No. GN 400269

ASSOCIATION OF COMMUNITY ORGANIZATIONS FOR REFORM NOW (ACORN), VALERIE NORWOOD, ELISE SHOWS, MARYANN ROBLES-VALDEZ, BOBBY MARTIN, PAMELA COOPER, and CARLOS RIVAS,	)	IN THE DISTRICT COURT
PLAINTIFFS,	)	OF TRAVIS COUNTY, TEXAS
VS.	)	
FINANCE COMMISSION of TEXAS, and CREDIT UNION COMMISSION of TEXAS,	)	
DEFENDANTS.	)	126 JUDICIAL DISTRICT

PLAINTIFFS' ORIGINAL PETITION

Plaintiffs file this original petition against Defendants and in support show:

I. DISCOVERY CONTROL PLAN

1. Plaintiffs intend to conduct discovery under Level 3.

II. PARTIES

2. Plaintiff Association of Community Organizations for Reform Now (ACORN) is the nation's largest community organization of low and moderate-income families, with over 150,000 member families across the country.

3. Plaintiffs VALERIE NORWOOD, ELISE SHOWS, MARYANN ROBLES-VALDEZ, BOBBY MARTIN, PAMELA COOPER, and CARLOS RIVAS, are individual homeowners in the state of Texas. Each took out a home equity loan.

4. Defendant Finance Commission of Texas is an agency of the state of Texas. Defendant may be served by certified mail to: Randall James, Executive

Director, State Finance Commission Bldg., 2601 North Lamar, Austin, Texas 78705.

5. Defendant Credit Union Commission of Texas is an agency of the state of Texas. Defendant may be served by certified mail to: Harold E. Feeney, Commissioner, 914 East Anderson Lane, Austin, Texas 78752-1699.

6. Plaintiffs notified the Attorney General of Texas of this action.

III. JURISDICTION AND VENUE

7. Plaintiffs challenge the validity of interpretations adopted by Defendants. Section 2001.038(b) of the Texas Government Code requires this action to be brought in this Court.

IV. INTRODUCTION

8. Plaintiffs challenge the validity of interpretations and rules relating to home equity loans adopted by Defendants Finance Commission of Texas and Credit Union Commission of Texas on December 18, 2003.

The Restrictive Nature of Home Equity Lending in Texas

9. For over 150 years, home equity loans were strictly prohibited in Texas. The homestead protection embodied in the Texas Constitution, Article XVI, Section 50 (hereinafter referred to as "Section 50"), prohibited homeowners from using their homes as security for loans other than for the purchase or improvement of the property. Texas was unique as the only state to prohibit this type of lending in the latter part of the 20th century. For decades, home equity lending flourished in the other 49 states but was not permitted in Texas.

10. In 1997, the 75th Legislature adopted HJR 31, an amendment to Section 50 of Texas Constitution which would permit certain home equity loans in Texas. HJR 31 was approved by the voters and became effective on January 1, 1998.

11. As amended, the Texas Constitution permitted a new narrow exception to the general rule against encumbering a homestead. The new exception was found in Article 16, Section 50(a)(6) and authorized home equity lending only where it meets the conditions of (a) through (q). Tex. Const. art. XVI §50(a)(6) (West 1998). In fact, Section 50(a)(6) details over 30 separate paragraphs of specific requirements that must be fulfilled for the loan to fall within the exception.

12. The requirements and conditions for the new Texas home equity loans are included entirely in the Texas Constitution. The Legislature was not given any authority to interpret, implement or otherwise affect this new category of loans. Nor was any agency given the power to interpret, implement or otherwise affect this new category of loans. No implementing legislation of any kind was enacted by the 75th Legislature. Everything needed to determine the requirements and conditions of this new category of loans was contained in Section 50.

13. In 2003, the Texas Constitution was amended again to, among other things, permit for agency interpretation of certain provisions of Section 50. SJR

42, enacted by the 78th Legislature and approved by the voters in August 2003, amended numerous provisions of Section 50 and added a new Section 50(t):

> The legislature may by statute delegate one or more state agencies the power to interpret Subsections (a)(5)-(a)(7), (e)-(p), and (t), of this section. An act or omission does not violate a provision included in those subsections if the act or omission conforms to an interpretation of the provision that is:
>
> (1) in effect at the time of the act or omission; and
> (2) made by a state agency to which the power of interpretation is delegated as provided by this subsection or by an appellate court of this state or the United States.

