

NO. \_\_\_\_\_

STATE OF TEXAS,  
Plaintiff,

v.

MIDLAND FUNDING LLC,  
MIDLAND CREDIT  
MANAGEMENT, INC., and  
ENCORE CAPITAL GROUP, INC.,  
Defendants.

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IN THE DISTRICT COURT OF

HARRIS COUNTY, TEXAS

\_\_\_\_ JUDICIAL DISTRICT

**PLAINTIFF'S ORIGINAL PETITION AND APPLICATION FOR  
TEMPORARY AND PERMANENT INJUNCTION**

TO THE HONORABLE JUDGE OF SAID COURT:

Plaintiff the STATE OF TEXAS, acting by and through Attorney General of Texas Greg Abbott, complains of **MIDLAND FUNDING, LLC, MIDLAND CREDIT MANAGEMENT, INC., and ENCORE CAPITAL GROUP INC.**, Defendants, and for cause of action would respectfully show as follows:

**I. DISCOVERY CONTROL PLAN**

1.1 The discovery in this case is intended to be conducted under Level 2 pursuant to TEX. R. Civ. P. 190.3.

**II. AUTHORITY**

2.1 This action is brought by Attorney General Greg Abbott, through his Consumer Protection & Public Health Division, in the name of the State of Texas and in the public interest under the authority granted to him by §17.47 of the Texas Deceptive Trade Practices-Consumer Protection Act, TEX. BUS. & COM. CODE ANN. §17.41 *et seq.* (hereafter the DTPA) upon the

grounds that Defendants have engaged in false, deceptive, and misleading acts and practices in the course of trade and commerce as defined in, and declared unlawful by, §§17.46(a) and 17.46(b) of the DTPA.

2.2 This action is also brought under the authority granted by §392.403(d) and §392.404 of the Texas Finance Code.

### **III. DEFENDANTS**

3.1 Defendant Midland Funding, LLC (“Midland Funding”) is a foreign limited liability company organized and existing under the laws of the Delaware. Midland Funding’s principal office is located at 8875 Aero Drive, Suite 200, San Diego, California 92123. Midland Funding is registered with the Texas Secretary of State pursuant to Tex. Fin. Code §392.101 to engage in debt collection activities in Texas. Midland Funding may be served with process by serving its registered agent for service of process: Service Company dba CSC - Lawyers Incorporating Service Company, 211 E. 7<sup>th</sup> Street, Suite 620, Austin, TX 78701-3218.

3.2 Defendant Midland Credit Management, Inc. (“Midland Credit”) is a foreign corporation organized and existing under the laws of the State of Kansas. Midland Credit’s principal office is located at 8875 Aero Drive, Suite 200, San Diego, California 92123. Midland Credit is registered with the Texas Secretary of State pursuant to Tex. Fin. Code §392.101 to engage in debt collection activities in Texas. Midland Credit may be served with process by serving its registered agent for service of process: Service Company dba CSC - Lawyers Incorporating Service Company, 211 E. 7<sup>th</sup> Street, Suite 620, Austin, TX 78701-3218.

3.3 Defendant Encore Capital Group Inc. (“Encore”) is a foreign corporation organized and existing under the laws of the State of Delaware. Encore’s principal office is located at 8875 Aero Drive, Suite 200, San Diego, California 92123. During the relevant period of time, Encore was registered with the Texas Secretary of State pursuant to Tex. Fin. Code §392.101 to engage in debt collection activities in Texas. Defendants Midland Funding and Midland Credit Management are subsidiaries of Encore. Encore may be served with process by serving the Texas Secretary of State, 1019 Brazos Street, Austin, Texas 78701 as its agent for service because Encore does not maintain a regular place of business in Texas or a designated agent for service of process, and this suit arose from Encore’s business in Texas.

#### **IV. VENUE**

4.1 Venue of this suit lies in Harris County, Texas, for the following reasons:

- A. Venue is proper in Harris County, Texas, because Harris County is the county in which all or a substantial part of the events or omissions giving rise to the claims occurred. TEX. CIV. PRAC. & REM. CODE §15.002(a)(1); and
- B. Venue is also proper under §17.56 of the DTPA because Defendants do business in Harris County, Texas, and many of the transactions that form the basis of this suit occurred in Harris County, Texas.

