

16. At the closing, Diamond has presented the consumer with a stack of closing papers that have never been shown to the consumer before and has directed the consumer to sign the final loan documents without reading them. These closings typically have taken place in either Diamond’s Dolphin or OSI offices, or in the consumer’s home. At these closings, Diamond has engaged in misrepresentations concerning the terms and costs of the loan, as he had during the initial solicitation of the consumer. Among the closing documents is the mortgage note itself, which contains a “Balloon

Rider” or “Balloon Note” on each 15-year balloon loan. Many consumers have not noticed the Balloon Rider or Balloon Note. In those instances when the consumer has inquired about the balloon payment, Diamond in many instances has misrepresented the meaning of the term to assuage the consumer’s concern.

17. In many instances, Diamond has presented consumers with incomplete closing documents for signature, including mortgage documents and the Truth in Lending Disclosure statements, in which the terms of the loan – such as the annual percentage rate, monthly payment amount, and balloon payment amount – were left blank at the time the consumer was asked to sign. Diamond also has requested that the consumer sign a Loan Brokerage Agreement in which the broker fee, under the name of Dolphin or OSI, was left blank. Diamond subsequently has filled in the broker fee amount after the closing. In many instances, Diamond has charged a broker fee of 10% of the loan amount. Typically, these broker fees were financed by the borrower and paid out of the loan proceeds at closing.

18. Within a short time after closing a loan, Diamond often has re-contacted the customer and induced or attempted to induce the customer again to refinance their loans through him. With each refinancing, substantial points and fees have been charged and added to the loan balance, often resulting in continually higher loan amounts and/or monthly mortgage payments.

19. At all times material herein, Defendants OSI and Diamond have maintained a course of trade in or affecting commerce, as “commerce” is defined in Section 4 of the FTC Act, 15 U.S.C. § 44, by providing mortgage loan-related services to consumers.

FEDERAL TRADE COMMISSION ACT VIOLATIONS

Count One

(By Plaintiff Federal Trade Commission)

20. In the course and conduct of offering credit, Defendants OSI and Diamond have represented, expressly or by implication, that consumers would obtain a loan on specified terms and at specified costs, including but not limited to:

- a. a loan whose payment schedule consists of the regular monthly payment amount specified;
- b. a loan whose principal would be paid off at the end of the term, with no balloon payment;
- c. a loan with a specific monthly payment amount, interest rate, and/or term of repayment;
- d. a loan with no prepayment penalties;
- e. a specified amount of cash for disbursement to the borrower, and/or a specified amount of cash for disbursement on behalf of the borrower to third-party creditors and/or home improvement companies; and
- f. a monthly payment amount that includes the payment into an escrow account for property taxes and insurance.

21. In truth and in fact, in many instances, consumers did not obtain a loan on the specified loan terms, or at the specified costs. Instead, they received loans on substantially different terms, and/or at substantially different costs, including but not limited to:

- a. a loan whose payment schedule does not consist only of the regular monthly payment amount specified, but also includes a final, large lump-sum balloon payment at the end of the term;
- b. a loan requiring a large balloon payment at the end of the loan term;
- c. a different monthly payment amount, interest rate, and/or term of repayment than that previously specified;
- d. a loan with prepayment penalties;
- e. a different amount of cash for disbursement to the borrower than promised, and/or a different amount of cash for disbursement on behalf of the borrower to third-party creditors and/or home improvement companies than promised; and
- f. a monthly payment that did not include the payment into an escrow account for property taxes and insurance.

Therefore, Defendants' representations, as alleged in paragraph 20, were, and are, false or misleading.

22. Defendants' practices constitute deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. § 45(a).

ILLINOIS CONSUMER FRAUD AND DECEPTIVE BUSINESS PRACTICES ACT

Count Two

(By Plaintiff State of Illinois)

Plaintiff State of Illinois further alleges that the Defendants have engaged in a course of trade or commerce which constitutes unfair and deceptive acts declared unlawful under Section 2 of the Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/2. The following factual examples set forth in paragraphs 23 through 60, *infra*, are pled as illustrations of such unlawful practices.

a. Ivette Cruz

23. In or around June of 1999, a man who identified himself as Mark Diamond solicited consumer Ivette Cruz to take out a home equity loan.

24. Diamond told Ms. Cruz that he could obtain a 30-year fixed rate loan for her. Diamond told Ms. Cruz that he could obtain for her a loan that had monthly payments that included payments for taxes and insurance.