No other power or authority was given to the Legislature or any agency.

14. Section 50(t) does not give an agency any advisory authority; it did authorize one or more agencies to create interpretative "safe harbors" for lenders. These agency interpretations will arguably bind all trial courts to hold the lenders as complying with the constitution so long as the lenders comply with the applicable interpretations.

15. The 78th Legislature also enacted SB 1067 which named Defendant Finance Commission of Texas and Defendant Credit Union Commission of Texas as the "state agencies" authorized by Section 50(t) to the interpret the specified provisions of Section 50.

16. The power given to Defendant Finance Commission of Texas and Defendant Credit Union Commission of Texas by Section 50(t) and SB 1067 is very limited and quite different from the normal grant to a regulatory agency.

Defendants were not given any authority to prescribe law or policy, or to make substantive (or even procedural) rules or to implement any provision relating to home equity lending. Defendants were given the sole authority to "interpret" certain sections of Section 50.

The Downside to Home Equity Loans: Predatory Lending

17. Home equity loans were prohibited in Texas until 1997 and permitted thereafter only in accordance with the strict restrictions and protections contained in the Texas Constitution because of concern about the adverse effect that defaults and foreclosures would have on families and communities.

18. Recent national adverse experience with home equity lending demonstrates that this concern was not misplaced. The Chairman of the Federal Deposit Insurance Corporation recently observed that home equity lending:

> [H]as a 'dark underbelly', and that underbelly is predatory lending. . . And while the debate goes on year after year, these predatory lenders continue sucking the economic lifeblood from families who have finally been able to achieve homeownership through changes in housing finance; or they target elderly home owners who are 'house rich and cash poor.'
>
> Don Powell, Chair FDIC, National Association of Affordable Housing Lenders 2002 Industry Conference, June 13, 2002.

19. The Federal Trade Commission (FTC) considers predatory lending practices as "a serious national problem." FTC, House Committee on Banking and Financial Services, May 24, 2000. A joint study by the United States Department of Housing and Urban Development (HUD) and the United States

Department of the Treasury observed: "Predatory lending has contributed to the rapid growth in foreclosures in many inner-city communities, and foreclosures can destabilize families and entire neighborhoods." See Curbing Predatory Home Mortgage Lending: A Joint Report, Department of the Treasury and HUD, June 2000 ("HUD/Treasury Report") at 13.

20. Over the past five years, the FTC has brought numerous enforcement actions against mortgage lenders for predatory practices. The FTC has resolved several of these cases with lenders agreeing to pay substantial sums in settlement. In November 2003, Fairbanks Capital agreed to pay $40 million dollars to aggrieved borrowers. In September 2002, Citigroup agreed to pay $215 million for abusive home equity practices by its newly-acquired subsidiaries, Associates First Capital Corp. and Associates Corp. N.A. In March 2002, First Alliance Mortgage Co. agreed to pay $60 million to settle charges of predatory practices.

21. In December 2002, Household International, the parent company of two home equity lenders, Household Finance and Beneficial, agreed to pay a total of $484 million nationwide to resolve allegations of predatory lending made by 18 states (including Texas) and the District of Columbia. In the Texas part of the case, Texas Attorney General Greg Abbott and Texas Consumer Credit Commissioner Leslie L. Pettijohn, on behalf of he State of Texas, filed suit against Household International, Inc. under the DTPA, Texas Finance Code and the Texas Constitution alleging predatory and abusive home equity lending practices. See

State of Texas v. Household International, Inc., No. 2002-5659, County Court at Law Number 3, El Paso County, Texas. The Texas portion of the settlement was approximately $7.5 million. The sheer size of these settlements – four settlements totaling over $800 million – amply demonstrates the seriousness and pervasiveness of the predatory lending problem.

22. These few settlements offer but a glimpse of the amount of actual economic toll exacted by predatory lenders. According to a recent study, predatory lending costs United States borrowers over $9 billion each year. Eric Stein, Quantifying the Economic Cost of Predatory Lending (Coalition for Responsible Lending, July 25, 2001).

