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No. 88414-5

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

KELLI GRAY, ET AL., PETITIONERS,

vs.

SUTTELL & ASSOCIATES, ET AL., RESPONDENTS.

AMENDED PETITIONERS' BRIEF IN SUPPORT OF DETERMINATION OF CERTIFIED QUESTIONS

Michael D. Kinkley,
WSBA #11624
Michael D. Kinkley, P.S.
4407 N. Division St., Suite 914
Spokane, WA 99207

Kirk D. Miller
WSBA #40025
Kirk D. Miller, P.S.
211 E. Sprague Ave.
Spokane, WA 99202
(509) 413-1494

Attorneys for Petitioners

ORIGINAL

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I. INTRODUCTION

Certified Questions

The following questions were certified to the Washington Supreme Court by the United States District Court for Eastern District Washington[1]:

a. Does the definition of "collection agency" in RCW 19.16.100(2) include a person who

1) Purchases claims that are owed or due or asserted to be owed or due another,

2) Undertakes no activity on said delinquent consumer account but rather contracts with an affiliated collection agency to collect the purchased claims, and

3) Is the named plaintiff in a subsequent collection lawsuit for said purchased claims?

b. Can a company, such as Midland Funding, LLC, file lawsuits in the Washington on delinquent consumer accounts without being licensed as a collection agency as defined by RCW 19.16.100(2)?

[1] ECF 446, pp. 6-7; ECF 447, p. 2.

II. STATEMENT OF THE CASE

For the purpose of certification the federal court indicated the following[2]:

> On April 8, 2011, Plaintiffs filed an Amended Complaint, alleging claims under the WCAA, Washington Consumer Protection Act, and Fair Debt Collections Practice Act against Defendants. *ECF No.297*. These claims are based in part on Plaintiffs' assertion that the following business arrangements and debt-collection processes used by Midland Funding violate the WCAA:
>
> 1. Midland Funding is a subsidiary of Encore Capital Group, Inc. that purchases defaulted consumer receivables, i.e., consumers' unpaid financial commitments to credit originators, such as banks, credit unions, consumer finance companies, commercial retailers, auto finance companies.
>
> 2. Midland Funding has no employees and is merely a holding company for the delinquent accounts it purchases and telecommunication companies.
>
> 3. Midland Credit Management Inc. (MCM) is an indirect parent of Midland Funding, LLC.

[2] ECF 446, Order, pp. 2-4.

4. Midland Funding and MCM entered into a Servicing Agreement. Pursuant to this Servicing Agreement, 1) MCM has all decision-making authority regarding the collection of the owed monies under the defaulted accounts purchased by Midland Funding, and 2) MCM's employees manage the collection process and perform the collection acts for these defaulted accounts.

5. MCM is licensed by the state of Washington as a collection agency.

6. MCM contracts directly with attorneys to file lawsuits in Midland Funding's name to collect on these defaulted accounts.

7. Between August, 2004, and November, 2010, Midland Funding, through the MCM-contracted attorneys, filed such collection lawsuits in Washington.

"Midland Funding LLC is owned 100% by Midland Portfolio Services, Inc". *ECF 121, p. 2.* "Midland Portfolio Services, Inc. is owned by Midland Credit Management Inc". *Id.* "Midland Credit Management Inc. is owned by Encore Capitol Group, Inc." *Id.* "Encore Capitol Group, Inc. is a publically held corporation that trades on the NASDAQ under the symbol 'ECPG'". *Id.*

III. ARGUMENT

A. Interpretation of a Statute

The determination of the certified questions requires this Court to interpret, as a matter of first impression, a portion of the definition section of the Washington Collection Agency Act (Hereafter "WCAA"). RCW 19.16.100(2)(a). The WCAA regulates persons that meet the definition of a "Collection Agency". RCW 19.16.100(2)(a)("Any person[3] directly or indirectly engaged in soliciting claims for collection, or collecting or attempting to collect claims owed or due or asserted to be owed or due another person").

The Court must determine, according to its established principles of statutory interpretation, whether the WCAA statute is intended to apply to persons that solicit claims to purchase, then collect or attempt to collect those claims through litigation. RCW 19.16.100(2)(a); see *Panag v. Farmers Ins. Co. of Washington*, 166 Wash. 2d 27, 44, 204 P.3d 885, 892 (2009). ("no adversarial exemption from suit under the CPA").

The purpose of statutory interpretation is "to determine and give effect to the intent of the legislature." *State v. Sweany*, 174 Wash.2d 909, 914, 281 P.3d 305 (2012); *State v. J.P.*, 149 Wash.2d 444, 450, 69 P.3d

[3] Person is broadly defined to include corporations. RCW 19.16.100(1) ("'Person' includes individual, firm, partnership, trust, joint venture, association, or corporation.")

318 (2003); *In re Pers. Restraint of Williams*, 121 Wash.2d 655, 663, 853 P.2d 444 (1993).

