

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. 06-CV-00067-REB-CBS

FLAGSTAR BANK, FSB,
a federally-chartered savings bank, and
IMPAC WAREHOUSE LENDING GROUP, INC.,
a California corporation,

Plaintiffs,

v.

FIRST COLLATERAL SERVICES, INC., a Delaware corporation,

Defendant.

FIRST AMENDED COMPLAINT AND JURY DEMAND

Plaintiffs, Flagstar Bank, FSB ("Flagstar"), and Impac Warehouse Lending Group, Inc. ("Impac"), through their attorneys, submit the following First Amended Complaint ("Complaint") against the Defendant First Collateral Service, Inc. ("FCS").

INTRODUCTION

1. This action concerns FCS's participation and assistance in a fraudulent mortgage scheme perpetrated by, among others, Amerifunding/Amerimax Reality, Inc. ("Amerifunding"), Gerald Small, Chad Heinrich, Charles Winnett and other employees and alter egos of Amerifunding (the "Amerifunding Conspirators") against Flagstar and Impac. FCS misrepresented Amerifunding's financial condition and creditworthiness, and assisted the Amerifunding Conspirators' fraudulent mortgage banking practices so that the Amerifunding Conspirators could use Flagstar and Impac's money to repay the

debt that it owed to FCS. As a result of FCS's misrepresentations and conduct, Flagstar and Impac suffered a combined \$35 million loss.

2. FCS's relationship with Amerifunding began in May, 2001, when FCS extended Amerifunding a \$5 million line of credit pursuant to a mortgage loan warehousing agreement. Within the first year, FCS began to have problems with Amerifunding, which had begun to regularly violate its mortgage warehouse agreement with FCS. By the end of January, 2003, FCS discovered that the Amerifunding Conspirators were involved in an unlawful scheme to obtain advances under the FCS mortgage warehouse credit facility through sham transactions. FCS had also discovered that the Amerifunding Conspirators were using the funds for their own purpose contrary to the terms and conditions of the FCS warehouse agreement.

3. With its discovery of Amerifunding's scheme, FCS knew that in order to be repaid the amount that it was owed by the Amerifunding Conspirators, FCS would have to help the Amerifunding Conspirators secure new lines of credit with other lending institutions. With these new lines of credit, the Amerifunding Conspirators could continue their fraud, defraud the new lending institutions, and use the stolen funds to repay FCS. To this end, in February, 2003, FCS entered into an agreement with the Amerifunding Conspirators to assist Amerifunding in securing lines of credit from Flagstar and Impac so that Flagstar and Impac would provide a replacement credit facility through which the Amerifunding Conspirators could continue their scam and obtain the funds necessary to repay FCS. In essence, FCS dumped the fraud of the Amerifunding Conspirators on Impac and Flagstar to obtain funds that were stolen from Flagstar and Impac.

4. The Plaintiffs bring this action to recover the losses they have suffered as a result of FCS's active participation in successfully defrauding the Plaintiffs. The Plaintiffs' Complaint consists of seven counts: Fraudulent Misrepresentation (Count I); Aiding and Abetting (Count II); Conspiracy (Count III); Colorado Organized Crime Control Act (Count IV); Racketeer Influenced Corrupt Organizations Act (Count V); Negligent Misrepresentation (Count VI); Unjust Enrichment (Count VII); and Breach of the Intercreditor Agreement (Count VIII).

5. The Plaintiffs seek compensatory damages for FCS's wrongful conduct. As a result of the fraud perpetrated on the Plaintiffs, the Plaintiffs have lost at least \$35 million. In addition, the Plaintiffs reserve the right to seek leave to amend their Complaint to assert claims for additional recovery of punitive damages.

JURISDICTION AND VENUE

6. This Court has jurisdiction over the defendants and the subject matter of this action pursuant to section 5 C.R.S.A. § 13-1-124 because the defendants were transacting business and committed a breach of contract and a tortious act in the State of Colorado within the meaning of the statute.

7. Venue is proper in this Court pursuant to C.R.C.P. 98 because service will be made on defendants in the City and Country of Denver and because defendant is not a resident of the State.

THE PARTIES AND OTHER KEY PARTICIPANTS

8. Plaintiff Flagstar is a federally chartered savings bank authorized to do business in Colorado. Flagstar is a Michigan corporation with its principal office in Troy, Michigan. Formed in 1987, Flagstar specializes in, among other things, mortgage

lending including mortgage warehouse loans for mortgage brokers. On April 16, 2003, Flagstar extended a \$5 million warehouse line of credit to Amerifunding. In November 2003, Flagstar increased Amerifunding's warehouse line to \$15 million based upon FCS's misrepresentations.

9. Plaintiff Impac is a California Corporation with its principal office located at 1401 Dove Street in Newport Beach, California, and is authorized to do business in Colorado. Impac is a wholly-owned subsidiary of Impac Mortgage Holdings, Inc., a Maryland Corporation. On May 8, 2003, Impac entered into a Master Repurchase Agreement with Amerifunding, extending Amerifunding a \$10 million line of credit.

10. Defendant First Collateral Services ("FCS") is a wholly owned subsidiary of The Citigroup and is a highly sophisticated warehouse lending institution that provides warehouse lines of credit for residential mortgages to small and mid-sized mortgage brokers throughout the United States. In 2001, FCS entered into a mortgage warehouse loan with Amerifunding.

11. Amerifunding is a Colorado corporation with its principal place of business in Westminster, Colorado. Amerifunding purports to be in the mortgage brokerage business and through its principals and employees engaged in mortgage fraud schemes against Flagstar and Impac.

12. Gerald Small ("Mr. Small") is a Colorado resident and a principal of Amerifunding. Mr. Small directed and conducted the Amerifunding Conspirator's fraud, racketeering activities, and theft as stated in this Complaint. Mr. Small pled guilty for his conspiracy against Flagstar and Impac in the case styled *United States of America v. Gerald Small et al.*, Criminal Case No. 04-CR-153-B ("Criminal Action").

13. Kelli Burkhalter-Small ("Ms. Burkhalter") is a Colorado resident and the CEO of Amerifunding. Like her husband, Gerald Small, Ms. Burkhalter participated in and conducted the fraud, racketeering activities, and theft at issue in this Complaint. Mr. Burkhalter has pled guilty to felony conduct in connection with this conspiracy in the Criminal Action.

14. Chad Heinrich ("Mr. Heinrich") was part of the criminal conspiracy with the Amerifunding Conspirators. Mr. Heinrich has been convicted of fraud for his involvement in the Amerifunding conspiracy and against Flagstar and Impac, and is currently incarcerated in the federal penitentiary system.