23. Concerned about the potential ill effects of predatory lending, the 77th Legislature adopted SB 317 which directed Defendant Finance Commission of Texas and the Consumer Credit Commissioner to conduct a study of mortgage lending practices to (1) identify possible predatory lending patterns or practices and (2) consider parameters that could be used to consistently classify credit risk among mortgage loans for the purpose of assessing possible predatory lending practices; and to issue a report detailing the findings and recommendations on or before December 1, 2002.

24. Plaintiffs allege that Defendants' rules and interpretations are unconstitutional and will ultimately add to the predatory lending problem in Texas.

V. THE RULES AND INTERPETATIONS

25. Defendants adopted rules and interpretations pursuant to Section 50(t) and SB 1067 which were filed with the Texas Secretary of State on December 19, 2003, codified under Title 7, Chapter 153, of the Texas Administrative Code. These interpretations became effective January 8, 2004.

26. Many of these alleged interpretations do not actually interpret the Texas Constitution, but are in fact new rules, or conflict with the constitutional provision as follows:

a. Section 153.5

Texas Constitutional Provision	Agencies' "Interpretation"
Section 50(a)(6)(E): "does not require the owner or the owner's spouse to pay, in addition to any interest, fees to any person that are necessary to originate, evaluate, maintain, record, insure, or service the extension of credit that exceed, in the aggregate, three percent of the original principal amount of the extension of credit;"	§153.5.Three percent fee limitation: Section 50(a)(6)(E). An equity loan must not require the owner or the owner's spouse to pay, in addition to any interest, fees to any person that are necessary to originate, evaluate, maintain, record, insure, or service the extension of credit that exceed, in the aggregate, three percent of the original principal amount of the extension of credit. ... ***(3) Charges that are Interest. Charges an owner or an owner's spouse is required to pay that constitute interest under the law, for example per diem interest and points, are not fees subject to the three percent limitation.*** ... .

Problem with Section 153.5: The interpretation declares "points" (which are not defined) as interest and therefore not included in the three percent cap. This interpretation conflicts with a plain reading of the constitutional provision. Points often take the form of loan discount fees which are paid to the lender up front and

financed with the loan. These funds are paid to the lender purportedly to reduce the interest rate charged to the homeowner. Thus, points are actually part of the principal of the loan, which is then used to calculate the interest charged on the loan. The constitution places a cap on all fees, except for the interest, as determined by the interest rate. Rather than finding loan discount fees as fees, Defendants have placed reliance on case law interpreting usury statutes passed in order to protect consumers, and turned a blind eye to the intent of the constitution. The case law is not controlling.

b. Section 153.8

Texas Constitutional Provision	Agencies' "Interpretation"
Section 50(a)(6)(H): "is not secured by any additional real or personal property other than the homestead;"	§153.8. Security of the Equity Loan: Section 50(a)(6)(H). An equity loan must not be secured by any additional real or personal property other than the homestead. The definition of "homestead" is located at Section 51 of Article XVI, Texas Constitution, and Chapter 41 of the Texas Property Code. (1) A lender and an owner or an owner's spouse may enter into an agreement whereby a lender may acquire an interest in items incidental to the homestead. ***An equity loan secured by the following items is not considered to be secured by additional real or personal property:*** (A) escrow reserves for the payment of taxes and insurance; (B) an undivided interest in a condominium unit, a planned unit development, or the right to the use and enjoyment of certain property owned by an association; (C) insurance proceeds related to the homestead; (D) condemnation proceeds; (E) fixtures; or (F) easements necessary or beneficial to the use of the homestead, including access easements for ingress and egress.

Problem with Section 153.8: The constitutional provision clearly states that a home equity loan cannot be "secured by any additional real or personal property other than the homestead." Defining the homestead may qualify as an interpretation, but the constitution does not provide for any exceptions. The exceptions in (a)(1)(A-E) do not interpret but improperly modify the language of the constitutional provision.

