

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MARK ZACHARY,	§	
Plaintiff,	§	
	§	
vs.	§	CIVIL ACTION NO. 08-cv-00214
	§	
	§	JURY TRIAL DEMANDED
COUNTRYWIDE FINANCIAL	§	
CORPORATION d/b/a	§	
COUNTRYWIDE HOME LOANS, INC. and	§	
COUNTRYWIDE MORTGAGE	§	
VENTURES, LLC a/k/a COUNTRYWIDE	§	
KB HOME LOANS,	§	
Defendants.	§	
	§	

PLAINTIFF'S SECOND AMENDED COMPLAINT

MARK ZACHARY, Plaintiff, by counsel, hereby complains of COUNTRYWIDE FINANCIAL CORPORATION d/b/a COUNTRYWIDE HOME LOANS, INC. and COUNTRYWIDE MORTGAGE VENTURES, LLC a/k/a COUNTRYWIDE KB HOME LOANS, and for cause of action shows the following:

I. JURISDICTION

1. Jurisdiction is invoked pursuant to the diversity of the parties under 28 U.S.C. §1332 to secure the protection of and redress the deprivation of rights as established by the public policy exception to the at-will doctrine espoused in Texas law commonly known as the *Sabine Pilot* doctrine derived from the case, *Sabine Pilot Srvce, Inc. v. Hauck*, 687 S.W.2d 733 (Tex. 1985).

II. VENUE

2. Venue is proper in the U.S. District Court for the Southern District of Texas Houston Division. A substantial part, if not all, of the cause of action accrued or arose in the Houston Division of the Southern District of Texas. Defendants maintain sufficient business contacts within the counties comprising the Houston Division. Furthermore, the Plaintiff resided within the Houston Division during the pertinent times in question and at least some of the events that form the basis of this lawsuit occurred in the Houston Division.

III. PARTIES

3. **MARK ZACHARY** (“plaintiff”) is a United States citizen and a resident of the County of Harris, State of Texas and at all pertinent times he was a resident of Harris County, Texas. At all times material hereto, Plaintiff was an employee of the Defendants.

4. Defendant **COUNTRYWIDE FINANCIAL CORPORATION d/b/a COUNTRYWIDE HOME LOANS, INC.** (“Countrywide”), is a New York corporation duly authorized to do business in Texas and was Plaintiff’s employer. Defendant Countrywide has accepted service of process through its counsel, but has not yet filed an answer.

5. Defendant **COUNTRYWIDE MORTGAGE VENTURES, LLC a/k/a COUNTRYWIDE KB HOME LOANS** (“CWKB”), is a Delaware corporation duly authorized to do business in Texas and was Plaintiff’s employer. Defendant has accepted service of process through its counsel, but has not yet filed an answer.

6. Defendants are “joint employers” as that term is understood under state and federal law. The term “Defendants” will mean Countrywide and CWKB collectively.

III. FACTS

7. Countrywide Financial Corporation/Countrywide Home Loans is a leading lender in home loans and other financing instruments and is publicly traded on the New York Stock Exchange as CFC. KB Home is a leading home builder which is also publicly traded on the New York Stock Exchange as KBH.

8. Zachary commenced his employment with Defendants in August 2006 as a Regional Vice President, Manager of the CWKB Home Loans Houston Division (which is a joint venture between Countrywide Financial Corporation and KB Home). His work equated to an excellent review that was given to him on February 28, 2007. Based on objective and subjective criteria, Zachary was poised to excel within the company. In his comments attached to his evaluation, Zachary was ominously prescient when he warned: *“In a market where there are more foreclosures and defaults than we care to talk about, I think part of that is because some builders and lenders are setting people up for further failure in life by putting them in loans and houses they do not belong in.”*

9. In September 2006, Mr. Zachary began questioning Countrywide executives as to a questionable practice on the part of Countrywide where only one appraiser was being used to appraise homes on behalf of KB Home as it related to CWKB. The appraiser, as known to Countrywide executives, was being strongly encouraged to inflate the homes' appraised value by as much as 6% to allow the homeowner to “roll up” all closing costs. Not only would the home buyer be duped by this act, the end investors (the secondary market) providing funds for these loans were also duped because they were not made aware that the actual home value could actually be less than the loan amount tied to the mortgage note.