15. Charles Winnett ("Mr. Winnett") was part of the criminal conspiracy with the Amerifunding Conspirators. Mr. Winnett participated in and conducted the fraudulent and racketeering activities described in this Complaint.

16. Security National Title, Inc. ("Security National") is a Colorado corporation with its principal place of business in Broomfield, Colorado. Security National purports to be in the title agency and escrow business. Security National is a sham entity that participated in the Amerifunding Conspirator's fraud, theft, and racketeering activities by, among other things, diverting Flagstar and Impac's funds to the Amerifunding Conspirators without valid loan and mortgage transactions.

17. TDF Mortgage Funding ("TDF") is a Colorado corporation with its principal place of business in Denver, Colorado. TDF purports to be in the mortgage lending business and purported to acquire loans and mortgages from Flagstar as brokered by the Amerifunding Conspirators. TDF is a sham entity that participated in the

Amerifunding Conspirator's fraud, theft, and racketeering activities by, among other things, diverting Flagstar and Impac's funds for the Amerifunding Conspirator's use.

18. Twentieth Century Mortgage, Inc. ("TCM"), is a Colorado corporation with its principal place of business in Aurora, Colorado. Like Amerifunding, Twentieth Century purports to be in the mortgage brokerage business. On December, 2003, Twentieth Century entered into a Mortgage Warehousing and Security Agreement with Flagstar ("Twentieth Century Agreement") for a \$15 million line of credit for the creation and sale of residential mortgage loans. Both Twentieth Century and Amerifunding had common employees who acted in concert in perpetrating the fraud, theft, and racketeering activities identified in this Complaint.

FACTUAL BACKGROUND

A. First Collateral's Warehouse Lending Business

19. FCS is a lending institution that provides warehouse lines of credit for residential mortgages. FCS provides warehouse lines to more than 400 customers and its total commitments exceed \$4.5 billion. One form of financing that FCS provides to mortgage brokers is a short-term, revolving credit facility called a "mortgage warehouse," which is a line of credit used by mortgage companies to fund loans to borrowers that are secured by a mortgage interest in the borrower's house. Mortgage warehouse loans contain strict provisions for the advances and use of the funds. The funds are to be used solely for a broker's mortgage loans and the advances are dependent upon the presentment and security of valid mortgage loans.

20. Under the mortgage warehouse agreement, the mortgage broker locates the individual purchaser of the home, drafts the mortgage documents, and closes the loan.

The warehouse bank funds the mortgage using the warehouse line of credit, and typically requires the mortgage broker to pay back the loan within thirty days of the advance. At closing, a mortgage banking company buys the loan. The loan is subsequently purchased by an investor company or a correspondent lender (also known as a "permanent" lender), who administers the loan. The mortgage company uses the proceeds of the sales of its mortgage loans, in large part, to repay the loans it received from the warehouse lender.

21. The mortgage broker ensures that the mortgage loan meets all banking and lending requirements and obtains the permanent lender's approval for the loan. The mortgage broker then provides the original loan documentation to the warehouse lender, represents to the warehouse lender that the loan and transaction are valid and proper, provides the warehouse lender with the permanent lender's approval, and requests the advance of funds from the warehouse facility. Based upon these representations and this documentation, the warehouse lender advances funds to the mortgage broker, and then sells the note and mortgage to the permanent lender under a bailee letter.

22. As a mortgage warehouse lender, FCS is exposed to credit risks if a counterparty associated with the mortgage activities, including the broker or correspondent lenders, fails to meet its obligations. If a counterparty becomes financially unstable, FCS may be unable to collect receivables owed to it.

23. Because of this exposure to the financial performance of counterparties, FCS, like all warehouse lending institutions, monitors counterparties' actions on a regular basis, including performing analyses of their financial stability. FCS also has policies, practices and procedures governing basic underwriting standards and standards for reviewing the sources from which the loans will be acquired. FCS has systems and

procedures in place to determine whether the broker and correspondent is well-managed and financially sound.

24. As an additional measure to minimize its exposure, FCS employs internal auditors who review all aspects of FCS's mortgage banking operations. The auditors assess compliance with FCS's policies and practices, investor criteria, federal and state laws, regulatory guidelines, and the mortgage warehouse agreements. FCS's audit staff reports audit findings and any potential risks to FCS's senior management.

B. FCS's Early Relationship With Amerifunding (2001-2002)

25. In May, 2001, FCS extended a \$10 million warehouse line to Amerifunding. Within a year, FCS started having problems with "stale" loans on the Amerifunding line, which are loans that had not be sold to a permanent lender within the time period prescribed by the warehouse agreement. As of September, 2002, Amerifunding's stale loans were 40% of its outstanding loans with FCS and totaled over \$3 million.

26. FCS's concerns with Amerifunding's stale loans were twofold. First, the stale loans indicated either that the loans were not documented properly, that the investor that had ostensibly committed to purchase the loans decided that the loans were not sellable, or that the investor documentation committing to purchase the loan was a sham. Second, FCS loses money on stale loans. Stale loans become unmarketable in the secondary market without new documentation.

27. As a result of Amerifunding's high percentage of stale loans and FCS's risk of loss on the stales, FCS called a default on the Amerifunding line at the end of

September, 2002. For the next couple of months, FCS granted Amerifunding multiple extensions on the warehouse facility, in an attempt to be repaid.

C. **FCS Discovers that the Amerifunding Conspirators Were Improperly Repurchasing Stale Loans Off of the Warehouse Line (October 2002 – Mid-January 2003)**

28. Towards the end of October, 2002, FCS discovered that \$4 million of the stale loans had been repaid, but not by the permanent investor that had originally committed to purchasing the loans. This discovery only increased FCS's concerns about Amerifunding, and, in January 2003, FCS informed Gerald Small that two of FCS's internal auditors, John Weerts and Brett LeQuesne, would be conducting an on-site audit of Amerifunding. Such an audit was specifically provided for under the warehouse agreement, which required Amerifunding to permit FCS representatives to visit and inspect its properties and files at any reasonable time.