c. Section 153.10

Texas Constitutional Provision	Agencies' "Interpretation"
Section 50(a)(6)(K): "is the only debt secured by the homestead at the time the extension of credit is made unless the other debt was made for a purpose described by Subsections (a)(1)-(a)(5) or Subsection (a)(8) of this section;"	§153.10.Number of Loans: Section 50(a)(6)(K). An equity loan must be the only debt secured by the homestead at the time the extension of credit is made unless the other debt was made for a purpose described by Section 50(a)(1)-(a)(5) or (a)(8). (1) Number of Equity Loans. An owner may have only one equity loan at a time, regardless of the aggregate total outstanding debt against the homestead. *(2)* ***Loss of homestead designation. If under Texas law the property ceases to be the homestead of the owner, then the lender may treat what was previously a home equity mortgage as a non-homestead mortgage.***

Problem with Section 153.10: The constitutional provision does not address what will happen when the property is no longer a homestead, thus the interpretation in 153.10(2) is really a new unauthorized rule.

d. Section 153.12

Texas Constitutional Provision	Agencies' "Interpretation"
Section 50(a)(6)(M)(i): "is closed not before the 12th day after the later of the date that the owner of the homestead submits an application to the lender for the extension of credit or the date that the lender provides the owner a copy of the notice prescribed by Subsection (g) of this section;"	§153.12.Closing Date: Section 50(a)(6)(M)(i). An equity loan may not be closed before the 12th calendar day after the later of the date that the owner submits an application for the loan to the lender or the date that the lender provides the owner a copy of the required consumer disclosure. For purposes of determining the earliest permitted closing date, the next succeeding calendar day after the date the lender provides the owner a copy of the required consumer disclosure is the first day of the 12-day waiting period. The equity loan may be closed at any time on or after the 12th calendar day after the date the consumer disclosure is provided to the owner. (1) Submission of a loan application to an agent acting on behalf of the lender is submission to the lender. ***(2) A loan application may be given orally or electronically.***

Problem with Section 153.12: The constitutional provision does not authorize or otherwise imply that a loan application may be made orally in order for the 12 day waiting period to begin. The provision does not state the deadline begins after an owner "applies" or "starts" the application process. The provision requires the application to be submitted. The literal text should be relied upon and the interpretation should strive to avoid a construction that renders any provision meaningless or inoperative. The intent of the Legislature when it passed this limitation can be found in the Section by Section Analysis of the resolution which states:

> **[A] lender or holder of equity loan may not close the loan before the twelfth day after the lender receives the completed application.**
>
> **House Comm. On Financial Institutions, Bill Analysis, Tex. C.S.H.J.R. 31, 75th Leg. (April 20, 1997).**

The proposed interpretation could result in the twelve day cooling off period to claim to begin when a Texas homeowner picks up the phone from a telemarketer and unknowingly answering some questions that might be part of a loan application. The interpretation should not allow the waiting period to begin until there has been a complete written application submitted or a written disclosure received as seemingly required by the constitutional provision.

e. Section 153.13

Texas Constitutional Provision	Agencies' "Interpretation"
Section 50(a)(6)(M)(ii): "one business day after the date that the owner of the homestead receives a final itemized disclosure of the actual fees, points, interest, costs, and charges that will be charged at closing. **If a bona fide emergency or another good cause exists and the lender obtains the written consent of the owner, the lender may provide the documentation to the owner or the lender may modify previously provided documentation on the date of closing;"**	§153.13.Preclosing Disclosures: Section 50(a)(6)(M)(ii). ... (4) A de minimus variance can be good cause at the owner's option. An owner who has received a preclosing disclosure may consent to receive a subsequent or modified preclosing disclosure on the date of closing under the good cause standard if: ***(A) the actual disclosed fees, costs, points and charges on the date of closing do not vary from the initial preclosing disclosure by more than the greater of:*** ***(i) $100 of the amount charged at closing or*** ***(ii) .125% of the principal amount of the equity loan at closing; or*** ***(B) one or more items in subparagraph (A) of this paragraph is less than the disclosed rate or amount on the initial preclosing disclosure.***

Problem with Section 153.13: The interpretation conflicts with a plain reading of the constitutional provision. "Good cause" is defined in part as an amount, and not a reason. The constitution says a borrower is to get a disclosure of the actual fees, points, interest and costs, not something close. Also, because the way the interpretation is drafted a lender can charge more than $100 over the initial disclosure (e.g, $1,000), and still close on the loan so long as another item in the list is actually less than the initial disclosure.