When possible, the court derives legislative intent solely from the plain language enacted by the legislature, considering the text of the provision in question, the context of the statute in which the provision is found, related provisions, and the statutory scheme as a whole. *State v. Ervin,* 169 Wash.2d 815, 820, 239 P.3d 354 (2010); *Dep't of Ecology v. Campbell & Gwinn*, LLC, 146 Wash.2d 1, 9–10, 43 P.3d 4 (2002). Plain language that is not ambiguous does not require construction. *State v. Delgado*, 148 Wash.2d 723, 727, 63 P.3d 792 (2003); *State v. Wilson*, 125 Wash.2d 212, 217, 883 P.2d 320 (1994); *State v. Evans*, 298 P.3d 724, 727-28 (Wash. 2013).

B. Washington Collection Agency Act, WCAA

"Consumer debt collection is a highly regulated field." *Panag v. Farmers Ins. Co. of Washington*, 166 Wash. 2d 27, 53, 204 P.3d 885, 897 (2009). The WCAA is a comprehensive statutory scheme to regulate "collection agencies". *RCW 19.16.* Midland Funding, LLC and Encore, Inc. each argue that it is not required to be regulated as a collection agency despite the fact that each both solicit debts to collect and also attempt to collect as "Midland Funding, LLC" the named Plaintiff in tens of thousands of cases in litigation in Washington.

C. The similar FDCPA includes "Debt Buyers" as debt collectors

A related and similar statute, the Federal Fair Debt Collection Practices Act[4] (hereafter "FDCPA") regulates "debt collectors". It is well settled that *buyers* of debt are "debt collectors"[5] regulated by the FDCPA. *McKinney v. Cadleway Properties, Inc.*, 548 F.3d 496, 502 (7th Cir. 2008) ("an agency in the business of acquiring and collecting on defaulted debts originated by another is a debt collector under the FDCPA even though it actually may be collecting for itself."); *Schlosser v. Fairbanks Capital Corp.*, 323 F.3d 534, 536 (7th Cir. 2003) (FDCPA "treats assignees as debt collectors if the debt sought to be collected was in default when acquired by the assignee, and as creditors if it was not"). See *Bailey v. Security Nat'l Servicing Corp.*, 154 F.3d 384, 387 (7th Cir.1998); *Whitaker v. Ameritech Corp.*, 129 F.3d 952, 958 (7th Cir.1997); see also *Pollice v. Nat'l Tax Funding, L.P.*, 225 F.3d 379, 403–04 (3d Cir.2000); *Wadlington v. Credit Acceptance Corp.*, 76 F.3d 103, 106–07 (6th Cir.1996); *Perry v. Stewart Title Co.*, 756 F.2d 1197, 1208 (5th Cir.1985).

D. Encore and Midland Funding have been found to be Debt collectors

Encore (and the other "Midland" companies) has repeatedly been found to be a "debt collector". *Jackson v. Midland Funding LLC*, 468 F.

[4] 15 USC 1692
[5] 15 USC 1692a(6)

App'x 123 (3d Cir. 2012) (Midland Funding "bringing time-barred action");*Jones v. Midland Funding*, LLC, 3:08-CV-802 RNC, 2012 WL 1204716 (D. Conn. Apr. 11, 2012); *Midland Funding LLC v. Brent*, 644 F. Supp. 2d 961 (N.D. Ohio 2009) modified on reconsideration, 308CV1434, 2009 WL 3086560 (N.D. Ohio Sept. 23, 2009); *Gomes v. Midland Funding, LLC*, 839 F. Supp. 2d 417, 418-19 (D. Mass. 2012)("Midland, a California corporation, is a third-party debt collection company. It purchases large electronic portfolios of defaulted consumer debts worth billions of dollars, for which it pays pennies on the dollar, in order to collect on them by instituting formal legal action. Plaintiffs allege that Midland typically 1) files bare-boned, boilerplate complaints that do not explain the basis for its damages calculation or its relationship to the alleged debt, 2) obtains judgments against defendants who are almost always under-represented, usually by default and 3) aggressively enforces such judgments in Massachusetts through wage garnishments, property liens and capias arrest warrants. Despite engaging in such debt enforcement action in Massachusetts since at least 2006, Midland allegedly is not, and has never been, licensed as a debt collector by the Commonwealth. Unlicensed debt collection is prohibited under M.G.L. 93, § 24A and may constitute a violation of the Massachusetts Consumer Protection Act, M.G.L. c. 93A ("Chapter 93A")).

Encore's own filings with the Securities and Exchange Commission indicate that it is in the business of collecting debts. For instance, Encore states that it "has been in the collection business for over 55 years and started purchasing portfolios for [its] own account approximately 18 years ago." Encore describes itself as a "leading consumer debt management company" and a "purchaser and manager of charged-off consumer receivables portfolios," and goes on to describe what it calls "our collection strategies," which include the use of "our own collection workforce." Encore regularly engages in debt collection activities.