29. week after FCS requested the audit, Bernadette Yee, an Assistant Vice President and FCS's account manager for Amerifunding, met with representatives of Amerifunding, including Gerald Small, Kelli Burkhalter, Lou Gayle, and Stephanie Gard. At that meeting, FCS learned that Small was purchasing the stale loans off the FCS line using his own funds, selling them to TDF Funding and Major Mortgage¹ at market value, and then moving the proceeds from the sale of the stales back to Amerifunding. This news was concerning to FCS. It meant that the Amerifunding Conspirators were violating Amerifunding's warehouse agreement with FCS, which required the loans to be purchased by an approved permanent lender who had underwritten the loan. Additionally, because Small was purchasing the loans himself, FCS knew or should have

¹ FCS later discovered that TDF Funding and Major Mortgage were two of Small's sham companies purporting to be permanent lenders.

known at this time that the Amerifunding Conspirators had submitted false permanent lender documentation and underwriting documentation. Based on these findings, Yee concluded that Small's infusion of capital into Amerifunding was improper because he had no ownership interest in Amerifunding.

30. After Yee's meeting with Amerifunding, she started researching TDF in an attempt to figure out whether TDF was a sham entity and, more importantly, whether the Amerifunding Conspirators were committing fraud. She asked Small for information on TDF, its relationship to Major Mortgage, and for TDF's financial statements. Yee also had Internet searches run on TDF Funding. FCS's concerns that Amerifunding was committing fraud did not stop with Yee. On January 27, 2003, the day before the audit at Amerifunding's office, FCS's internal auditors, Weerts and LeQuesne told Yee that they were concerned about the pipeline and thought Amerifunding may be flipping loans.

D. **FCS Concludes Amerifunding Is Involved in a Fraudulent Scheme (Late January 2003)**

31. On January 28, 2003, FCS representatives, including John Weerts, traveled to Amerifunding's offices to inspect Amerifunding's files, as they were permitted to do under the warehouse agreement. Lou Gayle, the COO of Amerifunding, and Wendy DeWitt, the CFO of Amerifunding, met the FCS personnel; Gerald Small was "sick" and unable to participate and Kelli Burkhalter also was unavailable.

32. The FCS representatives faced total noncooperation at the audit from Amerifunding. The Amerifunding Conspirators informed FCS that no files would be available and none would be forthcoming. Furthermore, although the Amerifunding Conspirators confirmed that the stale loans were being purchased by Small off the line using his own funds, sold to TDF, and then refunded back to FCS as refinances, the

Amerifunding Conspirators refused to provide FCS any additional information on TDF Funding, stating that they were under instructions to not give FCS information and claiming they had little knowledge of what was happening.

33. Amerifunding's refusal to give information at the audit confirmed FCS's suspicions that Amerifunding was a scam. FCS management concluded that FCS caught Amerifunding in a scheme, that the Amerifunding Conspirators were doing something not above board, and that once FCS confronted Amerifunding at the audit, Amerifunding was trying to cover their tracks and get out with minimal damage to their reputations. According to John Weerts, the Amerifunding representatives who were present at the audit acknowledged that Amerifunding was involved in fraudulent activities, but they were unwilling to come forward with the true story of what Amerifunding was doing. Weerts recommended to FCS management that FCS should wind down the relationship as quickly as possible.

E. **FCS Develops an Exit Strategy and Learns More About the Amerifunding Conspirators' Fraud (February – March 2003)**

34. At this point, after having concluded that Amerifunding was committing fraud, FCS's primary concerns were to get its money back that it had loaned to Amerifunding and to get rid of Amerifunding as a client. FCS set about developing its game plan.

1. **Step One: Learn More About Amerifunding's Scheme**

35. FCS's first step in its exit strategy was to learn more about Amerifunding's scheme and what exactly Amerifunding was doing with FCS's money. John Weerts provided to FCS management his analysis of the four different scenarios of fraud that the Amerifunding Conspirators could be committing, depending on the variables: (1) if TDF

Funding is a third party company and purchased loans but didn't record them, and Amerifunding convinced the borrowers to refinance and recorded the new loans, while releasing the old loans, then TDF Funding is left with unrecordable loans; or (2) the loans on the warehouse line are all, or mostly, straw borrowers, which means that Amerifunding funded at least \$4.0 million in fraudulent loans since 1/15/03 and possibly more in the prior months; or (3) the properties are currently development properties, and Amerifunding uses the warehouse line to help finance their development opportunities; or (4) if Amerifunding is using straw borrowers, they are overinflating the appraisals to maximize the cash out, then churning the loans on the warehouse line every 2 or 3 months to keep stales down.

36. Weerts' four scenarios make clear that FCS knew that Amerifunding was improperly using FCS's line of credit, but that FCS did not know exactly how the Amerifunding operation worked. In February, 2003, the Amerifunding Conspirators met again with FCS representatives to explain the suspicious activity on the warehouse line. FCS's remaining questions about the structure of Amerifunding's scheme were answered at this meeting. The Amerifunding Conspirators admitted to the FCS representatives that they were violating the warehouse agreement and committing fraud. They told FCS that they were using the warehouse line to finance properties that they were remodeling through affiliated construction companies, and that they were using funds from another investor to transfer the loans off the warehouse line once the loan went stale, and then refinanced the loans back onto the warehouse line.

2. **Step Two: Enter Into a Mutually-Beneficial Agreement With Amerifunding**

37. In February 2003, once FCS understood the matrix of Amerifunding's scheme, the second step of FCS's exit strategy was to enter into an agreement with Amerifunding that set out the terms and conditions of a "wind down" plan, at the end of which FCS was to be repaid in full and the parties were to go their separate ways.

38. For their part, the Amerifunding Conspirators imposed a couple of their own conditions, all of which FCS acknowledged were necessary in order for Amerifunding to have the means to repay FCS. First, FCS agreed to not turn the Amerifunding Conspirators over to the authorities. Second, FCS agreed to provide the Amerifunding Conspirators full cooperation in clearing out the warehouse and securing warehouse lines of credit from other third party lenders, knowing that those other lines of credit would be used to pay back FCS. In essence, the Amerifunding Conspirators offered to repay FCS by continuing the fraud against other mortgage lenders if FCS kept quiet and provided it with referrals. FCS agreed.

39. In the meantime, John Weerts recommended that FCS verify the title companies and run a new factual data report on Amerifunding and its guarantor. Lyndon Merkle, FCS's President, in an effort to reduce FCS's exposure, ceased funding to Amerifunding, and had property profiles ordered on all of Amerifunding's loans on the warehouse lines. Merkle also demanded that Amerifunding wire to FCS \$500,000 as a good faith deposit until all of the loans were liquidated.

40. In February and March 2003, FCS reviewed TDF Funding's "financials," and, after running a search on the properties by address and borrower, determined that the majority of the properties purchased on the Amerifunding line were not recorded, and that multiple properties were purchased by the same borrower. FCS knew that these

findings were further earmarks of fraud. If the properties were not recorded then questions exist as to whether the transactions occurred. Furthermore, multiple purchases by a single borrower typically does not occur with residential purchases.

