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14 ATTORNEYS FOR PLAINTIFFS

15 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
16 **COUNTY OF SAN MATEO**

17 DANIEL C. SILVA AND LARRY)
18 MATTISON,)
19 Plaintiffs,)
20 vs.)
21 PROVIDENT FUNDING ASSOCIATES,)
22 L.P., PROVIDENT FUNDING GROUP,)
23 INC., and DOES 1 through 50, inclusive,)
24 Defendants.)

CASE NO. CIV 443418
SECOND AMENDED COMPLAINT FOR:
VIOLATION OF CALIFORNIA BUSINESS
AND PROFESSIONS CODE SECTION 17200
ET SEQ.; VIOLATION OF CALIFORNIA
CIVIL CODE SECTION 1750 ET SEQ;
BREACH OF CONTRACT; BREACH OF
IMPLIED COVENANT OF GOOD FAITH
AND FAIR DEALING
CLASS ACTION
JURY TRIAL DEMANDED

1 **PLAINTIFFS' FIRST AMENDED COMPLAINT**

2 Plaintiffs Daniel C. Silva and Larry Mattison ("Plaintiffs"), on behalf of themselves and
3 all others similarly situated, complain against Defendants Provident Funding Associates, L.P.
4 ("Provident Associates") and Provident Funding Group, Inc. ("Provident Group") d/b/a
5 Provident Portfolio, Provident Home Loans, Polaris Mortgage, Members Home Source, Loan
6 Factory, Provident Funding Group, Mortgage Club America, America's Mortgage Club, Web
7 Star Mortgage, and Polaris Mortgage Associates (collectively referred to as "Defendants") and
8 bring this case on behalf of themselves and a class of borrowers whose promissory notes were
9 or are payable to or serviced by Provident Associates. Plaintiffs allege that Defendants
10 improperly assessed late fees in violation of their notes and state law. Plaintiffs assert their
11 claims as a representatives of a class under Section 17200 of the California Business and
12 Professions Code ("Unfair Competition Law" or "UCL"), Section 1781 of the California Civil
13 Code and under Code of Civil Procedure Section 382, and seek injunctive relief, disgorgement
14 and restitution of all ill-gotten gains, actual and punitive damages from the unlawful,
15 fraudulent and unfair conduct engaged in by Defendants. For their complaint, Plaintiffs allege
16 as follows:

17 **THE PARTIES**

- 18 1. Plaintiffs are residents of the State of Colorado.
- 19 2. Defendant Provident Funding Associates, L.P. is a California limited
20 partnership doing business in the state of California and throughout the nation with its
21 principal place of business in Burlingame, California. Provident Associates may be served
22 with process by and through Provident Funding Group, Inc., its general partner. Provident
23 Associates operates under numerous trade names including Provident Portfolio, Provident
24 Home Loans, Polaris Mortgage, Members Home Source, Loan Factory, Provident Funding
25 Group, Mortgage Club America, America's Mortgage Club, Web Star Mortgage, and Polaris
26 Mortgage Associates.

1 charge promptly but only once on each late payment."

2 11. After entering into the Notes, Plaintiffs were notified that payments under the
3 Notes were to be made to Provident Associates.

4 12. In early September, 2003, Plaintiff Silva sent a payment under the Silva Note to
5 Provident Associates in the full amount of principal and interest and escrow amount due of
6 \$1,307.63, plus \$192.37 in additional principal, and on information and belief, that payment
7 was received by Provident Associates before September 16, 2003.

8 13. In early August, 2004, Plaintiffs sent a payment under Plaintiffs' Note to
9 Provident Associates in the full amount of principal and interest and escrow amount due of
10 \$1,197.33, and on information and belief, that payment was received by Provident Associates
11 before August 16, 2004.

12 14. On information and belief, Plaintiffs' payments were received by Provident
13 Associates before the end of the Grace Period.

14 15. Either with knowledge that Plaintiffs' payments were timely received, or
15 without knowledge that Plaintiffs' payments were, in fact, late Provident Associates assessed a
16 late charge of \$50.22 to Plaintiffs' account and \$ 50.66 to Plaintiff Silva's account.

17 16. On information and belief, even though the payments of Plaintiffs and Class
18 members were timely received, Defendants failed to post such payments in a timely manner,
19 and improperly assessed late charges against Plaintiffs and Class members.

20 17. Further, Defendants engaged in the practice of assessing late charges against
21 Plaintiff and Class Members without being able to establish that payments were, in fact,
22 received late.

23 18. Upon information and belief, Defendants have no procedure in place through
24 which they could ascertain whether a payment that they post on the day after the Grace Period
25 was, in fact, received that day, or the day before (within the Grace Period).

26 19. Plaintiffs' payments, in this case, were in fact posted by Defendants the day after
27 the Grace Period.

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1 20. Defendants caused injury to Plaintiffs and members of the Class.

2 21. All conditions precedent have been met.

3 **CLASS ALLEGATIONS**

4 22. Plaintiffs bring this action on behalf of themselves and all others similarly
5 situated, as members of the proposed class ("Class"). The Class that Plaintiffs seek to
6 represent includes all persons who have or had promissory notes, which contain substantially
7 the same language regarding late charges as in the Notes and have been directed to make, and
8 have made payments to Provident Associates for late charges either when their payment was
9 received within the Grace Period, or when Provident Associates required payment of a late
10 charge without being able to establish that the payment was, in fact, received after the Grace
11 Period, at any time from four years preceding the first-filed complaint in this action to the
12 present. Excluded from the Class are the following:

13 a. Counsel of record for any of the parties;

14 b. Defendants and any entity in which Defendants have a controlling
15 interest, and their legal representatives, officers, directors, assigns and successors; and

16 c. The presiding and any appellate judges in this case, and all relatives of
17 these judges within the third degree of consanguinity.