E. The WCAA definition includes debt buyers, especially those that collect the accounts they buy

The WCAA, RCW 19.16.100(2)(a), defines a "collection agency" as, "any person directly or indirectly engaged in soliciting claims[6] for collection..." *RCW 19.16.100(2)(a).* Midland Funding, LLC solicits claims to purchase and then attempts to collect those accounts. Midland Funding, LLC is the named Plaintiff bringing tens of thousands of lawsuits in the state of Washington as a part of the collection of debt by the Encore Capitol Group Companies. No defendant (consumer) is ever made aware

[6] The WCAA defines "Claim": 'Claim' means any obligation for the payment of money or thing of value arising out of any agreement or contract, express or implied." RCW 19.16.100(5); *Panag v. Farmers Ins. Co. of Washington*, 166 Wash. 2d 27, 52, 204 P.3d 885, 897 (2009).

that anyone but Midland Funding, LLC is involved. Encore, Midland Credit and Midland Funding are in the business of debt collection.

"We purchase portfolios of defaulted consumer receivables at deep discounts to face value and use a variety of operational channels to maximize our collections from these portfolios."
http://investors.encorecapital.com/CorporateProfile.aspx?iid=4049160; see also *ECF 128-1, p. 7, EX A.*

"As one of the nation's biggest buyers of unpaid debt, Midland Funding LLC purchases charged-off debt in the form of charged-off accounts."
http://www.encorecapital.com/consumers/midland-funding-llc

"Encore Capital Group is a leading provider of debt management... Through its subsidiaries[7], the company purchases portfolios of consumer receivables from major banks, credit unions, and utility providers."
http://www.encorecapital.com/about

"Success in our business hinges on understanding, measuring, and predicting financially distressed consumer behavior."
http://www.encorecapital.com/about

[7] One of those subsidiaries is Midland Funding, LLC.

"From inception through December 31, 2011, we have invested approximately $2.1 billion to acquire 40.1 million consumer accounts with a face value of approximately $66.4 billion."

http://investors.encorecapital.com/GenPage.aspx?IID=4049160&GKP=207464

"We also have one of the industry's largest distressed consumer databases containing information regarding approximately 25 million consumer accounts."

http://investors.encorecapital.com/GenPage.aspx?IID=4049160&GKP=207464

F. Licensing is required for those who collect through litigation or otherwise

RCW 19.16.260, a section of the Washington Collection Agency Act [hereafter "WCAA"], "Licensing Prerequisite to Suit", provides that no collection agency "may bring or maintain an action in any court of this state involving the collection of a claim of any third party without alleging and proving that he or it is duly licensed under this chapter and has satisfied the bonding requirements hereof, if applicable..." *RCW 19.16.260*; *Audit & Adjustment Co. v. Earl*, 165 Wash. App. 497, 506, 267 P.3d 441, 445 (2011) review denied, 174 Wash. 2d 1017, 281 P.3d 688 (2012). Midland Funding, LLC is not licensed as a collection agency.

RCW 19.16.110, "License Required" states that "No person shall act, assume to act... as a collection agency as defined in this chapter... without first having applied for and obtained a license from the director." *RCW 19.16.110.*

G. Continued Need for Regulation of Debt Collection including Debt Buyers

"Debt Collection is a large, multi-billion dollar industry that directly impacts many consumers." "Fair Debt Collection Practices Act", CFPB Annual Report 2013. CFPB, March 2013, "Fair Debt Collection Practice Act", 2013 report to Congress. http://files.consumerfinance.gov/f/201303_cfpb_March_FDCPA_Report1.pdf, p. 8.

"Since the FDCPA's enactment[8], debt purchasing has emerged as a major industry." *Id, p.9.* "Debt Buyers buy ... distressed consumer debt in an attempt to liquidate charged-off consumer receivables" *Id.* "Even as the industry has changed, abuses still exist and the industry remains a top source of consumer complaints." *Id.* "The FTC continues to receive more complaints about the debt collection industry than any other specific industry. *Id, p. 14.* "'Third party Debt Collectors' include...debt buyers collecting on debts they purchased in default." *Id, p. 14, fn 14.* "Debt

[8] In 1977 finding "abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors". 15 USC §1692a.

Buying has become a significant part of the debt collection system over the past decade..." FTC, February 1, 2013, Annual Report Letter to CFPB http://www.ftc.gov/os/2013/02/130213cfpbreport.pdf p. 8. ; see also CFPB Annual Report 2013, p 52.

"The limited information that debt buyers receive may make it more likely that they will attempt to collect from the wrong consumer or the wrong amount" *Id.*

In 2010, the Federal Trade Commission reported that state courts consumer collection litigation was "seriously flawed". "Repairing a Broken System", note 3, at i; FTC, "Repairing a Broken System", 2010, http://www.ftc.gov/os/2010/07/debtcollectionreport.pdf.

Midland Funding, LLC cannot legally bring or maintain any lawsuits in this state since it solicits to purchase obligations for the payment of money arising from an alleged agreement but is not licensed as a "collection agency". *RCW 19.16.260; RCW 19.16.110; RCW 19.16.100(2)(a); RCW 19.16.100(5).*

H. Midland Funding through Midland Credit employees routinely commit a fraud on the courts of this state and consumers.

Midland Funding, LLC as Plaintiff presents its case through documents (almost always by default but sometimes Summary Judgment and mostly against Pro Se defendants). The documents it presents to the

court would be hearsay unless the documents fall within an exception to hearsay and must be authenticated. ER 801[9], ER 901. The hearsay exception that Midland Funding claims is the "Business records as evidence". *RCW 5.45.020.*

Summary Judgment and affidavits require personal knowledge. CR 56(e) ("affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith"); ER 602 ("A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony.")

