

**UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA**

ROBERT H. BRAVER, an individual,

Plaintiff,

v.

CASE NO. CIV-04-1013-W

**AMERIQUEST MORTGAGE
COMPANY, INC. dba AMERIQUEST
MORTGAGE CORPORATION, INC. its
AGENTS, EMPLOYEES, and ASSIGNS;
et al**

Defendants.

**AMERIQUEST MORTGAGE COMPANY'S ANSWER AND AFFIRMATIVE
DEFENSES TO PLAINTIFF'S PETITION**

Defendant Ameriquest Mortgage Company ("Ameriquest") (erroneously sued as Ameriquest Mortgage Company, Inc.), by and through its attorneys of record, answers the Petition filed by Robert H. Braver ("Petition") as follows:

1. Answering Paragraph 1 of the Petition, Ameriquest lacks sufficient information or belief upon which to admit or deny the allegations of this paragraph, and based thereon, generally and specifically denies them.
2. Answering Paragraph 2 of the Petition, Ameriquest denies, generally and specifically, the allegations herein.
3. Answering Paragraph 3 of the Petition, Ameriquest denies, generally and specifically, the allegations herein.
4. Answering Paragraph 4 of the Petition, Ameriquest denies, generally and specifically, the allegations herein.

5. Answering Paragraph 5 of the Petition, Ameriquest denies, generally and specifically, the allegations herein.

6. Answering Paragraph 6 of the Petition, Ameriquest lacks sufficient information or belief upon which to admit or deny the allegations of this paragraph, and based thereon, generally and specifically denies them.

7. Answering Paragraph 7 of the Petition, Ameriquest lacks sufficient information or belief upon which to admit or deny the allegations of this paragraph, and based thereon, generally and specifically denies them.

8. Answering Paragraph 8 of the Petition, Ameriquest lacks sufficient information or belief upon which to admit or deny the allegations of this paragraph, and based thereon, generally and specifically denies them.

9. Answering Paragraph 9 of the Petition, Ameriquest denies, generally and specifically, the allegations against Ameriquest and lacks sufficient information or belief upon which to admit or deny the remaining allegations and, based thereon, generally and specifically denies them.

10. Answering Paragraph 10 of the Petition, Ameriquest denies, generally and specifically, the allegations herein.

11. Answering Paragraph 11 of the Petition, Ameriquest denies, generally and specifically, the allegations herein.

12. Answering Paragraph 12 of the Petition, Ameriquest denies, generally and specifically, the allegations herein.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

(Failure to State a Claim)

1. Plaintiff fails to allege sufficient facts to state any claim for which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

(Laches)

2. Plaintiff's claims are barred by the doctrine of laches.

THIRD AFFIRMATIVE DEFENSE

(Statute of Limitations)

3. Plaintiff's claims are barred by all applicable state and federal statutes of limitations.

FOURTH AFFIRMATIVE DEFENSE

(Mistake)

4. Any alleged acts or omissions of Ameriquest giving rise to Plaintiff's claims are the result of innocent mistake despite reasonable procedures implemented by Ameriquest.

FIFTH AFFIRMATIVE DEFENSE

(Fault of Plaintiff)

5. If Plaintiff suffered or sustained any loss, injury, damage or detriment, the same was directly and proximately caused and contributed to by the breach, conduct, acts, omissions, activities, carelessness, recklessness, negligence, and/or intentional misconduct of Plaintiff, and not by Ameriquest.

SIXTH AFFIRMATIVE DEFENSE
(Fault of Others)

6. If Plaintiff suffered or sustained any loss, injury, damage or detriment, the same was directly and proximately caused and contributed to by the breach, conduct, acts, omissions, activities, carelessness, recklessness, negligence, and/or intentional misconduct of others, and not by Ameriquest.

SEVENTH AFFIRMATIVE DEFENSE
(Unjust Enrichment)

7. Plaintiff would be unjustly enriched if allowed to recover on this Petition.

EIGHTH AFFIRMATIVE DEFENSE
(Comparative Negligence)

8. Plaintiff's own negligence proximately caused and contributed to the resulting injuries and damages claimed in the Petition.

NINTH AFFIRMATIVE DEFENSE
(Intervening Acts)

9. The damages complained of were the result of the intervening actions of others and were not proximately caused by the actions or omissions of Ameriquest.

TENTH AFFIRMATIVE DEFENSE
(Contribution)

10. Any physical harm alleged could be attributed to several causes, and the damages for this harm, if any, should be apportioned among the various causes according to the contribution of each cause to the harm sustained.