25. On or about June 28, 1999, Diamond went to Ms. Cruz's home and presented a stack of papers for her to sign. Only Diamond and Ms. Cruz were present when Ms. Cruz signed the papers. Ms. Cruz recalls that she signed a very large number of documents at this time, which she now understands to be her loan closing. Ms. Cruz also recalls that most of the documents presented to her at closing had blanks that were not filled in at the closing. During the closing, Ms. Cruz did not see any papers that said what the monthly payment amount of the loan was, what the term of the loan was, whether she was getting a balloon loan, what the annual percentage rate was, or what any payments to

Diamond or to the home improvement company would be. Since Diamond never told Ms. Cruz about any different loan terms than those he had initially promised, she believed that she was obtaining a 30-year fixed rate loan in which the monthly payments would include payments for taxes and insurance.

26. Diamond did not present Ms. Cruz with a copy of the loan papers at the closing. Ms. Cruz received copies of the loan papers weeks after the closing had taken place.

27. In truth and in fact, Diamond obtained a 15-year balloon loan for Ms. Cruz, not a 30-year fixed rate loan.

28. In truth and in fact, Diamond obtained a loan for Ms. Cruz with monthly payments that did not include payments for taxes and insurance.

b. Virgie Brown

29. In or around December 1998, a man who identified himself as Mark Diamond solicited consumer Virgie Brown to take out a home equity loan.

30. Diamond told Ms. Brown that he could obtain a 15-year fixed rate loan for her. Diamond told Ms. Brown that she would not pay much in fees for the loan. Diamond told Ms. Brown that he could refinance her new loan at a lower interest rate within a year for no additional fees. Diamond told Ms. Brown that he could obtain for her a loan that had monthly payments that included taxes and insurance.

31. On or about January 13, 1999, Diamond went to Ms. Brown's home for the loan closing and presented a stack of papers for her to sign. Only Diamond, Ms. Brown, Ms. Brown's husband, and Ms. Brown's daughter were present at the loan closing. Since Diamond never told Ms. Brown about any different loan terms, she believed that she was obtaining a 15-year fixed rate loan;

that she would not pay much in fees for the loan; that she could refinance her new loan with Diamond at a lower interest rate within a year for no additional fees; and that the loan had monthly payments that included taxes and insurance.

32. Diamond did not present Ms. Brown with a copy of the loan papers at the closing. Ms. Brown received copies of the loan papers over a month after the closing had taken place.

33. In truth and in fact, Diamond obtained a 15-year balloon loan for Ms. Brown, not a 15-year fixed rate loan.

34. In truth and in fact, Diamond obtained a \$90,000 loan for Ms. Brown, in which the mortgage broker fees alone were \$9,000.

35. In truth and in fact, Diamond obtained a loan for Ms. Brown in which there was a 3%, or \$2700, prepayment penalty if Ms. Brown refinanced the loan to obtain a lower interest rate during the first three years of the loan.

36. In truth and in fact, Diamond obtained a loan for Ms. Brown with monthly payments that did not include payments for taxes and insurance.

c. Lela B. Gill

37. In the Fall of 1999, Ms. Gill was in need of financing to complete a home remodeling project at a cost of \$17,000. The construction company referred her to Mark Diamond, of OSI Financial Services.

38. A man who identified himself as Mark Diamond came to Ms. Gill's home and stated he could obtain a loan for her that would pay for the home improvement project and also pay off her outstanding bills.

39. In June 1999, Diamond came to Ms. Gill's home with the final loan papers. At the closing, he told Ms. Gill and her husband that the loan would be a 30-year fixed rate loan with monthly payments that would not change during the loan term.

40. Diamond presented a large stack of documents to be signed and never mentioned that the loan would be a 15-year balloon loan.

41. The loan closed on June 29, 1999. However, after payments were made to creditors and after loan fees and Diamond's broker fees were deducted, the proceeds were insufficient to pay for the intended home improvement project.

42. Diamond then offered to refinance the loan for a larger balance. The second loan closed on September 26, 1999.

43. At the closing of the second loan, Diamond stated that the loan would be a 30-year fixed rate loan with payments that would not change during the loan term.

44. Diamond stated that if Ms. Gill paid in a timely manner for several months, Diamond could arrange for a new loan with a lower monthly payment. Diamond never mentioned that the loan being closed contained a prepayment penalty.

45. Once again, Diamond presented a large stack of papers at the September 26, 1999 closing and did not explain that the loan was a 15-year balloon loan.

46. At that closing, Diamond requested that the Gills state the date of signing as September 24, 1999, when, in fact, the signing date was September 26, 1999. The Gills refused to do this and stated the correct date on the documents.

47. Diamond did not give the Gills any copies of the loan documents they had signed at either closing. The Gills received some copies a number of weeks after the closings after repeatedly requesting them from Diamond.

48. The Truth In Lending Disclosure proved to be dated September 24, 1999, despite the actual closing date of September 26, 1999.