F. **As Part of Its Exit Strategy, FCS Encourages Flagstar and Impac to Extend Warehouse Lines to Amerifunding (April - May 2003)**

41. In April, 2003, FCS learned that Impac and Flagstar were considering extending warehouse lines to Amerifunding. FCS acted pursuant its agreement with the Amerifunding Conspirators to assist Amerifunding in locating other lines of credit so that it could be repaid by the Amerifunding Conspirators by defrauding others. In May, 2003, Impac entered into a Master Repurchase Agreement with Amerifunding, extending Amerifunding a \$10 million line of credit.

42. For its part, Flagstar was considering lending Amerifunding \$5 million. Flagstar and FCS executed an Intercreditor Agreement, which established priorities with respect to each company's loans to Amerifunding, and on April 16, 2003, Flagstar entered into a Mortgage Warehouse Agreement with Amerifunding to loan Amerifunding up to \$5 million to fund loans for residential buyers that Amerifunding would originate and broker (the "Flagstar/Amerifunding Warehouse Agreement").

G. **FCS Continues to Press Amerifunding for its Money (June-Early July 2003)**

43. In late June, it became clear that the Amerifunding Conspirators would not fulfill FCS's paydown conditions that they agreed to in February despite FCS's agreement to assist the Amerifunding Conspirators in locating other victims. FCS management — which had become increasingly concerned about the prospects for recouping its money — pressed Yee for a solution. On June 23, 2003, Bernadette Yee informed Gerald Small by letter that Amerifunding failed to comply with the February paydown agreement, and

stated that since Amerifunding has the ability to purchase the outstanding notes, she would highly recommend that the company use its own funds to purchase the loans off the line immediately. FCS Management also demanded that Amerifunding deliver to FCS \$1 million as additional cash collateral by June 27, 2003.

44. Around this same time, FCS's investigation of Amerifunding and the various entities associated with Amerifunding intensified, as FCS concluded that it would be required to take legal action against the Amerifunding Conspirators. FCS's outside counsel, who was hired to evaluate FCS's claims against Amerifunding, asked an independent private investigator to conduct a detailed investigation of Security Title, TDF Mortgage, Amerifunding, and Kelli Burkhalter. FCS began collecting relevant e-mails from FCS employees, and began to physically inspect the properties purchased with the warehouse line, to determine if the collateral they held for Amerifunding was worth anything at all.

45. In its desperation to be repaid, FCS began to discuss with more frequency using the Flagstar and Impac warehouse lines as a source of funds to help the Amerifunding Conspirators pay off the outstanding FCS loans. On June 23, 2003, Mike Williams of TDF Funding sent a letter to Bernadette Yee, informing her that the Amerifunding Conspirators had asked Flagstar to increase its line and reminded Yee that this increase would alleviate TDF from funding Amerifunding's deals and allow TDF to start purchasing Notes from First Collateral Services. Yee and Williams both understood that an increase in the Flagstar line meant more cash for FCS.

46. On June 24, 2003, Gerald Small wrote a letter to Bernadette Yee setting out his plan to pay down the Amerifunding line with FCS, and informed Yee that

Amerifunding had requested a \$10 million increase in the Flagstar line. That same day, Yee notified FCS Management about the Flagstar and Impac's lines, which were approved for \$5 million and \$10 million respectively.

47. In response to Yee's notification, FCS management specifically asked Yee whether FCS provided a reference on behalf of Amerifunding to either of the companies, and whether FCS had Intercreditor Agreements with either of the companies, in an apparent effort to determine any exposure. Yee informed FCS management that she had received a reference call from Impac sometime in early May, that FCS and Flagstar had an Intercreditor Agreement, and that FCS and Impac did not have an Intercreditor Agreement.

H. **FCS Confirms Intention to Pursue Legal Action Against Amerifunding (Mid-July 2003)**

48. On July 11, 2003, any possible doubts FCS had about the Amerifunding Conspirators' activities were confirmed by Henry Larez of FCS, who had been researching the properties purchased through the Amerifunding line. Larez sent an e-mail to Joanne Holbert from FCS's workout division, stating that "[i]t has been confirmed as we suspected [that] Amerifunding Deeds or Mortgages have not been recorded, excluding the two Texas Properties." Holbert responded "Thank you, no surprise."

49. On July 14, 2003, Holbert wrote an "SAR" Memo (presumably "Suspicious Activity Report") to FCS senior management summarizing her findings on Amerifunding. The memo confirms that as of July 14, 2003, FCS (1) knew that the documentation provided by Amerifunding for the loans was fraudulent; (2) knew that the Settlement Agent and Title Company for all of the loans were fraudulent; (3) knew that FCS intended to pursue legal action against the Guarantor, Kelli Burkhalter/Small, the

Company, Amerifunding, the Title Company, Security Title, the investor, TDF, and possibly the banks the funds were wired to; and (4) knew that recovery of any funds would need to be from litigation, because the collateral was "worthless:"

[T]he Collateral Documentation provided by the customer at the time FCS advanced on the loans was fraudulent with the exception of two loans. The profiles indicated that the legal descriptions attached to the Deeds of Trust were not for the property addresses as indicated on the DOT nor were the borrowers on title for the property addresses. Further investigation revealed that the Settlement Agent/Title Company for all of the loans was also fraudulent. Security Title is not a licensed corporation in the state of Colorado; the address that was provided on the Lender Instructions does not exist. The bank account that the funds were wired to was actually in the name of Security National Title; it was incorporated in February 6, 2003. The registered agent for Security National Title was the same as the registered agent for TDF Funding, "TDF," Charles Winnett. "TDF" is the investor who had purchased several loans off the line, 66% since April 4, 2003. "TDF" was incorporated February 27, 2003. The schedule that we received from the customer of what loans would be purchased throughout the month of July were to be purchased by "TDF." FCS intends to pursue legal actions against the Guarantor, Kelli Burkhalter, the company, Amerifunding/AmeriMax Realty, the Title Company, Security Title, the investor, "TDF," and possibly the bank funds were wired to, First National Bank. Recovery of any funds will need to be from litigation, the collateral is worthless.

I. **FCS Provides A Reference to Flagstar for a \$10 Million Increase in the Amerifunding Warehouse Line (August 2003)**

50. Approximately three weeks after FCS unequivocally concluded that the Amerifunding Conspirators had committed fraud and that FCS intended to take legal action against the company, FCS provided a reference on behalf of Amerifunding to Flagstar to induce Flagstar to increase Amerifunding's line from \$5 million to \$15 million. Such reference calls are typical in the banking and lending industry, and depending on the amount of credit that is being extended, are required by internal policies before a lending institution extends credit to a new customer.