#### **V. PUBLIC INTEREST**

5.1 Plaintiff, State of Texas, has reason to believe that Defendants have engaged in, and will continue to engage in, the unlawful practices set forth below. Plaintiff, State of Texas, has reason to believe Defendants have caused and will cause immediate, irreparable injury, loss and damage to the State of Texas and its citizens, and will also cause adverse effects to legitimate business

enterprises which lawfully conduct trade and commerce in this State. Therefore, the Consumer Protection & Public Health Division of the Office of the Attorney General of the State of Texas believes and is of the opinion that these proceedings are in the public interest.

#### **VI. TRADE AND COMMERCE**

6.1 Defendants have, at all times described below, engaged in conduct constituting trade and commerce, as those terms are defined in §17.45(6) of the DTPA.

#### **VII. ACTS OF AGENTS**

7.1 Whenever in this petition it is alleged that a particular Defendant or group of Defendants did any act, it is meant that:

- A. The Defendant or group of Defendants performed or participated in the act; or
- B. The Defendant's or group of Defendants' officers, agents, attorneys, trustees or employees performed or participated in the act on behalf of and under the authority of the Defendant or group of Defendants.

#### **VIII. NOTICE**

8.1 The Defendants, through their attorney, have been contacted by the consumer protection division at least seven (7) days prior to the filing of this suit pursuant to §17.47 of the DTPA to inform them in general of the alleged unlawful conduct.

#### **IX. FACTUAL BACKGROUND**

9.1 Defendants are one of the largest third party consumer debt collector companies in the country. Defendants purchase large portfolios of consumer debts from issuers of consumer credit such as VISA, Mastercard, Bank of America, Bank One, and Citibank, comprising millions of consumer accounts, such as credit card debts and defaulted auto loans and cellular phone plans.

Defendants pay pennies on the dollar for these accounts. In 2010 alone, Defendants paid \$362 million to acquire consumer debt portfolios with a face value of \$10.9 billion for an average price of approximately 3.3 cents per dollar of debt acquired. For 2010 alone, Defendants reported ~\$49 million in profits. Every year, Defendants purchase hundreds of thousands of accounts involving Texas consumers.

9.2 When Defendants purchase these consumer debt portfolios, generally these accounts have been “charged off” by the original creditors. The original creditors or their agents have exhausted their own debt collection efforts and determined that the account needs to be “charged off”, which allows for the creditor to take the loss as a tax deduction.

9.3 The electronic portfolios of these charged off accounts acquired by Defendants contain limited categories of information about the debt. Typically, Defendants do not acquire the underlying credit agreements, payment history, or statements (or “media”) but retain the right to purchase the documentation from the original creditor at a later date.

9.4 Defendants’ collection activities prefer “efficiency” and profits over compliance with Texas debt collection laws. Defendants churn out millions of collection letters and millions of telephone calls from its call centers in Arizona, Minnesota and India, often using incomplete and/or inaccurate electronic information purchased from original creditors. Consumers complain Defendants have targeted the wrong person for collection or are attempting to collect debts that have been fully or partially paid or settled. Consumers also complain that Defendants pursue them for collection of old debts for which they do not have any records and are beyond the statute of limitations and credit reporting periods. Defendants’ form collection letters contain very little information about the debt, no supporting documentation, and no proof that ownership of the

debt has been transferred to Defendants. When a citizen contacts Defendants to dispute a debt or the amount of the balance owed, or to ask for additional information, little or nothing is done to investigate or verify the legitimacy of the debt.

9.5 Consumers complain that when they tell Defendants they do not owe the debt Defendants refuse to provide documentation to verify the debt and turn the tables on the consumer to prove the debt is not owed or not owed in the amount alleged. Consumers complain that this practice has resulted in loss of credit rating, inability to refinance their homes, and even loss of job opportunities, in addition to the aggravation of being harassed by a debt collector who refuses to verify the debt. Some consumers pay Defendants just to avoid a false report to the credit reporting agencies or avoid the harassment of a lawsuit. The Better Business Bureau reports that over 15,000 consumers have filed complaints regarding Defendants' collection practices.

***Robo-Signed Affidavits.***

9.6 When a consumer does not respond to collection efforts, Defendants may refer the account to law firms to file a lawsuit on their behalf. Since 2002, Defendants have filed over 60,000 debt collection lawsuits in Texas courts.