This inflated value put the buyer upside down on the home immediately after purchasing it; thus, setting up the buyer to become more susceptible to defaulting on the loan. It also put the lender and secondary market end investor at risk because they were unaware of the true value of their asset.

10. After Zachary brought his concerns to executives within CWKB, it was brushed aside as he was told, “that was the way KB Home wanted it.” Not agreeing with the statement or procedure he turned to his Countrywide executive in Houston. From there he was directed to the Employee Relations Department and subsequently to Senior Risk Management executives where a meeting was conducted by phone in May 2007. In January 2007 an audit had been conducted and brought to the attention of Countrywide executives which corroborated his concerns.

11. Zachary continued to make this inflated appraisal issue known to Defendant’s executives. For example, Zachary recounted in an e-mail dated May 11, 2007, to KB Home executives and CWKB’s Senior Vice President and Divisional Manager to whom Zachary reported, a letter from an appraiser to the appraiser’s Area Appraiser Manager whereby the appraiser was told by the KB Home Closing Coordinator that “*KB will not be able to continue doing business with him if he cannot hit the contract sales price on his appraisals*” and that the KB Home Closing Coordinator stated that “*his past appraiser never missed the contract sales price even if he had to go outside of the given community to make value.*” Zachary went on to state in the e-mail that “*This is considered appraisal fraud.*”

12. Zachary continued to voice his concerns on other grave illegal issues which were being conducted by CWKB. Another of such issues involved Countrywide's practice of flipping a loan application from a "full doc" loan program to a "stated income" or "no income, no asset" loan program. He learned that loans were being canceled at the prime regional operations center as full documentation loans and transferred to the sub-prime operations center in Plano, Texas as stated loans or No Income No Assets ("NINA") loans.

13. Zachary sent an e-mail to one of his supervisors, the Senior Vice President Divisional Manager of CWKB dated February 13, 2007, where he stated that "*in visiting with a few HLCs (Home Loan Counselors) and (the Branch Manager) it seems to be an accepted practice for (CWKB and Countrywide) to have a full doc loan and then if it can't be approved at the ROC (Regional Operations Center) we flip to a stated and send to FSL (Full Spectrum Lending) under non-prime (sub-prime business unit).*"

14. Countrywide's representatives were aware that the applicant would not be eligible for any loan program based on their current income level and/or job status. So, the loan officer would then coach the loan applicant as to what income level would be needed to qualify when it was sent to the sub-prime originators in Plano, Texas. The applicant would then apply with sub-prime and would qualify under the status of a "stated" or "NINA" loan application. Indeed, loan officers would go so far as to actually assist the loan applicant with the application to submit to the prime or sub-prime unit with false income amounts, so that the applicant would get the loan under false pretenses.

15. Another example is that in an e-mail dated October 25, 2006, from Zachary to another Senior Vice President and Divisional Operations Manager of CWKB, Mr. Zachary

asks: “just so I am fully understand our NINA-If a person is doing an NINA, it has to be OO (Owner occupied) and he/she has to have a job in the area in which they are buying right?...suppose a KB agent blurted out on the phone that this buyer has to go NINA because he doesn’t have a job in the Houston area. Suppose we had him approved on another product but when we asked for bank statement the agent said you don’t need bank statements because he should be on a NINA because he doesn’t have a job! If that case were to present itself, we’d have to deny it huh?” Zachary received a reply that same date from the **Senior Vice President Divisional Manager of CWKB** stating “*I wouldn’t deny it because I didn’t hear anything. I would definitely tell the SC (sales counselor) to shut up or shoot him!*”