51. FCS knew that a positive reference for Amerifunding would enable the Amerifunding Conspirators to get more credit to pay back FCS, and that the Amerifunding Conspirators would ultimately become another institution's problem. Based on industry custom, FCS also knew that Flagstar would rely on the information provided by FCS in making the decision to extend Amerifunding a line of credit. And therefore, despite its discovery of the Amerifunding Conspirators' fraudulent scheme, FCS provided Flagstar a positive reference, inducing Flagstar to loan Amerifunding \$15 million.

52. Two days before the reference call, the Amerifunding Conspirators sent multiple e-mails to Yee, informing her that Flagstar would be calling FCS for a reference, confirming that FCS had agreed to give the Amerifunding Conspirators a positive reference so that the FCS line could be cleared, and stating that it would be in "everyone's best interest" to give the Amerifunding Conspirators a good reference, which would enable Amerifunding to pay down its obligations to FCS.

53. On August 5, 2003, Small sent an e-mail to Yee telling her that he needed to talk to her, that Flagstar wanted a reference from Yee, that Small did not tell Flagstar about Amerifunding's problems with FCS, and that he needs to make sure the increase goes through. Small again reminded Yee that if the Flagstar increase goes through, Amerifunding could have the FCS note paid within a week. Small asked Yee to call him to discuss the Flagstar reference.

54. On August 6, 2003, the Amerifunding Conspirators followed up with FCS concerning the agreement for a favorable reference, reiterating that the reference would enable Amerifunding to repay FCS. Lou Gayle wrote to Yee, informing her that if

Flagstar requests a reference from FCS, it would be "in all of our best interests to have First Collateral state that our relationship is good and that we did what we said we were going to do. As you have stated in the past, it is First Collateral's position to provide us with a good report when reference is requested from other Warehouse lenders. We hope as we draw this chapter to a close, that you will continue with that precedent. Basically we are saying that when this line increase goes through we can finish liquidating our line with you and have our relationship end on the best of terms." Yee forwarded Gayle's e-mail to FCS senior management.

55. On August 6, 2003, Small sent Yee another e-mail, stating: "I need to talk to you about Flagstar. If my increase goes through today I can refinance all loan on the other line within a week. I really need your help and finalize this in the next week"

56. FCS never denied any of this (because it could not) and continued to act on its agreement to help the Amerifunding Conspirators defraud others so that it could be repaid. After receiving these e-mails, Yee discussed the upcoming Flagstar reference call with FCS management, which was paying close attention to the Amerifunding situation and was continuing to press Yee for a solution. Sally Shaver and Lyndon Merkle provided Yee instructions on what she should say to Flagstar.

57. On August 7, 2003, Yee sent an e-mail to FCS management, relaying her reference call with Joe Lathrop, Flagstar's account manager for Amerifunding, as instructed by Shaver and Merkle. Yee's e-mail states that she provided the following information to Lathrop: (1) FCS is winding down Amerifunding's line; and (2) FCS decided not to renew Amerifunding's line due to the on and off stale loan issues. When Lathrop asked Yee for detailed information on the stales, and Yee explained to Lathrop

that she cannot provide any information, but assured Lathrop that FCS had provided Amerifunding ample time to obtain other warehouse lines. Yee's explanation that FCS provided Amerifunding ample time to secure other warehouse lines is significant in this context; it meant that there was nothing about Amerifunding that was causing FCS to wind down the relationship within a specific time period, which, of course, was not true since FCS management had instructed Yee and others numerous times to wind down the relationship with Amerifunding as quickly as possible. Yee never mentioned Amerifunding's fraud to Lathrop, never mentioned to Lathrop that Amerifunding's collateral was worthless, and never mentioned to Lathrop that FCS was pursuing possible legal remedies against Amerifunding.

58. At the time FCS agreed to help the Amerifunding Conspirators secure the additional warehouse lines from Flagstar and Impac, FCS knew that the Amerifunding Conspirators would also defraud Flagstar and Impac, just as it had defrauded FCS. The only way that the Amerifunding Conspirators could free up the funds to repay FCS was to continue fraudulently diverting the funds released from the warehouse line to its own shell entities. FCS also knew that the fraud it helped the Amerifunding Conspirators continue to perpetrate on Flagstar and Impac was broader in scope than the fraud the Amerifunding Conspirators committed against FCS, because Flagstar and Impac had extended over three times the amount of money extended by FCS.

59. Within a week after the reference call with Lathrop, FCS management received regular updates on Amerifunding's outstanding balance, which was decreasing almost daily. By the end of September, the Amerifunding Conspirators had paid FCS in full, using the Plaintiffs' money. FCS knew that this money had been obtained from

Flagstar and Impac through the Amerifunding Conspirator's continued scheme. In November, 2003, Flagstar increased Amerifunding's warehouse line to \$20 Million, acting again in reliance on the August 2003 reference provided by FCS.

J. **FCS Washes Its Hands of the Amerifunding Problem While More Companies Become Involved in the Fraud (December – March 2003)**

60. After Flagstar's November 2003 increase in the Amerifunding line, Flagstar told Amerifunding that Amerifunding had reached its credit limit. Amerifunding therefore decided to find another mortgage brokerage company through which it could obtain more credit without Flagstar's knowledge of their scheme. Twentieth Century Mortgage, Inc. ("TCM") was the solution.

61. TCM is a Colorado brokerage company that was owned and operated by Treve Kinsey in Colorado, and had grown into a substantial company with offices throughout the western region. In 2002, Mr. Kinsey placed TCM on the market with a broker, seeking to sell the company to a third party. In the summer of 2003, Mr. Small offered Mr. Kinsey \$3.2 million in cash for the company, sight unseen.

62. Mr. Small told Mr. Kinsey that Chad Heinrich would be the named owner of the company instead of Mr. Small, but that Mr. Kinsey would stay on to manage the daily operations. This enabled Mr. Small to hide his involvement and to obtain further credit in TCM's name when Amerifunding could not do so on its own.

63. TCM approached Flagstar, touting Mr. Kinsey's continued management of TCM. TCM did not disclose its relationship with Amerifunding (which had used up its credit with Flagstar) or Mr. Heinrich's true identity. Instead, TCM requested a \$15 million warehouse loan from Flagstar, explaining that Mr. Kinsey was continuing as the

President and claiming that Mr. Heinrich had extensive mortgage experience and net worth. As a result, Flagstar entered into a mortgage warehouse agreement with TCM.