ELEVENTH AFFIRMATIVE DEFENSE
(No Duty)

11. Ameriquest owes no duty to Plaintiff to control the alleged conduct of third persons.

TWELFTH AFFIRMATIVE DEFENSE
(Causation)

12. The Petition fails to show that any alleged acts or omissions of Ameriquest caused the injuries or damages claimed by Plaintiff.

THIRTEENTH AFFIRMATIVE DEFENSE
(Failure to Join Indispensable Parties)

13. The injuries or damages of which Plaintiff complain were caused in whole or in part by non-parties whom Plaintiff has failed to join in this action.

FOURTEENTH AFFIRMATIVE DEFENSE
(Failure to Mitigate Damages)

14. Plaintiff has failed, in whole or in part, to mitigate his alleged damages.

FIFTEENTH AFFIRMATIVE DEFENSE
(Several Liability)

15. Should Plaintiff prevail against Ameriquest, Ameriquest's liability is several and limited to its own actionable segment of fault, if any.

SIXTEENTH AFFIRMATIVE DEFENSE
(Preemption)

16. Plaintiff's claims are expressly preempted by the federal Can-Spam Act of 2003, including but not limited to 15 U.S.C. §§ 7701 et seq. and 15 U.S.C. § 7707(b).

SEVENTEENTH AFFIRMATIVE DEFENSE
(Waiver)

17. Plaintiff has waived any and all claims, rights and demands made by him in the Petition.

EIGHTEENTH AFFIRMATIVE DEFENSE
(Lack of Malice)

18. The allegedly wrongful conduct of Ameriquest was not malicious.

NINETEENTH AFFIRMATIVE DEFENSE
(Choice of Law)

19. Ameriquest expressly reserves any defenses that it may have available under any applicable laws of other jurisdictions, in accordance with federal choice of law rules.

TWENTIETH AFFIRMATIVE DEFENSE
(Offset)

20. Ameriquest is entitled to an offset to the claims set forth in the Petition sufficient to diminish or defeat Plaintiff's recovery thereunder.

TWENTY-FIRST AFFIRMATIVE DEFENSE
(Privilege)

21. The statements or representations made by Ameriquest, as alleged in the Petition, were privileged under State and Federal law.

TWENTY-SECOND AFFIRMATIVE DEFENSE
(Estoppel)

22. Plaintiff's claims are barred by the equitable doctrine of estoppel.

TWENTY-THIRD AFFIRMATIVE DEFENSE
(Consent)

23. Plaintiff consented to and approved all the acts and omissions about which Plaintiff now complains.

TWENTY-FOURTH AFFIRMATIVE DEFENSE
(Justification)

24. The acts and omissions alleged in the Complaint were justified.

TWENTY-FIFTH AFFIRMATIVE DEFENSE
(No Damages)

25. Plaintiff did not incur any damage or loss as a result of any act or conduct by Ameriquest.

TWENTY-SIXTH AFFIRMATIVE DEFENSE
(Speculative Damages)

26. Any damage or loss Plaintiff did incur as a result of any act or conduct by Ameriquest would be speculative at best.

TWENTY-SEVEN AFFIRMATIVE DEFENSE
(Third Party Independent Contractors)

27. The acts and/or omissions alleged in the Petition were committed by third party independent contractors for which Ameriquest has no responsibility.

TWENTY-EIGHT AFFIRMATIVE DEFENSE
(Reservation of Rights)

28. Ameriquest has insufficient knowledge or information on which to form a belief as to whether it may have additional, as yet unstated, affirmative defenses available. Ameriquest therefore reserves the right to assert additional affirmative defenses in the event discovery indicates that they may be appropriate.

TWENTY-NINTH AFFIRMATIVE DEFENSE
(Deprivation of Property without Due Process of Law)

29. Plaintiff's alleged statutory damages are so grossly disproportionate to any actual damages suffered by Plaintiff as to constitute a deprivation of property without due process of law.

WHEREFORE Ameriquest prays for judgment as follows:

1. That Plaintiff take nothing by reason of his Petition;
2. For its costs of suit herein;
3. For attorneys' fees according to proof; and
4. For such other and further relief as this Court may deem just and proper.

Respectfully Submitted:

s/ Robert A. Nance

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CERTIFICATE OF SERVICE

This is to certify that on this 23rd day of August, 2004, I electronically transmitted the attached documents to the Clerk of Court using the ECF system for filing the transmittal of a Notice of Electronic Filing to the following registrants:

Michael R. McKee
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Attorney for the Plaintiff

s/ Robert A. Nance
Robert A. Nance