Midland Funding, LLC, Encore, and Midland Credit cannot meet the requirements of personal knowledge nor those imposed by RCW 5.45.020 with an affiant with actual knowledge. They fill in this gap with a false declaration from Midland Credit Management[10] employee. This is part of the 'broken system" the FTC examined in an extensive report in 2010 and the CFPB more recently. In *Midland Funding LLC v. Brent*, 644

[9] Hearsay: ER 801
[10] MCM is a licensed collection agency in the state of Washington.

F. Supp. 2d 961, 967 (N.D. Ohio 2009) modified on reconsideration, 308CV1434, 2009 WL 3086560 (N.D. Ohio Sept. 23, 2009) the court found that:

> "In paragraph 1, the affidavit reads "... I make the statements herein based upon my personal knowledge." It is apparent from the Jimenez deposition that Mr. Jimenez actually had no personal knowledge of Ms. Brent or her account.

The robo-signed affidavits filed on behalf of Midland Funding by Midland Credit include other false statements:

> Mr. Jimenez has no personal knowledge about the Brent account. He was not familiar with this account, did not know the last time a payment was made and did not know the outstanding balance. The paragraph also represents that the law firm, JBR, was hired by Mr. Jimenez or one of his employees. However, the following exchange during the deposition makes clear this is not true:

Midland Funding LLC v. Brent, 644 F. Supp. 2d at 967 (N.D. Ohio 2009).

The *Gray* case began in Spokane Superior Court as a contract collection case against Ms. Gray. After several years of litigation, the case was dismissed[11] by Judge Jerome Leveque because the Plaintiff, Midland Funding could not prove that there was ever a debt or that Midland Funding owned the debt. The anomaly was that all affidavits were filed by Midland *Credit* employees. Ms. Gray then filed in federal court for violations of the WCAA, the WCPA, and the FDCPA. In the *Gray* federal

[11] The petitioners request that the court take judicial notice of the Court's Decision signed by Judge Leveque and filed 2/4/11. See Appendix B.

matter the defendants filed the "Form 400" used by them in the *Gray* state court case. See attached, *ECF 34-1, p. 16-17*(attached)[12]. In that affidavit, affiant Elizabeth Neu makes a number of allegations which at deposition in the federal matter she admitted were false. Compare ECF 34-1, p. 16-17(attached) with deposition testimony. *ECF No. 179-1.* In fact Ms. Neu admits that she never had actually read any of the tens of thousands of affidavits she had signed.

> Q. Up until and including today have you ever read the affidavit all the way through?
> A. No.

ECF No. 179-1, page 20. Her affidavit (ECF 34-1, p. 16, paragraph 2) says she reviewed records, but she did not.

> Q. Did you review any of the Midland Credit records before you signed the affidavit?
> A. No.
>
> Q. And did you review any other documents before you signed the affidavit?
> A. No..

ECF No. 179-1, page 52

> Q. ...[C]an you describe for me what information is in Midland Credit Management's database?
> A. No. I do not have that information.

[12] The petitioners request that the court take judicial notice of the affidavit filed by the Defendants in that lawsuit as ECF 34-1, pp. 16-17. See Appendix A.

> Q. Okay. Did you ever see the information that was in Midland Credit Management's database –
> A. No.
>
> Q. -- at any time?
> A. No.

ECF No. 179-1, page 17-18

In her Affidavit, Ms. Neu testified that "Midland Funding LLC is the current owner of, and/or successor to, the obligation sued upon.". *ECF 34-1, p. 16, paragraph 1, 3 (attached).* In deposition, however, Ms. Neu testified:

> Q. ... Do you know how Midland Funding LLC became the owner of and/or successor to the obligation sued upon?
> A. No, I don't.

ECF No. 179-1, page 19

Ms. Neu testified "that the attorneys representing plaintiff Midland funding LLC were retained by Midland Funding LLC behalf by me or persons reporting to me...". *ECF 34-1, p. 16, paragraph 2.* When asked about the statement in deposition, however, she testified:

> Q. Did you ever retain any of those individuals [the Suttell Attorneys] on behalf of Midland Funding or anyone else?
> A. No.
>
> Q. Did anyone reporting to you retain any of those individuals on behalf of Midland Funding or anyone else?
> A. No.

ECF No. 179-1, page 76

> Q. ...Who was reporting to you in August of 2008?
> A. No one.
>
> Q. Do you know the name of the person who hired the attorney to represent Midland Funding LLC?
> A. No.

ECF No. 179-1, page 29

In her affidavit Ms. Neu claims "personal knowledge". *ECF 34-1, p. 16, paragraph 1, 2; see CR 56(e); ER 602.* But in the deposition she testified as follows:

> Q. At the time you signed the affidavit did you know whether the debt was delinquent?
> A. Midland Credit had all that information.
>
> Q. would it be fair to say that you had no personal knowledge of whether –
> A. No personal knowledge.
>
> Q. -- that debt was delinquent or not?
> A. (No response.)
>
> Q. Can you answer the question?
> A. No personal knowledge.