64. By this point, Flagstar had extended a \$20 million line to Amerifunding and a \$15 million line to TCM. Amerifunding and TCM continued to operate as one company with Mr. Kinsey taking direction from Amerifunding. Mr. Heinrich and Mr. Small began collapsing the companies, Amerifunding employees began to work at the TCM offices, and Mr. Heinrich, the sole shareholder of TCM, officed at Amerifunding.

K. **Flagstar and Impac Discover Amerifunding's Fraud and Suffer a Combined \$35 Million Loss**

65. In March 2004, after Flagstar became suspicious of Amerifunding's conduct, Joe Lathrop called Yee to ask her about Amerifunding and to tell her that Flagstar believed Amerifunding had a straw loan on its line.² This time, Yee was more forthcoming about what FCS had discovered about the Amerifunding Conspirators and told Lathrop what she had initially withheld when Lathrop had called for the referral in August. In essence, Yee admitted that she had lied to Flagstar about FCS's reasons for terminating the Amerifunding line.

66. Yee told Lathrop that she hoped that if Amerifunding had a straw loan on Flagstar line, there was only one, indicating that FCS had discovered that Amerifunding had multiple straw loans on the FCS line before FCS closed the account. Yee also told Lathrop that FCS was able to get out of its relationship with Amerifunding, after it had concluded Small was not doing traditional mortgage banking and was engaged in misconduct. Yee told Lathrop that there were several indications of misconduct, including FCS's discoveries about TDF and the relationship between TDF and

² A "straw loan" is a loan made in the borrower's name, but not with the borrower's funds.

Amerifunding, and FCS's questions about the title companies Amerifunding was using. Yee reminded Lathrop that FCS was able to get out of the Amerifunding situation with full remuneration by obtaining Small's cooperation, and suggested to him that Flagstar also may be able to obtain cooperation from Small and work out the problem instead of pursuing its legal remedies.

67. Flagstar notified the government and immediately sued Amerifunding, TCM, the Smalls, Mr. Heinrich, Mr. Winnett, Mr. Kinsey, and others. Flagstar obtained injunctions against the Amerifunding Conspirators, contacted the Amerifunding Conspirators, and moved to collect the amounts due under the warehouse agreements. Mr. Small met with Flagstar, and admitted that the Amerifunding Conspirators were involved in a complex scheme of mortgage fraud. On October 12, 2005, Small plead guilty to federal bank fraud and wire fraud that resulted in damages to Flagstar and Impac in the amount of over \$35 Million.

68. As FCS had already learned, Small admitted that Amerifunding, led by Mr. Small, represented itself as a valid and legitimate mortgage broker. In connection with the warehouse agreements it entered into with FCS, Flagstar, and Impac, the Amerifunding Conspirators created Security National as a sham title company and created TDF as a sham permanent lender and end purchaser of the notes and mortgages. The Amerifunding Conspirators created false financial and corporate information for these companies to make them look like legitimate companies that had similar names. The Amerifunding Conspirators then manufactured bogus loans and mortgage transactions by using fictitious names, stolen identities, and forged signatures. With these falsified documents and transactions, the Amerifunding Conspirators represented to

Flagstar that the loans and mortgages were valid and proper, requested advances, and that TDF, as the ostensible permanent lender, had approved the loans. Based upon these false and forged loan documents and TDF's supposed approvals, Flagstar and Impac advanced funds to Amerifunding under the warehouse agreements. The loan proceeds were not used for their proper purpose, but instead were siphoned to sham entities controlled by the Amerifunding Conspirators, and, as FCS had discovered back in January, 2003, were used by the Amerifunding Conspirators to, among other things, purchase property for themselves. In the meantime, because money needed to be repaid quickly under the warehouse agreements, some funds were cycled back to the lenders so that they would advance more money under the revolving warehouse line. To Flagstar and Impac, it appeared that the warehouse line was active and growing but being repaid timely. To the Amerifunding Conspirators, this meant that they needed to increase the draw of money such that the roll of funds advanced by the Plaintiffs continued to balloon.

69. As with Amerifunding, TCM used TDF as a sham permanent lender for TCM loans, but it formed a new title company (Chicago Title Guaranty ("Chicago Title")) as the sham title company for the TCM loans. The fraud, however, was the same. TCM submitted falsified documents in the same fashion for "TDF" transactions, and based upon the Amerifundings' misrepresentations and false documents, Flagstar advanced money under the TCM warehouse agreement.

70. In the end, under the warehouse agreements, the Amerifunding Conspirators had use of over \$200 million of Flagstar's and Impac's money. The Amerifunding Conspirators used this money to, among other things, purchase property for their personal gain.

71. As partial restitution, Small provided money and real property to Flagstar for the fraud and forgeries. On March 12, 2004, the Amerifunding Conspirators wired money to Flagstar that had been originally stolen under the auspices of TCM. The Amerifunding Conspirators additionally gave Flagstar title and deeds to real property in Nevada, Colorado, and Texas on account of their debts to Flagstar. Flagstar still does not own these properties deeded to it by Small free and clear. A majority of the properties are subject to government forfeiture, and Flagstar may not ultimately receive the full value of them. Even if Flagstar successfully challenges the government forfeiture order, the total value of the properties has not yet been determined, but it is millions of dollars less than the total amounts due to Flagstar and Impac.

72. As part of his plea and the criminal judgment, Mr. Heinrich was ordered to pay \$22,400,000 to Flagstar and \$12,632,080.64 to Impac. Pursuant to 18 U.S.C. § 3664(m)(1)(B), Flagstar and Impac received and obtained final judgments against Mr. Heinrich for the total restitutionary amount of \$35,032,080.64 based upon Mr. Heinrich's criminal conduct against Flagstar and Impac. The plaintiffs so far have received only \$2,127,000 of that Judgment, through a settlement with Mr. Kinsey and TCM.

FIRST CLAIM FOR RELIEF

(Fraudulent Misrepresentation and Nondisclosure – Flagstar Only)

73. Flagstar repeats and realleges the allegations of paragraphs 1 through 72 above as if set forth fully herein.

74. As detailed above, FCS participated in a scheme to induce Flagstar into extending millions of dollars of credit to the Amerifunding Conspirators and to cover up the massive fraud at Amerifunding so that FCS's own line of credit to Amerifunding could be repaid. FCS provided Flagstar with false information concerning

Amerifunding's true purpose, misrepresented Amerifunding's ability and intentions to honor their credit obligations, misrepresented the validity of Amerifunding's transactions and residential loan mortgages, misrepresented the value of Amerifunding's collateral, and actively assisted the Amerifunding Conspirators with concealing their fraudulent activities so that they could obtain additional lines of credit.

