

## WHAT TO LOOK FOR WHEN ESTABLISHING THE VICARIOUS LIABILITY FOR A PARENT COMPANY AS TO VIOLATIONS COMMITTED BY IT'S SUBSIDIARIES.

This analysis is based on the SEC 10-K filings for Encore Capital Group, Inc. however any of the big debt buyer/collection companies that are publicly traded must file them with the SEC. This will help you to know where to find relevant and usable information to support your claim and what it means in regard to the statutes at issue in your suits.

### **EXTRACTED FROM ENCORE CAPITAL GROUP, INC.'s 10-K FILINGS FOR 2010, 2011 & 2012**

Encore Capital Group, Inc. is directly involved in all enumerated violations above. In its Form 10-K securities filings, it states the following:

**2010 10-K Securities Filing- pg 1** *“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.” . . . “We maintain strong relationships with many of the largest credit providers in the United States, and believe that we possess one of the industry’s best collection staff retention rates.”* **An outright admission that Encore is directly involved in the operations and actions of their subsidiaries by saying “We...maximize collections”. They state they buy consumer debt and “possess one of the industry’s best **collection** staff retention rates” this statement alone identifies them as a “debt collector”. In addition, ordinary principles of vicarious liability apply to Encore in all violations alleged against one of their wholly owned subsidiaries referred to as “The Company” or “We”.**

**Encore’s employees and agents had a direct, personal participation in the violations alleged. In addition Encore’s employees and/or agents personally authorized the violations alleged. These employees and agents are personally liable under the (FDCPA, FCRA, TCPA whichever is appropriate), for such conduct.**

**As a legal person, Encore can only act through its employees and agents. Hence, Encore is liable for those acts of its agents or employees in the scope of their authority or employment. Encore’s employees and/or agents personally**

participated and/or authorized the violations alleged in the scope of their authority or employment.

**See also the Interview Article below of J. Brandon Black, CEO of both Encore and Midland Credit Management.**

**2010 10-K Securities Filing- pg 2** *“and each year we deploy significant capital to purchase credit bureau and customized consumer data that describe demographic, account level, and macroeconomic factors related to credit, savings, and payment behavior.”* ... *“During collections, we apply our “willingness-capability” framework, which allows us to match our collection approach to an individual consumer’s payment behavior.”* **Nowhere within the FCRA are any of these reasons listed as permissible purpose to obtain a consumer’s credit report. This is nothing more than blatant data mining with no effort to first authenticate or validate the information purchased in a “portfolio”.**

**2010 10-K Securities Filing- pg 3** *“Once a portfolio of interest is identified, we obtain detailed information regarding the included accounts, including certain information regarding the consumers themselves. We then purchase additional information related to credit, savings or payment behavior for the consumer we are contemplating purchasing. Our internal modeling team then analyzes this information to determine the expected value of each potential new consumer”* .... **It is obvious that the Encore defendants obtained the credit reports for analytic purposes in a data mining exercise when considering the fact that OFTEN no overt collection attempts ie; calls, letters, or litigation are made until after a consumer demands validation of the information they were reporting to the CRA’s and instead, collection attempts ensue. It is also apparent the acquisition of the credit reports were for other than mere collection review or information needed to collect when they fail to send the consumer a dispute notice within 5 days of the first information furnishing to the CRA’s which is considered a collection action.**

**2010 10-K Securities Filing- pg 4** **Formal Approval Process on the purchase of portfolios**.... *“Members of the investment committee include our CEO, CFO, and other members of our senior management team and experts as needed.”* ..... **Encore’s CEO and CFO are directly involved in the approval of the purchases which result in the collection efforts of “the Company” and are therefore directly**

connected to any subsequent violations of consumer statutes carried out by the employees and/or agents.