49. In truth and fact, in both cases, Diamond obtained 15-year balloon loans for the Gills, despite Diamond's assurance and the Gills' belief that the loans would be 30-year fixed rate loans.

d. Levester Gibbons

50. In or around March 1999, Ms. Gibbons called Mark Diamond of OSI Financial Services to refinance his mortgage in order to consolidate debt and obtain some cash.

51. Diamond came to Ms. Gibbons' home and offered a 15-year loan that would be paid off at the end of the loan term.

52. On May 18, 1999, Diamond again came to Ms. Gibbons' home to close the loan. Diamond presented Ms. Gibbons with a large stack of documents to be signed, many of which were dated May 13, 1999. When questioned about the date, Diamond stated that he was behind in his work and was trying to hurry up.

53. Diamond never explained that the loan contained a balloon payment. When Ms. Gibbons noticed the term "balloon" on one of the documents, Diamond explained that a "balloon loan" is one where the monthly payment amount goes down after the first few payments. The original loan amount was about \$70,000.

54. On or around November 1999, another representative of OSI called Ms Gibbons and

offered to refinance Ms. Gibbons' loan at a lower interest rate with lower monthly payments.

55. Diamond again came to the Gibbons' home and suggested a larger loan, in the amount of \$105,300. Diamond stated that with this loan, the Gibbons' monthly payment would go down. The Gibbons were paying \$732 per month at the time.

56. On November 10, 2000, the closing for the second loan took place. Diamond again told the Gibbons that their monthly payment for the new loan would be lower than their current payment of \$732. Ms. Gibbons did not see a monthly payment figure on the documents she signed.

57. Ms. Gibbons believed that the second loan was a fully amortizing, 15-year fixed rate loan.

58. When the first monthly statement arrived, Ms. Gibbons discovered that the new monthly payment was \$1,082.32.

59. Ms. Gibbons had understood that property taxes and insurance would be included in the second loan payment as they had been in the first loan, since Diamond represented that the features of both loan were the same. However, taxes and insurance were not included in the monthly payment for the second loan.

60. Although Ms. Gibbons had believed both the first and second loans to be a fully amortizing 15-year fixed rate loans, in truth and fact both were 15-year balloon loans.

61. Therefor, by engaging in the practices set forth in paragraphs 20 and 21, and 23 through 60, *supra*, Defendants have engaged in deceptive acts or practices in or affecting commerce in violation of Section 505/2 of the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/2.

CONSUMER INJURY

62. Consumers have suffered, and will continue to suffer, substantial injury as a result of Defendants' violations of the FTC Act and the Illinois Consumer Fraud and Deceptive Business Practices Act, as set forth above.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff Federal Trade Commission pursuant to Sections 5(a) and 13(b) of the FTC Act, 15 U.S.C. §§ 45(a) and 53(b), and pursuant to this Court's own equitable powers, and Plaintiff State of Illinois pursuant to the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/7, and the Court's own equitable powers, request that this Court:

1. Enter judgment against Defendants and in favor of Plaintiffs for each violation alleged in this complaint;
2. Permanently enjoin and restrain Defendants from violating the FTC Act and the Illinois Consumer Fraud and Deceptive Practices Act;
3. Find Defendants jointly and severally liable for redress to all borrowers who were injured as a result of their violations, as appropriate;
4. Award such relief as the Court deems necessary to prevent unjust enrichment and to redress borrower injury resulting from Defendants' violations of the FTC Act and the Illinois Consumer Fraud and Deceptive Business Practices Act, including, but not limited to, refund of monies paid and disgorgement of ill-gotten gains;
5. Assess a civil penalty in the amount of fifty thousand dollars (\$50,000) per violation of the Illinois Consumer Fraud and Business Practices Act found by the Court to have been committed by

any Defendant with the intent to defraud; if the Court finds any Defendant has engaged in methods, acts or practices declared unlawful by the Illinois Consumer Fraud and Business Practices Act, without the intent to defraud, then assess a statutory civil penalty of fifty thousand dollars (\$50,000), all as provided in Section 7 of the Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/7; and

6. Award Plaintiffs their costs of bringing this action, as well as such other relief as may be just and proper.

Dated: November 1, 2002

Respectfully submitted,

WILLIAM E. KOVACIC
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CERTIFICATE OF SERVICE

1. My name is Stanley Wojciechowski. I am an attorney with the State of Illinois, the plaintiff in this matter. My business address is 100 W. Randolph St., 12th Floor, Chicago, Illinois 60601.

2. On November 1, 2002, I served a true and correct copy of the foregoing AMENDED COMPLAINT by causing it to be sent via fax and First Class U.S. mail from Chicago, IL, to the following:

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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on November 1, 2002 at Chicago, Illinois.

Stanley Wojciechowski