75. FCS knew that its statements to Flagstar were materially false and misleading and omitted the true facts.

76. Because FCS voluntarily responded to Flagstar's credit inquiries on Amerifunding, FCS had a duty to accurately and completely respond to those inquiries.

77. FCS intended that Flagstar rely on FCS's representations concerning Amerifunding.

78. As fellow lending institutions, Flagstar reasonably and justifiably relied upon FCS's misrepresentations concerning Amerifunding.

79. As a result of FCS's misconduct, Flagstar has suffered damages in excess of \$22 million.

SECOND CLAIM FOR RELIEF
(Aiding and Abetting Fraud – Flagstar Only)

80. Flagstar repeats and realleges the allegations of paragraphs 1 through 72 as if set forth fully herein.

81. As detailed above, the Amerifunding Conspirators engaged in a fraudulent scheme of fraud, forged documents, and sham entities to steal money from Flagstar under mortgage warehouse credit facilities.

82. As detailed above, FCS knew of the Amerifunding Conspirators' fraudulent scheme and helped to conceal it until after its own line of credit to Amerifunding was repaid.

83. As detailed above, FCS provided substantial assistance to the Amerifunding Conspirators, including: (a) responding positively to Flagstar's reference call on Amerifunding; (b) providing Flagstar with false information concerning Amerifunding's true purpose; (c) misrepresenting Amerifunding's ability and intentions to honor their credit obligations; (d) misrepresenting the validity of Amerifunding's transactions and residential loan mortgages; (e) misrepresenting the value of Amerifunding's collateral; (f) preserving Amerifunding's line of credit until Amerifunding was able to secure additional lines; and (g) failing to report Amerifunding to the legal authorities once it had discovered the fraud despite having a duty to do so.

84. As a result of FCS's misconduct, Flagstar has suffered damages in excess of \$22 million.

THIRD CLAIM FOR RELIEF
(Conspiracy – Flagstar Only)

85. Flagstar repeats and realleges the allegations of paragraphs 1 through 72 as if set forth fully herein.

86. As detailed above, FCS conspired with the Amerifunding Conspirators to conceal the truth about their fraudulent business operations so that Flagstar would extend credit to the Amerifunding Conspirators and FCS would be repaid.

87. As detailed above, FCS committed overt acts in furtherance of the conspiracy, including: (a) responding positively to Flagstar's reference call on Amerifunding; (b) providing Flagstar with false information concerning Amerifunding's

true purpose; (c) misrepresenting Amerifunding's ability and intentions to honor their credit obligations; (d) misrepresenting the validity of Amerifunding's transactions and residential loan mortgages; (e) misrepresenting the value of Amerifunding's collateral; (f) preserving Amerifunding's line of credit until Amerifunding was able to secure additional lines; and (g) failing to report Amerifunding to the legal authorities once it had discovered the fraud despite having a duty to do so.

88. As a result of FCS's misconduct, Flagstar has suffered damages in excess of \$22 million.

FOURTH CLAIM FOR RELIEF
(Violation of Colorado Organized Crime Control Act
C.R.S. § 18-17-101 et seq. – Flagstar Only)

89. Flagstar repeats and realleges the allegations of paragraphs 1 through 72 as if set forth fully herein.

90. FCS and the Amerifunding Conspirators constituted a racketeering enterprise under the Colorado Organized Crime Control Act, C.R.S. § 18-17-101 et seq. ("COCCA"). FCS knew that the Amerifunding Conspirators were using warehouse loans to commit fraud. FCS knew that the only way it could be repaid by the Amerifunding Conspirators is if the Amerifunding Conspirators secured lines of credit from additional financial institutions and used those lines of credit to repay FCS. FCS knew, at the time it agreed to help the Amerifunding Conspirators secure the warehouse lines from Flagstar, that the Amerifunding Conspirators would also defraud Flagstar, just like it had defrauded FCS, because the only way that the Amerifunding Conspirators could free up the funds to repay FCS was to continue fraudulently diverting the funds released from the warehouse line. FCS also knew that the fraud it helped the Amerifunding Conspirators continue to perpetrate on Flagstar was broader in scope than the fraud the Amerifunding

Conspirators committed against FCS, because Flagstar extended almost twice the amount of money extended by FCS.

91. FCS engaged in a pattern of racketeering activities. The racketeering activities have included, among other things, the predicate acts of bank fraud. FCS knowingly induced Flagstar by means of false representations to extend lines of credit to Amerifunding, when it knew that Flagstar would be defrauded by the Amerifunding Conspirators. Further, FCS induced Flagstar to extend the lines of credit to Amerifunding by false representations, so that Amerifunding could use Flagstar's money to repay FCS.

92. As a direct result of FCS's predicate acts and pattern of racketeering activities, Flagstar has suffered damages in excess of \$22 million.

FIFTH CLAIM FOR RELIEF
**(Violation of Racketeer Influenced and Corrupt Organizations Act,
18 U.S.C. § 1962 et seq. – Flagstar Only)**

93. Flagstar repeat and reallege the allegations of paragraphs 1 through 72 as if set forth fully herein.

94. FCS and the Amerifunding Conspirators constituted a racketeering enterprise under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962 et seq. ("RICO"). FCS knew that the Amerifunding Conspirators were using warehouse loans to commit fraud. FCS knew that the only way it could be repaid by the Amerifunding Conspirators is if the Amerifunding Conspirators secured lines of credit from additional financial institutions and used those lines of credit to repay FCS. FCS knew that the Amerifunding Conspirators would also defraud Flagstar, just as they had defrauded FCS, because the only way that the Amerifunding Conspirators could free up the funds to repay FCS was to continue fraudulently diverting the funds released from the

warehouse line. FCS also knew that the fraud it helped the Amerifunding Conspirators continue to perpetrate on Flagstar was broader in scope than the fraud the Amerifunding Conspirators committed against FCS, because Flagstar extended almost twice the amount of money extended by FCS.

95. As a nation-wide lending institution, FCS was engaged in interstate commerce.

96. FCS engaged in a pattern of racketeering activities. The racketeering activities have included, among other things, the predicate acts of bank fraud. FCS knowingly induced Flagstar by means of false representations to extend lines of credit to Amerifunding, when it knew that Flagstar would be defrauded by the Amerifunding Conspirators. Further, FCS induced Flagstar to extend the lines of credit to Amerifunding by false representations, so that Amerifunding could use the Flagstar money to repay FCS.