ECF No. 179-1, page 36

In the affidavit, Ms. Neu testified regarding the account balance, interest rate and how the interest rate was calculated. *ECF 34-1, p. 16, paragraph 2, 4.* But in the deposition she stated:

> Q. When you worked for Midland Credit Management did you look at the interest rates before you signed these affidavits?
> A. No.

> Q. And would you take any measures to independently verify that the numbers were correct other than just looking at the affidavit?
> A. No.

ECF No. 179-1, page 38.

Ms. Neu swore in the affidavit that she knew that the loan met the requirements of TILA. *ECF 34-1, p. 16, paragraph 4.* But she testified in deposition:

> Q. Did you ever know how calculations were performed as required by the Federal Truth in Lending Act?
> A. No.

ECF No. 179-1, page 39-40

Ms. Neu is a robo-signer whose affidavit testimony was used in hundreds of thousands of cases to obtain default and summary judgments against consumers. Consistent with Midland Credit's policy, she had no personal knowledge of the matters on which she was testifying.

> Q. was it your understanding that you were required by Midland Credit Management to sign the affidavits?
> A. Yes.

In deposition, Ms. Neu specifically denied that she is a custodian of records (see *RCW 5.45.020*):

> Q. And then it says, "I am a custodian of records for Midland Credit Management, Inc."...Based on your definition do you think today that you were a custodian of records in 2009?
> A. No.

ECF No. 179-1, page 63

> Q. In 2009 what did you know about the recordkeeping systems of Midland Credit Management?
> A. Just that I believed they were true and accurate. I never saw them.
>
> Q. Did you have any idea in 2009 what the records consisted of?
> A. No.
>
> Q. Did you have any idea in 2009 how Midland Credit Management obtained the records?
> A. No.
>
> Q. And in 2009 did you have any understanding about what the recordkeeping systems were for Midland Funding LLC?
> A. No.
>
> Q. Did you have any understanding of what records were kept by Midland Funding LLC?
> A. No.

ECF No. 179-1, page 66

> Q. ...[H]ave you ever, in any case, been a custodian of records for Midland Credit Management?
> A. No.
>
> Q. Have you ever in any case or under any circumstances ever had personal knowledge of the recordkeeping systems maintained on behalf of Midland Funding?
> A. No.

ECF No. 179-1, page 76-77

> Q. Have you ever under any circumstances been familiar with the manner and method by which Midland Credit

> Management creates and maintains its normal business books and records?
> A. No
>
> Q. Do you now or have you ever had any knowledge under any circumstance regarding whether the records of Midland Credit Management are kept in the regular course of business?
> A. No.

ECF No. 179-1, page 77

In the Spokane County Superior Court *Midland Funding LLC v. Kelli Gray* case number 08-2-04860-2, several documents including a purported credit card statements and a purported cardholder agreement were attached to Ms. Neu's affidavit that was used in support of a motion for default judgment. Through the federal litigation, it was learned that the Suttell and Hammer law office-not the affiant-attached all alleged supporting documentation (i.e. the business records allegedly being authenticated and made admissible by the Neu affidavit). In deposition, Ms. Neu testified that she was unaware of any documents being attached to her declaration.

> Q. In the entire time you worked at Midland Credit Management did you ever see a statement attached to any affidavit?
> A. No.
>
> Q. In the entire time you worked at Midland Credit Management did you ever see a cardholder agreement or original contract attached to an affidavit?
> A. No.

ECF No. 179-1, page 71-72

Despite claiming in her affidavit that she had personal knowledge regarding multiple categories of information, her deposition testimony reveals that nearly every statement contained her affidavit was not only not based on her personal knowledge, but that she had no idea what she was swearing to.

> Q. Do you now or did you at any time in the past ever have any knowledge of the relevant financial information concerning any of the Midland Funding or Midland Credit accounts?
> A. No.
>
> Q. Do you now or did you at any time have any knowledge regarding agreements that a customer had made with an original creditor before it came to Midland Credit or Midland Funding?
> A. No.
>
> Q. Do you now or did you at any time in the past regarding any of your -- the affidavits that you signed have knowledge of whether any defendant used or authorized the use of a credit card account?
> A. No.
>
> Q. Do you now know or at any time did you -- in the past did you know whether any defendant failed to make a payment on an account?
> A. No.

ECF No. 179-1, page 79

> Q. Did you at any time know whether Midland Credit Management or Midland Funding had demanded payment from a defendant?

A. No.

ECF No. 179-1, page 79-80

> Q. Do you now or did you ever have any knowledge regarding how the attorneys representing Midland Funding or Midland Credit Management were retained?
> A. No.
>
> Q. So if you were called to testify as a witness in a case against Kelli Gray could you testify as to any of the facts regarding her account at Midland Credit Management or Midland Funding?
> A. No.