9.7 These lawsuits vary slightly depending upon the law firm that is engaged by Defendants; however, typically Defendants' debt collection lawsuit includes a boilerplate form petition, with Midland Funding as named plaintiff, for breach of contract and makes demand for principal, interest, costs, and attorneys' fees. The petition often contains gross errors such as alleging (falsely) that Midland Funding sold goods or services to the consumer, or stating that a copy of the credit agreement is attached to the petition (but is not). The boilerplate petition contains

requests for admissions that often include obviously false statements or self-serving legal conclusions such as admit or deny

- that true and correct copies of the terms and conditions of the use of the credit account are attached to the Original Petition (no such terms and conditions are attached);
- that the plaintiff [Midland Funding] extended credit to the consumer (which is contradicted by the face of the petition which states that Midland Funding is the assignee of the original creditor);
- that defendant [the consumer] has no defense to this suit, and judgment should be granted as prayed for;
- that plaintiff should be awarded reasonable attorney's fees;
- the affidavit attached to the petition is fully legal and correct.

9.8 Defendants typically attach a one page form "affidavit" or sworn statement to the petition. Under Texas law an affidavit is a written, factual statement signed by the person making it, sworn to before an officer authorized to administer oaths, and officially certified by the officer under seal of office. Tex. Gov't Code §312.011(1). The affidavit must show that it was made by a person who is competent to testify. Tex. R. Evid. 601(a). The affidavit must be based on the affiant's personal knowledge and must state that the facts in it are true. Tex. R. Evid. 104(b), 602. If statements made in an affidavit are false, they may be grounds for perjury.

9.9 A typical mass-produced form affidavit used by Defendants against Texas citizens prior to 2009 is called a "Form 425 (Texas) Affidavit." (A sample is attached as Ex. A hereto.) In Form 425, the affiant swears under oath (i) that the affiant has "personal knowledge" of the "facts herein" from his or her review of records of Midland Credit Management, (ii) that the

underlying “claim” is “within the personal knowledge” of the affiant, and (iii) that the affiant has “personal knowledge of relevant financial information” concerning the underlying account, including that the defendant failed to make payments on the account, that demand has been made, and that the affiant retained attorneys in the case to collect the debt.

9.10 These form affidavits attached to Defendants’ form petitions are used by Defendants to “prove up” the debt when moving for default judgment or summary judgment against the consumer. In granting default judgment or summary judgment in a liquidated damages case, the courts rely upon affidavits as evidence that the plaintiff has actually verified the debt is owed by the consumer who is being sued, that the balance owed is correctly stated, and that any interest or other charges are correctly stated according to the underlying credit agreement.

9.10 From 2002 through 2009, it is undisputed that Defendants filed thousands of false affidavits in their collection suits throughout Texas. Three Midland Credit employees have testified in depositions that during their employment, they signed 300 to 400 form affidavits *per day* at their offices in Minnesota, that they did little to nothing to review the contents of their affidavits before signing, that they did not review any documentation regarding the account before signing, that they did not review any exhibits before signing, and that they did not sign the affidavits before a notary. They also testified that they did not have any contact of any kind with the debtor. One employee testified that he simply picked up stacks of affidavits off of the computer, signed them (hundreds at a time) and forwarded them to the notary for signature and to be mailed to the law firm filing the lawsuit. The employees/affiants also testified that they had no knowledge about the sale of the debt portfolios from the original creditors to Midland Funding, how Midland Funding came to be the successor in interest on the debt, or how Midland

Funding retained its attorneys (although they attest to having personal knowledge in their affidavits).

9.12 The end result of these robo-signed affidavits is that the default judgments and summary judgments entered by the courts are based on affidavits that are false. The courts are misled into concluding that the affiant has actually verified the debt, the correct balance owed, the interest rate that is applicable, and the identity of the debtor, when in fact none of it has been verified by the affiant. Since approximately 90% of all of Defendants' collection cases result in a default judgment against an unrepresented person, the affidavits themselves are rarely challenged. These mass-produced judgments are then used by Defendants as leverage against unrepresented individuals.