18 23. It is impracticable to bring all members of the class before the court.
19 The precise number of Class members and their addresses are unknown to Plaintiffs, although
20 it is believed that the Class numbers in the thousands. Members of the Class may be identified
21 from Defendants' records, and may be notified of the pendency of this action by mail,
22 supplemented, if deemed necessary, by published notice.

23 24. There are questions of law and fact involved in this case which affect all
24 members of the Class and which predominate over any individual issues. Questions of law and
25 fact common to the Class members include, but are not limited to, the following:

26 a. Whether Defendants' conduct violates Civil Code §§1750, et seq.;

27 b. Whether Defendants' conduct violates Civil Code §§17200, et seq.;

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1 c. Whether Defendants' conduct constitutes breach of contract and breach
2 of the implied covenant of good faith and fair dealing;

3 d. Whether Defendants were unjustly enriched; and

4 e. Whether Plaintiffs and the Class are entitled to injunctive relief and the
5 nature of such relief.

6 25. The claims or defenses of Plaintiffs are typical of the claims or defenses of the
7 class.

8 26. Plaintiffs will fairly and adequately protect the interests of the class. Plaintiffs
9 have no interests that are antagonistic to the Class and have hired competent counsel who are
10 experienced in class actions.

11 27. A class action is the superior method for fair and efficient adjudication of this
12 controversy. Since the injury suffered by individual members of the Class may be relatively
13 small, the expense and burden of individual litigation make it impractical for members of the
14 Class to seek redress individually for the wrongful conduct alleged herein. Further, it would be
15 virtually impossible for the members of the Class individually to redress effectively the wrongs
16 done to them. Even if the members of the Class themselves could afford such individual
17 litigation, the court system could not. Individualized litigation also presents a potential for
18 inconsistent or contradictory judgments. Individualized litigation increases the delay and
19 expense to all parties and the court system. By contrast, the class action device presents far
20 fewer management difficulties, and provides the benefits of single adjudication, economy of
21 scale, and comprehensive supervision by a single court.

22 28. In addition, the prosecution of separate actions by individual members of the
23 Class would create a risk of inconsistent or varying adjudications with respect to individual
24 members of the Class, which would establish incompatible standards of conduct for the party
25 opposing the Class, or adjudications with respect to individual members of the Class which
26 would, as a practical matter, be dispositive of the interests of other Class members not parties
27 to the adjudications, or substantially impair or impede their ability to protect their interests.

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1 by Defendants within 15 calendar days after payment is due on the notes; and for such further
2 equitable relief as the Court may deem proper.

3 **SECOND CAUSE OF ACTION**

4 **VIOLATION OF CIVIL CODE §§1750, et seq.**

5 35. Plaintiffs reassert and reallege the allegations set forth above.

6 36. Plaintiffs and Class Members suffered injury as a result of Defendants'
7 employment of the following methods, acts, or practices which are unlawful under Civil Code
8 §§1770(a)(5), (14), and (16):

9 a. Taking actions that have the tendency or capacity to deceive Plaintiffs
10 and Class members about the amounts actually owed on their promissory notes; and

11 b. Withholding material information from Plaintiffs and the Class that
12 Defendants cannot accurately determine when note payments are received.

13 37. As a result of these unlawful policies and practices, Plaintiffs and the Class are
14 entitled to an injunction issue against Defendants, pursuant to Section 1780(a)(2) of the
15 California Civil Code, to prevent Defendants from engaging in such future unlawful, unfair
16 and fraudulent business practices. More specifically, Plaintiffs and members of the Class seek
17 an order enjoining the conduct complained of herein; an award of restitution to each Class
18 Member for any wrongful late charges; an order requiring Defendants to accept and properly
19 credit payments proffered by Plaintiffs and Class members received by Defendants within 15
20 calendar days after payment is due on the Notes; for such further equitable relief as the Court
21 may deem proper; actual damages, and punitive damages.

22 38. Plaintiffs and members of the Class are also entitled to an award of reasonable
23 attorneys' fees pursuant to California Civil Code Section 1780(d).

24 **THIRD CAUSE OF ACTION**

25 **BREACH OF CONTRACT**

26 39. Plaintiffs reassert and reallege the allegations set forth above.

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1 **PRAYER FOR RELIEF**

2 WHEREFORE, Plaintiffs pray for judgment as follows:

- 3 1. That Plaintiffs be appointed Class representatives;
- 4 2. That Plaintiffs' Counsel be appointed counsel for the Class;
- 5 3. For injunctive relief as requested above;
- 6 4. For an order of disgorgement and restitution as requested above;
- 7 5. For actual damages;
- 8 6. Punitive damages;
- 9 7. For attorneys' fees and costs; and
- 10 8. Such other and further relief as the Court may deem necessary or appropriate.

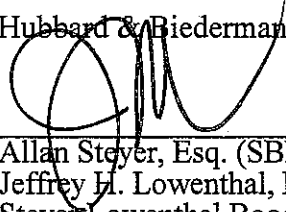
11 Dated: January 9, 2006

Respectfully Submitted,

12 Steyer Lowenthal Boodrookas
13 Alvarez & Smith LLP

14 Hubbard & Biederman, L.L.P.

15 By:


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11 ATTORNEYS FOR PLAINTIFFS

12 **JURY DEMAND**

13 Plaintiffs Daniel C. Silva and Larry Mattison hereby demand a jury trial.

14 Dated: January 9, 2006

15 Respectfully Submitted,

16 Steyer Lowenthal Boodrookas
17 Alvarez & Smith LLP

18 Hubbard & Biederman, L.L.P.

19 By: 

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