ECF No. 179-1, page 80

Elizabeth Neu testified that she signed in the range of 100 to 300 affidavits per day to be used in debt collection lawsuits. *ECF No. 179-1, page 46.*

I. Midland Funding is the alter ego of Midland Credit used to hide the WCAA remedies form the courts and public

With regard to corporations, Washington has long recognized the 'alter ego' doctrine, which provides:

> Where a private person so dominates and controls a corporation that such corporation is his *alter ego*, a court is justified in piercing the veil of corporate entity and holding that the corporation and private person are one and the same.

(Italics original.) *Pohlman Inv. Co. v. Virginia City Gold Mining Co.*, 184 Wash. 273, 283, 51 P.2d 363 (1935); *Standard Fire Ins. Co. v. Blakeslee*, 54 Wash. App. 1, 5, 771 P.2d 1172, 1174 (1989).

Midland Credit owns 100% of Midland Funding. *ECF 121, p. 2.* Midland Credit employees do everything attributed to Midland Funding since Midland Funding has no employees. *ECF 446, Order, pp. 2-4, paragraphs 2, 4, 5.* The "servicing agreement" is illusory in that Midland Credit has all the rights to do and decide everything up to and including the "fee" for servicing while Midland funding has none. *ECF 446, p. 2, paragraph 4; ECF 181-1.* The agreement between the two alleged entities is signed by the same person since he is "president" of both entities. ECF 181-1, p. 20 (lower right corner number). Notice between the two goes to exactly the same address: "Midland Credit Management, 8870 Aero Drive, San Diego California" (Midland Funding's is "care of" Midland Credit). *ECF 181-1, pp17-18* (lower right corner number). In fact all of the substantial violations of the FDCPA and the WCAA were done by Midland Credit employees in the name of Midland Funding. *ECF 446, p. 2, paragraph 4.* But no one that does not file a federal lawsuit and engage in extensive litigation including extensive discovery would ever know of Midland Credit collection agency's hidden role as the true actor in the Midland finding lawsuits. Even the payment of a "servicing" fee is illusory.) *ECF 181-1, p 12*, section 4.3, p. 21, "Exhibit A Fees" ("fee per IRS Code 482"). The fee is only whatever the IRS will not reject as tax

fraud[13]. No real amount is agreed, which is appropriate since Midland Funding and Midland Credit have the same president and always use Midland Credit (a Washington licensed collection agency) employees. The "servicer [Midland Credit] is granted full power and authority…". *ECF 181-1, p. 9, paragraph 2.5.* Midland Credit can sell the portfolio for any price it chooses. *ECF 181-1, p. 9, paragraph 2.7.* Midland Credit can settle any claim as it see fit. *ECF 181-1, p. 9, paragraph 2.6.* Midland Credit makes all the decisions for Midland funding (since Midland Funding exists on paper only) including "portfolio acquisitions", "management of the collection attorneys", "financial and accounting", "cash management" and everything else. *ECF 181-1, p. 23.* Midland Funding is a shell corporation operated entirely by Midland Credit as an attempt at avoiding liability and licensing.

J. The courts of Washington should be allowed to apply the remedies of the WCAA done in the name of Midland Funding.

It is a violation of the WCAA prohibited practices section to:

[13] IRS code 482 states: In any case of two or more organizations, ..owned or controlled directly or indirectly by the same interests, the Secretary may distribute, apportion, or allocate gross income, deductions, credits, or allowances between or among such organizations, trades, or businesses, if he determines that such distribution, apportionment, or allocation is necessary in order to prevent evasion of taxes or clearly to reflect the income of any of such organizations, trades, or businesses. In the case of any transfer (or license) of intangible property (within the meaning of section 936 (h)(3)(B)), the income with respect to such transfer or license shall be commensurate with the income attributable to the intangible.

> (7) Use any name while engaged in the making of a demand for any claim other than the name set forth on his or her or its current license issued hereunder. RCW 19.16.250(7);
>
> (8) fail to provide adequate information about an account being collected. RCW 19.16.250(8)(a)-(i).

By Midland Credit acting in the name of its wholly owned subsidiary Midland Funding consumers did not even know they have right to this information. The WCAA prohibits "(16) Threaten[ing] to take any action against the debtor which the licensee cannot legally take at the time the threat is made." *RCW19.16.250.* This would include litigation in which Midland Funding did not actually own the debt like in the *Gray* state court matter. The WCAA prohibits:

> (21) Collect or attempt to collect in addition to the principal amount of a claim any sum other than allowable interest, collection costs or handling fees expressly authorized by statute, and, in the case of suit, attorney's fees and taxable court costs.

RCW 19.16.250(21).

Midland Credit/Midland Funding appears to simply make up the interest rate and charge a flat rate for attorney fees ($650-$850). The WCAA prohibits:

> (23) Bring an action or initiate an arbitration proceeding on a claim when the licensee knows, or reasonably should know, that such suit or arbitration is barred by the applicable statute of limitations.

RCW 19.16.250(23).

In *Gray,* it is alleged that Midland Funding/Midland Credit did just that.