97. As a direct result of FCS's predicate acts and pattern of racketeering activities, Flagstar has suffered damages in excess of \$22 million.

SIXTH CLAIM FOR RELIEF
(Negligent Misrepresentation – Flagstar Only)

98. Flagstar repeats and realleges the allegations of paragraphs 1 through 72 as if set forth fully herein.

99. As detailed above, FCS gave positive referrals directly to Flagstar concerning Amerifunding, inducing Flagstar to extend millions of dollars in lines of credit to Amerifunding. During the reference calls, FCS provided Flagstar with information concerning Amerifunding which, in the exercise of reasonable care, FCS would have known was materially false and misleading. FCS failed to use reasonable

care in providing Flagstar with truthful and accurate information concerning the true purpose of Amerifunding's business, Amerifunding's ability and intentions to honor their credit obligations, the validity of Amerifunding's transactions and residential loan mortgages, and the value of Amerifunding's collateral.

100. As detailed above, FCS intended for Flagstar to rely, and Flagstar justifiably relied, on the information provided by FCS.

101. As a result of FCS's negligence, Flagstar has suffered damages in excess of \$22 million.

SEVENTH CLAIM FOR RELIEF
(Unjust Enrichment – Flagstar and Impac)

102. Plaintiffs repeat and reallege the allegations of paragraphs 1 through 72 as if set forth fully herein.

103. As detailed above, FCS assisted the Amerifunding Conspirators in securing Flagstar and Impac's warehouse lines of credit.

104. Amerifunding used Flagstar and Impac's lines of credit to pay down FCS.

105. FCS knew that the Amerifunding Conspirators used Flagstar and Impac's money to repay FCS.

106. FCS benefited from the receipt of Flagstar and Impac's money.

107. It would be unjust to allow FCS to retain these ill-gotten gains. FCS should not be rewarded for luring Flagstar and Impac into extending multi-million dollar lines of credit to Amerifunding when FCS knew the Amerifunding Conspirators were engaged in fraud and when it knew that the Amerifunding Conspirators would use Flagstar and Impac's money to repay FCS. As a matter of equity, FCS should be required to disgorge these improperly obtained sums.

EIGHTH CLAIM FOR RELIEF
(Breach of Intercreditor Agreement – Flagstar Only)

108. Flagstar repeats and realleges the allegations of paragraphs 1 through 72 as if set forth fully herein.

109. As detailed above, FCS assisted the Amerifunding Conspirators in securing Flagstar's warehouse lines of credit.

110. Amerifunding used Flagstar's lines of credit to pay down FCS.

111. FCS knew that the Amerifunding Conspirators used Flagstar's money to repay FCS.

112. Paragraph 6 of the Intercreditor Agreement between Flagstar and FCS requires each Creditor who receives "any payment which another Creditor is entitled to receive" to "hold the same in trust for the appropriate Creditor and promptly deliver such payment to the entitled Creditor."

113. FCS breached Paragraph 6 of the Intercreditor Agreement by luring Flagstar into extending multi-million dollar lines of credit to Amerifunding when FCS knew the Amerifunding Conspirators were engaged in fraud, and by retaining Flagstar's money for itself. FCS has a contractual obligation under the Intercreditor Agreement to disgorge these improperly retained sums.

NINTH CLAIM FOR RELIEF
(Conversion – Flagstar and Impac)

114. Plaintiffs repeat and reallege the allegations of paragraphs 1 through 72 as if set forth fully herein.

115. As detailed above, FCS assisted the Amerifunding Conspirators in securing Plaintiffs' warehouse lines of credit.

116. Amerifunding used Plaintiffs' lines of credit to pay down FCS.

117. FCS knew that the Amerifunding Conspirators used Plaintiffs' money to repay FCS.

118. FCS wrongfully appropriated and has wrongfully exercised permanent dominion and control over Plaintiffs' monies to the exclusion of Plaintiffs.

119. FCS's exercise of dominion and control over the monies unjustifiably denied Plaintiffs to the right to use, consume, exploit and profit from such monies.

120. The exercise of dominion and control over the Plaintiffs' monies by FCS is without legal justification and constitutes conversion of Plaintiffs' assets.

121. The wrongful conversion of Plaintiffs' monies was accomplished by FCS under circumstances of fraud, willful and wanton misconduct and/or recklessness within the meaning of C.R.S. § 13-21-102.

122. Plaintiffs are entitled to immediate ownership, possession, and control over the monies wrongfully converted by FCS.

TENTH CLAIM FOR RELIEF
(Imposition of a Constructive Trust – Flagstar and Impac)

123. Plaintiffs repeat and reallege the allegations of paragraphs 1 through 72 as if set forth fully herein.

124. As set forth herein, FCS engaged in deceptive, fraudulent, and wrongful conduct by assisting the Amerifunding Conspirators in securing Flagstar's warehouse lines of credit.

125. Amerifunding used Flagstar's lines of credit to pay down FCS.

126. FCS knew that the Amerifunding Conspirators used Flagstar's money to repay FCS.

127. FCS holds the money it illegally received from Amerifunding as a constructive trustee for the benefit of Plaintiffs.

ELEVENTH CLAIM FOR RELIEF
(Civil Theft – Flagstar Only)

128. Flagstar repeats and realleges the allegations of paragraphs 1 through 72 as if set forth fully herein.

129. As set forth herein, FCS knowingly obtained and exercised control of Flagstar's money by fraud and deception and used that money in such a manner as to permanently deprive Flagstar of the use or benefit of that money.

130. FCS's conversion and misappropriation of Flagstar's money constitutes theft under the provisions of C.R.S. § 18-4-401.

131. Flagstar is entitled to recover from FCS three times the value of the money converted and misappropriated by FCS.

132. Flagstar also is entitled to recover from FCS its reasonable attorneys' fees under the provisions of C.R.S. § 18-4-405.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs request that Judgment be entered against FCS for restitution, compensatory damages, consequential damages, treble damages, exemplary damages, statutory damages, attorneys' fees, costs (including expert witness fees), prejudgment and post judgment interest, and such other and further relief as the Court deems just and appropriate. Plaintiffs expressly reserve the right to seek leave to amend their complaint to assert claims for punitive damages.

JURY DEMAND

Plaintiff demands a trial by jury on all claims.

Dated this 1st day of February, 2006.

BROWNSTEIN HYATT & FARBER, P.C.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 1st day of February, 2006 the foregoing **FIRST AMENDED COMPLAINT AND JURY DEMAND** was filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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