16. Yet another example is that on May 8, 2007, Zachary sent an e-mail to Countrywide’s Risk Management group wherein he forwarded an e-mail dated April 9, 2007, which he had sent to Countrywide’s Senior Vice President Divisional Manager to whom he reported, where he stated that he had been “*putting a stop to deals like: originating a loan here as full doc only to be canceled and sent to non-prime as stated or NINA because I can no longer allow that to go on*” and that a Countrywide account executive, having known about the situation suggested that such person will “*go stated.*” Zachary also commented in the e-mail that he has “*worked against any fraud issues.*”

17. Indeed such practice even occurred without the customer’s knowledge. For example, a potential buyer known to Zachary continued to complain because the loan officer filled in an income amount that the buyer did not even meet. This customer complained to Countrywide by writing in an e-mail dated September 19, 2006, “*I was told that my loan had been turned over to Countrywide’s internal fraud department for review because a loan*

officer increased my income figures without authorization in order to get me approved for the stated income loan. I was told by several people at Countrywide that this was done just to get me qualified and that nobody would check on it. I told them I could not sign such inflated income figures and that Countrywide should process my application based on the numbers I provided.” Zachary began to bring such complaints and concerns to executives within Countrywide and CWKB. He made his first complaint in November 2006 to no avail. His concerns escalated through early 2007 when he continued to complain to additional executives, to Countrywide’s Employee Relations Department and to Risk Management in the aforementioned meeting which took place in early May 2007. In fact, Risk Management officials asked him to name names during the conference call. The identities of those individuals were provided by Zachary to Countrywide’s Risk Management executives.

18. Zachary had also told Countrywide’s Employee Relations Representative in an e-mail dated April 11, 2007, that the practice of allowing loans that were rejected due to debt to income issues were being accepted by the company’s non-prime unit as ‘stated’ or ‘NINA’ and the inflated appraisals constitutes a “*formula for disaster.*”

19. Contemporaneously with the complaint discussed above, Zachary had serious concerns as well about the requirement that Countrywide approve 10% of the backlog inventory of loan applications each day so that the green light could be given to KB Home to start building the homes under contract. Zachary was instructed by the highest levels of CWKB to approve such percentage with an unconditional final approval. Yet, when he reviewed the loan applications, credit scores and borrower information provided on the Homes Not Authorized (HNA) report and other internal Countrywide reports, he realized

that such unconditional approvals could not be made on any percentage approaching the 10% threshold given to him. After being instructed to do so, Zachary met with the Regional Operations Center Vice President to try to meet that number. They were unable to do so.

20. More specifically, he told his supervisor with CWKB, who was a Senior Vice President and Divisional Manager, that he was refusing to unconditionally approve an applicant who did not meet the requisite criteria due to the fraudulent and illegal nature of such conduct. Zachary's supervisor with CWKB came to Houston in May 2007 to review the situation. From that point forward, Zachary was excluded from the process and taken out of the loop and he was treated like a pariah by his supervisor. Yet, all of a sudden, the 10% approval rate was being met after his supervisor intervened. When Zachary checked into the approvals, he saw that they were being unconditionally approved as Phase Code 2 approvals, but which lacked the critical documentation and information required to properly place them in such category. In essence, the loans were being approved without a review by an underwriter. These approvals were known as "Shadow Approvals." With such "Shadow Approvals," KB Home could start building the house. The loan may eventually get approved to a person who was not able to meet the payment terms of the loan due to their poor financial situation and history. A discussion of these concerns was also brought by Zachary to the attention of various executives and then to the Risk Management team, culminating in the May 2007 meeting, above.