f. Section 153.15

Texas Constitutional Provision	Agencies' "Interpretation"
Section 50(a)(6)(N): "is closed only at the office of the lender, an attorney at law, or a title company;"	§153.15.Location of Closing: Section 50(a)(6)(N). An equity loan may be closed only at an office of the lender, an attorney at law, or a title company. The lender is anyone authorized under Section 50(a)(6)(P) that advances funds directly to the owner or is identified as the payee on the note. (1) An equity loan must be closed at the permanent physical address of the office or branch office of the lender, attorney, or title company. The closing office must be a permanent physical address so that the closing occurs at an authorized physical location other than the homestead. ***(2) A lender may accept a properly executed power of attorney allowing the attorney-in-fact to execute closing documents on behalf of the owner.*** ***(3) A lender may receive consent required under Section 50(a)(6)(A) by mail or other delivery of the party's signature to an authorized physical location and the homestead.***

Problem with Section 153.15: The constitution requires closings to occur at an office of the lender, a title company or attorney's office; meanwhile the

interpretation clearly provides an exception to this provision by allowing closings to occur using a power of attorney which could be signed by a borrower at their kitchen table.

g. Section 153.18

Texas Constitutional Provision	Agencies' "Interpretation"
Section 50(a)(6)(Q)(i): "is made on the condition that: **the owner of the homestead is not required to apply the proceeds of the extension of credit to repay another debt except debt secured by the homestead or debt to another lender;"**	§153.18.Limitation on Application Proceeds: Section 50(a)(6)(Q)(i). An equity loan must be made on the condition that the owner of the homestead is not required to apply the proceeds of the extension of credit to repay another debt except debt secured by the homestead or debt to another lender. (1) An owner may use the proceeds of an equity loan for any purpose. An owner is not precluded from voluntarily paying off a debt that is owed to the same lender. (2) The lender may not require an owner to repay a debt owed to the lender, unless it is a debt secured by the homestead. The lender may require debt secured by the homestead or debt to another lender or creditor be paid out of the proceeds of an equity loan. The lender may not otherwise specify or restrict the use of the proceeds. ***(3) When an owner applies for a debt consolidation loan, it is the owner, not the lender, that is requiring that proceeds be applied to another debt. If the proceeds of a home equity loan are used in conformity with owner's credit application, the limitations of this section do not apply.***

Problem with Section 153.18: The interpretation carves out an exception to the constitution where none exists. A lender may not require the borrower to use the proceeds to pay off its debt unless it is secured by the homestead, regardless of the name of the loan. The constitution also does

not provide an exception when the funds are used in conformity with the credit application. The interpretation attempts to modify the constitution, not interpret it.

h. Section 153.20

Texas Constitutional Provision	Agencies' "Interpretation"
Section 50(a)(6)(Q)(iii): "is made on the condition that: **the owner of the homestead not sign any instrument in which blanks are left to be filled in;"**	§153.20.No Blanks in the Equity Loan Agreement: Section 50(a)(6)(Q)(iii). The "blanks that are left to be filled in" referenced in Section 50(a)(6)(Q)(iii) refers to omitted contract terms in the equity loan agreement.

Problem with Section 153.20: The constitutional provision states that blanks should not be within "any instrument" signed by the owner. The interpretation improperly restricts this to "omitted contract terms in the equity loan agreement."

i. Section 153.22

Texas Constitutional Provision	Agencies' "Interpretation"
Section 50(a)(6)(Q)(v): "is made on the condition that: **the lender, at the time the extension of credit is made, provide the owner of the homestead a copy of all documents signed by the owner related to the extension of credit;"**	§153.22.Copies of Documents: Section 50(a)(6)(Q)(v). At closing, the lender must provide the owner with a copy of all documents that are signed at closing in connection with the equity loan. ***The lender is not required to give the owner copies of documents that were signed by the owner prior to closing, such as those signed during the application process.*** Because of their nature some documents, for example, a notification of the election of an owner or an owner's spouse not to rescind under the right of rescission must be signed after the date of closing. The lender must provide the owner copies of documents signed after the date of closing within three business days.