The WCAA provides significant and important remedies. An "additional penalty" for violation of the prohibited practices section (*RCW 19.16.250*) and for failing to be licensed is to strip the amount hat might be collected back to principle. *RCW 19.16.450.* Several elements of the WCPA (*RCW 19.86*) are determined by a finding of a violation of the WCAA against "collection agency" as defined by the WCAA.

> "The operation of a collection agency or out-of-state collection agency without a license as prohibited by RCW 19.16.110 and the commission by a licensee or an employee of a licensee of an act or practice prohibited by RCW 19.16.250 are declared to be unfair acts or practices or unfair methods of competition in the conduct of trade or commerce for the purpose of the application of the Consumer Protection Act found in chapter 19.86 RCW."

RCW 19.16.440.

IV. CONCLUSION

The law is unambiguous. Midland Funding, LLC solicits claims to purchase, in order to collect those claims for profit. *RCW 19.16.100(2)(a).* Therefore Midland Funding, LLC is a "collection agency" required to be licensed. *RCW 19.16.100(2)(a); RCW 19.16.110.* Litigation is specifically prohibited without being licensed as a collection agency. *RCW 19.16.260.* There is no litigation exception . *Panag v. Farmers Ins. Co. of*

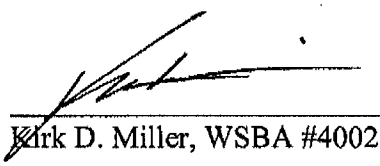
Washington, 166 Wash. 2d 27, 204 P.3d 885 (2009); *Evergreen Collectors v. Holt*, 60 Wash. App. 151, 155, 803 P.2d 10, 13 (1991) ('Evergreen's threat to proceed to trial in order to recover fees was the type of communication that the Legislature obviously sought to prohibit by RCW 19.16.250(14). In our judgment, Evergreen's actions were an egregious violation of that subsection.") Midland Credit Management acts in Washington by naming its wholly owned subsidiary as the Plaintiff. One cannot do through an alter ego what one cannot do oneself.

In order to obtain the right to collect an assigned claim Midland Funding, LLC admits that it "directly or indirectly engage in soliciting claims for collection..." in order to obtain the assignment of a claim to collect. Midland Funding, LLC solicits credit card debt ("claims") to purchase, to then collect. Midland Funding, LLC meets the definition of a collection agency. RCW 19.16.100(2)(a). But Midland Funding, LLC is not licensed. The petitioner request that this court determine that Midland Funding must be licensed as a collection agency to legally bring lawsuits in this state.

Respectfully submitted this 30th day of May, 2013.

Michael D. Kinkley P.S.

via telephone 5/31/13
Michael D. Kinkley, WSBA 11624
Kirk D. Miller, P.S.



Kirk D. Miller, WSBA #40025

Attorneys for Plaintiffs/Petitioners

V. APPENDIX

A. Form 400, Declaration of Elizabeth Neu, ECF 34-1, pp. 16-17

B. Judge Jerome Leveque Memorandum Opinion in *Midland Funding, LLC v. Kelli Gray* (Spokane County Superior Court Cause No. 08-02-04860-2)

Form 400

State of Minnesota)
) ss
Stearns County)

In _____ Court
_____ Judicial (Circuit/District)

Midland Funding LLC,

Plaintiff

-vs-

GRAY, KELLI

Defendant(s)

ELIZABETH NEU, whose business address is Road, Suite Saint Cloud, Minnesota 56303,, certifies and says:

1. I am employed by Midland Credit Management, Inc., servicer of this account on behalf of Midland Funding LLC I make the statements herein based upon my personal knowledge. Midland Funding LLC is the current owner of, and/or successor to, the obligation sued upon.

2. That by virtue of such relationship and my employment with Midland Credit Management Inc., I have personal knowledge of all relevant financial information concerning Midland Credit Management Inc.'s account number 5726, which includes the following information: that the defendant did fail to make payments on the account and that demand has been made for defendant to make payment of the balance owing on the account described above more than thirty (30) days prior to making this affidavit; that the attorneys representing plaintiff Midland Funding LLC were retained on Midland Funding LLC behalf by me or persons reporting to me for the purpose of collecting the delinquent debt owed on the defendant's account number set out above; and that there was due and owing to Midland Funding LLC the sum of $2,065.22.

3. That plaintiff's predecessor in interest sold and assigned all right, title and interest in the defendant's FCNB-SPIEGEL account to the plaintiff.

4. The final statement of account reveals that the defendant owed a balance of $2,065.22 on the following date: 2004-12-31; and that such balance will continue to earn interest at a rate of .00% as annual percentage rate calculated as required by the Federal Truth in Lending Act, until judgment is entered herein, after which interest on the unpaid balance shall accrue as required by law and as set forth within the terms of the judgment.

5. That upon information and belief, based upon business dealings with the defendant (s), the defendant (s), is/are not a minor (s) or mentally incapacitated person (s).

I certify under penalty of perjury that the foregoing statements are true and correct.

Dated this 26 day of August 2008.

16

ELIZABETH NEU

Affiant's Signature

State of Minnesota

Stearns County

Subscribed and sworn to (or affirmed) before me on this 26 day of August, 2008 by ELIZABETH NEU, personally known to me or proved to me on the basis of satisfactory evidence to be the person(s) who appeared before me.