21. Within several weeks after the Risk Management meeting in May 2007 where Zachary laid it on the line with his recitation of the abovementioned illegal acts, he was given a written warning by his CWKB supervisor, for performance issues. Not only is the

timing damning to the company, but it comes on the heels of an excellent performance evaluation provided to him just three months prior. Indeed, Countrywide cavalierly included the 10% threshold as being a performance metric that Zachary was required to meet despite the “Shadow Approval” issues. Nonetheless, the warning created an unobtainable action plan in an effort to set Zachary up to fail. He then provided a response to the warning and followed that up with a lengthy memo to his supervisor regarding the “Shadow Approval” issues and the illegality of this and the other practices referenced above. More specifically, he reiterated and outlined the fraudulent and “illegal” conduct that has been taking place within Countrywide and its impact on the lender, home builder, and investors (such as Fannie Mae, FHA, VA and other private investors) with the end result being defaults and foreclosures. Countrywide failed to heed the warning bells and alarm raised by Zachary. Rather, it chose to eliminate them by setting him up to fail after his refusal to perform such illegal acts and reporting of such concerns and then, approximately two weeks later, terminating him.

CAUSE OF ACTION

Cause of Action - Public Policy Wrongful Discharge under *Sabine Pilot*¹

22. The preceding paragraphs are incorporated by reference herein.
23. The Defendants are liable to Plaintiff under the public policy exception to the

¹ Zachary has filed a complaint with the U.S. Department of Labor in connection with his whistleblower retaliation claims against Defendants pursuant to the employee protection provisions of Public Law 107-204, Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002, 18 USC §1514A (“Sarbanes-Oxley”). Sarbanes-Oxley covers employees of publicly traded companies, their contractors, and agents from retaliatory or discriminatory actions by the employer. Since the U.S. Department of Labor is currently investigating such claims which may be brought into this lawsuit at some point in time in the future and since the facts and claims are intertwined, Plaintiff has sought an abatement of this proceeding while the government’s investigation is pending.

employment- at-will doctrine which prohibits an employer from discharging an employee for refusing to perform an illegal act which carries criminal penalties. As a result of Defendants' actions, the Plaintiff sues for actual damages in an amount in excess of the minimum jurisdictional limits of this court.

24. As a further result of Defendants' acts described above, Plaintiff has suffered and continues to suffer mental anguish and emotional distress and damage to his career and reputation, all to his detriment and compensable at law.

25. The wrongful conduct of Defendants is evidenced by actual malice and/or conscious indifference towards employees who refuse to perform illegal acts. Due to the Defendants' conduct, punitive damages in excess of the minimum jurisdictional limits of this Court should be assessed against Defendants so as to deter this type of egregious and reprehensible conduct in the future.

WHEREFORE, Plaintiff prays that this court advance this cause on the docket, order a speedy hearing at the earliest practicable date and cause this case in every way to be expedited and upon such hearing to:

- i. Grant Plaintiff a preliminary and permanent injunction enjoining Defendants, its agents and employees and those acts from continuing to maintain the policies, practices, customs or usages which have resulted in the unlawful conduct toward Plaintiff described herein.
- ii. Grant Plaintiff a declaratory judgment, that the practices, policies, customs and usages complained of herein are violative of his rights under state law.

- iii. Order the Defendants to grant Plaintiff additional equitable, actual and compensatory relief, requiring said Defendant to make Plaintiff whole, including but not limited to promotions, back pay and front pay including all accrued interest, insurance benefits, pension benefits, vacation benefits, sick leave, and other incidental benefits that attach to and were incidental to Plaintiff's employment with Defendants and incidental to any such position held or sought by Plaintiff.
- iv. Order the Defendants to pay punitive damages in an amount at least three times the actual and compensatory damages awarded.
- v. Order front pay for Plaintiff in lieu of reinstatement, if reinstatement is not feasible.
- vi. Pre-judgment interest at the highest legal rate;
- vii. Post-judgment interest at the highest legal rate until paid; and
- viii. Grant Plaintiff his Court costs incurred herein and such further, additional or alternative relief and affirmative action orders as may appear equitable and just.

Respectfully submitted,
HILDER & ASSOCIATES, P.C.

By: /s/ Philip H. Hilder

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