Problem with Section 153.22: The constitutional provision says that the lender is required to provide the owner at closing a copy of all documents signed by the owner that are related to the extension of credit. The interpretation directly conflicts with this provision.

j. Section 153.51

Texas Constitutional Provision	Agencies' "Interpretation"
Section50(g): "An extension of credit described by Subsection (a)(6) of this section may be secured by a valid lien against homestead property if the extension of credit is not closed before the 12th day after the lender provides the owner with the following written notice on a separate instrument: ... ."	§153.51.Consumer Disclosure: Section 50(g). An equity loan may not be closed before the 12th day after the lender provides the owner with the consumer disclosure on a separate instrument. ***(1) If a lender mails the consumer disclosure to the owner, the lender shall allow a reasonable period of time for delivery. A period of three calendar days, not including Sundays and legal holidays, constitutes a rebuttable presumption for sufficient mailing and delivery.*** (2) Certain provisions of the consumer disclosure do not contain the exact identical language concerning requirements of the equity loan that have been used to create the substantive requirements of the loan. The consumer notice is only a summary of the owner's rights, which are governed by the substantive terms of the constitution. ***The substantive requirements prevail regarding a lender's responsibilities in an equity loan transaction.*** A lender may supplement the consumer disclosure to clarify any discrepancies or inconsistencies. ***(3) A lender may rely on an established system of verifiable procedures to evidence compliance with this section.***

Problem with Section 153.51: The interpretation improperly attempts to change the plain language of the constitutional provision by declaring that mailing the disclosures, allowing three days for delivery, constitutes actually providing the disclosures to the borrower; and declaring that the disclosures are not binding when in conflict with other loan documents; and declaring that a lender may rely on "an established system of verifiable procedures to evidence compliance." The proposed interpretation does not interpret but clearly modifies the language of the constitutional provision. The constitution requires the lender to provide disclosures to the homeowner. The provision did not merely require the lender to mail the disclosures and presume the borrower received them. The constitution contemplates that the owner actually receive the disclosures before a lender could close a loan. The constitution did not provide a provision relating to whether the disclosures or the other loan documents trump the other, and also did not provide a provisions allowing lenders to demonstrate compliance merely by showing they have an established procedure. The constitution did not merely require a lender to have a procedure, but requires every borrower to be provided a disclosure of their rights.

27. Defendants acknowledge that the new interpretations seek to do more than just interpret the specific provisions of the Texas Constitution:

> **These interpretations are intended to not only construe the actual language of the provisions, *but also to***

> ***provide a practical framework*** **for home equity lending that reflects the constitutional language and the intent of the legislature and the voters.**
>
> **Preamble, 7 Tex. Admin. Code Ch. 153 (2004) (Joint Financial Regulatory Agencies comprised of Finance Commission of Texas and Texas Credit Union Commission).**

28. **While the new rules may in fact provide a practical framework for home equity lending in this state, they also unconstitutionally expand the safe harbors provided to lenders. The constitutional and statutory provisions merely give Defendants the power to fairly interpret specific provisions of Section 50, Article XVI of the Texas Constitution: Subsections (a)(5)-(a)(7), (e)-(p), and (t). The problem is that many of the rules are not actually interpretations at all, or are not fair interpretations.**

29. **On information and belief, the new rules and interpretations were in fact the result of "negotiations" between Defendants' staff and lenders. While Plaintiffs were able to provide comments to Defendants prior to the adoption of the rules and interpretations, Plaintiffs were not invited to participate in any negotiations. Depending on the extent and substance of these negotiations, Plaintiffs reserve all allegations of unfair influence or improper rulemaking procedures until completion of discovery.**

VI. CAUSE OF ACTION

30. **Defendants have adopted interpretations and rules in violation of the Texas Constitution which interfere with or impair, or threaten to interfere with or impair, a legal right or privilege of Plaintiffs. Pursuant to Section 2001.038 of the**

Texas Government Code, and Chapter 37 of the Texas Civil Practice & Remedies Code, Plaintiffs seek a declaratory judgment to invalidate the rules and interpretations.

VII. REQUEST FOR RELIEF

31. Plaintiffs request the Court for the following:

a. a judgment declaring that Defendants' rules and interpretations are invalid;

b. court costs, and any other relief to which Plaintiffs are entitled.

32. Plaintiff ACORN also requests the Court for attorney fees and court costs pursuant to Section 37.009 of the Texas Civil Practice & Remedies Code. (The individual Plaintiffs, represented by Robert W. Doggett, do not request attorney fees.)

Respectfully submitted,

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