9.13 Thus, for years, Defendants have affirmatively and systematically deceived the Texas courts and undermined the fairness of the justice system on a massive scale. Through Defendants' illegal practices, a great deal of the State's judicial resources have been expended helping the Defendants to obtain dubious judgments based on incomplete information and supported by false and fraudulent affidavits. Defendants use these fraudulent affidavits as leverage against consumers, taking unfair advantage of their lack of knowledge about their legal defenses. The practical end result of Defendants' scheme is that Defendants are asserting judgment liens against Texans which were fraudulently obtained and in some cases were obtained against individuals who complain they do not owe the debt at all or owe an amount that is less than the amount of the judgment.

## **X. FALSE, MISLEADING, AND DECEPTIVE ACTS AND PRACTICES**

10.1 Defendants, in the course of acts and/or omissions as alleged above, have in the course of trade and commerce engaged in false, misleading, and deceptive acts and practices declared unlawful in §17.46(a) and §§17.46(b) of the DTPA. Such acts include:

- A. Engaging in false, misleading, or deceptive acts in the conduct of any trade or commerce, as alleged more specifically herein, in violation of §17.46(a) of the DTPA;
- B. Causing confusion or misunderstanding as to the source, sponsorship, approval, or certification of goods or services, as alleged more specifically herein, in violation of §17.46(b)(2) of the DTPA;
- C. Causing confusion or misunderstanding as to the affiliation, connection, or association with, or certification by another, as alleged more specifically herein, in violation of §17.46(b)(3) of the DTPA;
- D. Representing that an agreement confers or involves rights, remedies, or obligations which it does not have or involve or which are prohibited by law as set forth herein in violation of §17.46(b)(12) of the DTPA.

## **XI. VIOLATIONS OF THE TEXAS FINANCE CODE**

11.1 Defendants, in the course of acts and/or omissions as alleged above, have engaged in acts in violation of Tex. Fin. Code §392.404. Such acts include:

- A. Misrepresenting the character, extent, or amount of a consumer debt in violation of Tex. Fin. Code §392.404(a)(8);
- B. Representing that a consumer debt may be increased by the addition of attorney's fees, investigation fees, service fees, or other charges if a written contract or statute does not authorize the additional fees or charges in violation of Tex. Fin. Code §392.404(a)(12) ;
- C. Using any other false representation or deceptive means to collect a debt or obtain information concerning a consumer in violation of Tex. Fin. Code §392.404(a)(19).

## **XII. DIRECT AND DERIVATIVE LIABILITY**

- 12.1 Defendants are doing business in the State of Texas.
- 12.2 Defendants are “inextricably intertwined” and/or connected in the transactions and/or acts alleged in this Petition.
- 12.3 Defendants are each the alter ego of the other.
- 12.4 The corporate fiction should be disregarded as it was used as a means of perpetrating fraud and/or abuse of the corporate structure.
- 12.5 Each Defendant actively participated in the acts or omissions which are the subject of this Petition, sought to benefit from the transactions, and profited from the transactions and/or acts alleged in this Petition.
- 12.6 Each Defendant is directly liable for the relevant acts and omissions alleged in this Petition.

### **XIII. DISGORGEMENT/CONSTRUCTIVE TRUST**

13.1 All of Defendants' assets are subject to the equitable remedy of disgorgement, which is the forced relinquishment of all benefits that would be unjust for Defendants to retain. Defendants should be ordered to disgorge all monies fraudulently taken from individuals and businesses together with all of the proceeds, profits, income, interest and accessions thereto. Such disgorgement should be for the benefit of victimized consumers and the State of Texas. The State prays for constructive trust over all monies obtained by Defendants from consumers through fraud or false pretenses.

### **XIV. TRIAL BY JURY**

14.1 Plaintiff herein requests a jury trial and tenders the jury fee to the Harris County District Clerks office pursuant to TEX. R. CIV. P. 216 and TEX. GOVT. CODE §51.604.

### **XV. INJURY TO CONSUMERS**

15.1 Defendants have, by means of these unlawful acts and practices, obtained money or other property from identifiable persons to whom such money or property should be restored or who, in the alternative, are entitled to an award for damages.

### **XVI. REQUEST FOR DISCLOSURE**

16.1 Under Texas Rule of Civil Procedure 194, Plaintiff requests that Defendants disclose, within 50 days of service of the Original Petition, the information or material described in Rule 194.2(a)(l).