(signature of Notary) (seal of Notary)

Judy Ann Richter
Notary Public-Minnesota
My Commission Expires Jan. 31, 2010

Notary Public for the State of Minnesota

Suttell & Associates

17

1116 W. Broadway Ave., Room 403
Spokane, Washington 99260-0350

Superior Court of the State of Washington
for the County of Spokane

Department No. 9

Jerome J. Leveque
Judge

Kahren McCrow, Judicial Assistant
Tammey McMaster, Court Reporter

TEL: (509) 477-5784
FAX: (509) 477-5714 • TDD: (509) 477-5790
email: dept9@spokanecounty.org

February 4, 2011

Isaac L. Hammer
Mark Thomas Case
PO Box C-90006
Bellevue, WA 98009

Michael D. Kinkley
Michael D Kinkley PS
4407 N. Division St. Ste. 914
Spokane, WA 99207-1660

Kirk David Miller
Attorney At Law
209 E. Sprague Ave.
Spokane, WA 99202-1533

MIDLAND FUNDING LLC VS GRAY, KELLI
No. 2008-02-04860-2

Dear Counsel:

This letter refers to several motions, some brought by plaintiff and others by defendant:

Plaintiff's Motions

- Motion for Protective Order
- Plaintiff's Motion for Summary Judgment

Defendant's Motions

- Defendant's Motion to Dismiss
- Defendant's Motion to Strike Ms. Neu's Declarations and Attachments
- Defendant's Motion to Strike Minford's Declaration and Attachments

Defendant's Motions to Strike Neu's and Minford's Declarations and Attachments are GRANTED. Ms. Neu's declarations are obviously lacking foundation reliability and credibility; are not based on personal knowledge and cannot stand.

Mr. Minford's declaration is also based on legal and conclusionary statements without a foundation to support those assertions. The Court agrees with defendant's argument that the declarations are attempting to support factual assertions and legal conclusions with hearsay and frankly not much else. Legal conclusions, of course, are likewise not admissible and the entire

declaration lacks credibility and reliability.

Plaintiff's Motion for Protective Order is DENIED. Plaintiff moved for a protective order but did not produce the documents they wanted protected for an *in camera* review. I advised in order for the Court to determine if there is a basis for that protection, the records seeking needed to be reviewed *in camera*. Rather than allow that review, plaintiff attempted to establish required criteria through declarations. As stated above, those declarations failed and have been stricken. Ruling on the Motion for Protective Order was reserved pending an *in camera* review which plaintiff elected to forego in lieu of declaration testimony, which failed, therefore motion DENIED.

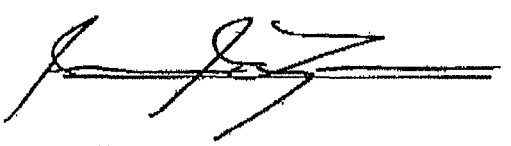
Defendant's Motion to Dismiss is GRANTED. The record does not contain any evidence of a written assignment of the Spiegel debit. There is a failure of production of any admissible evidence in the record before me to establish ownership of the debt upon which plaintiff is suing. Attempts to do so through the declarations have failed, as those declarations and attachments have been stricken by the Court. The plaintiff has not produced admissible evidence establishing any accounts were transferred to the plaintiff, and if any were, whether they included defendant's account that is the subject matter of this case, and without that they failed to establish that they have a right to bring the claim.

Plaintiff's Motion for Summary Judgment is DENIED. See Defendant's Motion to Dismiss above.

I am asking Mr. Kinkley to prepare the appropriate orders and circulate for signature. Note, orders not requiring Findings and Conclusions, should not contain them, but should contain a complete and accurate list of the materials the Court relied upon in addition to oral argument to support its decision.

If there are objections to the proposed orders, Mr. Kinkley should obtain a presentment date by promptly contacting my judicial assistant, Ms. McCrow. If that is necessary, a Notice of Presentment shall be filed with the Clerk and copies provided to the parties. The parties must then submit their proposed order(s) and a one page letter telling me why theirs is to be preferred over the other party's. Oral argument will not be necessary or permitted.

Sincerely,



Jerome J. Leveque
Superior Court Judge

jjl/ksm

OFFICE RECEPTIONIST, CLERK

To: Rachel Elston
Cc: 'Kirk Miller (E-mail)'; 'MDKOFFICE'
Subject: RE: E-FILING: 88414-5

Rec'd 5-31-13

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Rachel Elston [mailto:relston@millerlawspokane.com]
Sent: Friday, May 31, 2013 4:24 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: 'Kirk Miller (E-mail)'; 'MDKOFFICE'
Subject: E-FILING: 88414-5

Kelli Gray, et al. v. Suttell & Associates, et al.

Case No. 88414-5

Kirk D. Miller, WSBA #40025

Phone # 509-413-1494

kmiller@millerlawspokane.com

Rachel Elston
Paralegal Intern

Kirk D. Miller, P.S.
211 E Sprague
Spokane, WA 99202
(509) 413-1494
FAX (509) 413-1724

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