## **XVII. TEMPORARY INJUNCTION AND PERMANENT INJUNCTION**

17.1 Defendants have engaged in the unlawful acts and practices described above. Unless restrained by this Honorable Court, Defendants will continue to violate the laws of the State of Texas and cause damage to the State of Texas and to the general public. Therefore, Plaintiff requests a Temporary Injunction and Permanent Injunction as indicated below in the Prayer.

17.2 Plaintiff request leave of this Court to conduct expedited discovery, including written discovery requests and telephonic, oral, and written depositions prior to any temporary injunction hearing. Any depositions, telephonic or otherwise, would be conducted with reasonable, shortened notice to Defendants and their attorneys.

## **XVIII. PRAYER**

18.1 WHEREFORE, Plaintiff prays that Defendants be cited according to law to appear and answer herein; that after due notice and hearing a TEMPORARY INJUNCTION be issued; and upon final hearing a PERMANENT INJUNCTION be issued, restraining and enjoining Defendants, Defendants' successors, assigns, officers, agents, servants, employees and attorneys and any other person in active concert or participation with Defendants from engaging in the following acts or practices:

A. Transferring, concealing, destroying, or removing from the jurisdiction of this Court any books, records, documents, invoices or other written or computer generated materials relating to the business of Defendants currently or hereafter in their possession, custody, or control except in response to further orders or subpoenas in this cause;

B. Filing an affidavit in any court in the State of Texas that falsely represents that the affiant has personal knowledge of the contents of the affidavit;

C. Filing an affidavit in any court in the State of Texas that was not signed in the presence of a notary or other official who is acknowledging the signature;

D. Filing an affidavit in any court in the State of Texas in which the affiant attests to the authenticity of attachments to the affidavit unless the affiant has reviewed the attachments before signing the affidavit;

E. Filing an affidavit in any court in the State of Texas which contains any false statement of fact;

F. Filing any pleadings in any court in the State of Texas for collection of a consumer debt for which the statute of limitations has passed unless Defendants have a supportable and good faith belief that an exception to limitations exists;

G. Misrepresenting the character, extent, or amount of a consumer debt in violation of Tex. Fin. Code §392.404(a)(8);

H. Representing that a consumer debt may be increased by the addition of attorney's fees, investigation fees, service fees, or other charges if a written contract or statute does not authorize the additional fees or charges in violation of Tex. Fin. Code §392.404(a)(12) ;

I. Using any other false representation or deceptive means to collect a debt or obtain information concerning a consumer in violation of Tex. Fin. Code §392.404(a)(19).

18.2 In addition, Plaintiff, State of Texas, respectfully prays that this Court will:

- A. Adjudge against Defendants, jointly and severally, civil penalties in favor of Plaintiff, State of Texas, in an amount of not more than \$20,000.00 per violation of the DTPA;
- B. Adjudge against Defendants, jointly and severally, civil penalties in favor of Plaintiff, State of Texas, in an amount up to \$250,000.00 allowed by law under the DTPA, specifically, §17.47(c)(2) of the DTPA, due to Defendants committing acts and practices which were calculated to acquire or deprive money or other property from consumers who were 65 years of age or older when the act or practice occurred;
- C. Impose a constructive trust on all monies obtained by Defendants from consumers by fraud or false pretenses for distribution, and order Defendants to restore all money or property taken from identifiable persons by means of unlawful acts or practices, or in the alternative, award judgment for damages to compensate for such losses;
- D. Order Defendants to pay Plaintiff, State of Texas, attorneys fees and costs of court pursuant to TEX. GOVT CODE §402.006(c);
- E. Order Defendants to pay pre-judgment interest on all awards of restitution, damages, civil penalties and attorney fees as provided by law; and
- F. Grant all other relief to which Plaintiff, State of Texas, may show itself entitled.

Respectfully submitted,

GREG ABBOTT  
Attorney General of Texas

DANIEL T. HODGE

First Assistant Attorney General

BILL COBB

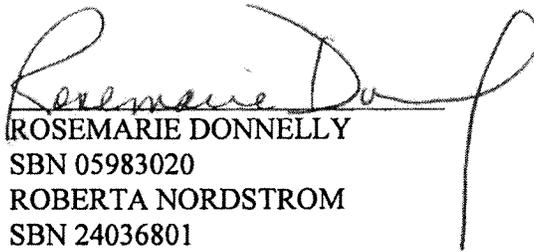
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