Collection Approach- **Call Centers**- *“We maintain domestic collection call centers in San Diego, California, Phoenix, Arizona and St. Cloud, Minnesota” .... “During our new hire training period, we educate account managers to understand and apply applicable laws and policies that are relevant in the account manager’s daily collection activities. Our ongoing training and monitoring efforts help ensure compliance with applicable laws and policies by account managers.”* **Skip**

**Tracing** – *“If a consumers phone number proves inaccurate when an account manager calls an account, or if current contact information for a consumer is not available at the time of account purchase, then the account is automatically routed to our skip tracing process. We currently use a number of different skip tracing companies to provide phone numbers and addresses.”*

**ALSO FOUND IN THE 2011 REPORT ON PAGE 5 and 2012 10-K Securities Filing- pg 4**

So it would appear obvious to an ape that if a consumer’s telephone number given to an original creditor is no longer in service and the original creditor does not have a current phone number for said consumer, then a skip tracing service is used to find a new number the CONSUMER did not and could not have given even the original creditor prior written consent to call let alone a third party such as the Encore “The Company”. It is clear that not only is Encore and its subsidiaries willfully and knowingly violating the TCPA as a matter of policy and procedure they are equally willfully and knowingly violating the FDCPA in regard to telephone harassment when they know full well the recipient of the call has not given prior consent. It shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system...to any telephone number assigned to a...cellular telephone service... 47 U.S.C. § 27(b)(1)(A). The TCPA provides telephone service subscribers a private right of action for injunctive relief and statutory damages for violations:

A person or entity may...bring...an action based on a violation of [47 U.S.C. § 227(b)] to enjoin such a violation, an action to recovery for actual monetary loss from such a violation, or to receive \$500 in damages for each such violation, whichever is greater, or both...If the court finds that the defendant willfully or knowingly violated [47 U.S.C. § 227(b),] the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the [statutory damages available above]. 47 U.S.C. § 227(b)(3).

Continual calling to either a landline or a cell phone can be a violation of the FDCPA as well; 1692d(5), Caused the phone to ring or engaged any person in telephone conversations repeatedly.

Further Encore is liable for the violations because it and its officers and directors ratified those violations. In its Form 10-K securities filings for at least the years 2010,2011, and 2012, Encore states it “uses predictive dialers to place calls to consumers and that if the telephone numbers included in the account information purchased in portfolios prove to be inaccurate, they engage in the use of “skip tracing” to obtain NEW and alternative numbers. This, despite publicly acknowledging the fact that Encore’s collection methods implicated the TCPA and other applicable laws in its securities filings. Encore has made no effort to change those efforts but has in fact expanded its “skip tracing” efforts.

Ratification happens when the principal knowingly accepts an agent’s actions after the fact. By disclosing to Encore’s shareholders that Encore’s (*through its subsidiaries to include Midland Credit Management*) use of predictive dialers was at risk of violating the TCPA and other applicable laws over many years through its Form 10-K securities filings, and by failing to take any action to change the conduct that gave rise to such violations, such as the use of “new numbers discovered by skip tracing”, Encore and its officers and directors ratified Encore’s conduct. Encore is liable for any violations which it ratified.

**2010 10-K Securities Filing- pg 5** “*Through our Quality Assurance program, our FDCPA training for new account managers and our FDCPA recertification program for continuing account managers, and our Consumer Relations.*” Encore describes many times in its annual 10-K SEC filings that the “account managers” are employed in the call centers. The call centers are operated by Midland Credit Management (MCM). The statement above reinforces the fact that Encore is directly involved in the daily operations and business decisions of it’s subsidiaries and MCM specifically.

**2010 10-K Securities Filing- pg 6 - Predictive Dialer Technology** – “*During 2010, we upgraded our predictive dialer technology to accommodate the continued expansion of our call centers. With this upgrade, we expect to have additional call volume capacity and greater efficiency through shorter wait times and an increase in the number of live contacts. We believe that this will help maximize account manager productivity and further optimize the yield on our portfolio purchases.*

*We also believe that the use of predictive dialing technology helps us to ensure compliance with certain applicable federal and state laws that restrict the time, place, and manner in which debt collectors can call consumers.” This would be a very clear statement that the calls made to consumers are irrefutably conducted via a predictive dialing system regardless of any claims to “manual dialing”.*

**Computer Hardware-** *“We use a robust computer platform to perform our daily operations, including the collection efforts of our global workforce. Because our custom software applications are integrated within our database server environment, we are able to process transaction loads with speed and efficiency. The computer platform offers us reliability and expansion opportunities. Furthermore, this hardware incorporates state of the art data security protection. We back up our data daily, and store copies at a secured off-site location. We also mirror our production data to remote location to give us full protection in the event of the loss of our primary data center. To ensure the integrity and reliability of our computer platform we periodically engage outside auditors specializing in information technology to examine both our operating systems and disaster recovery plans.”* Once again Encore identifies “IT’S GLOBAL WORKFORCE”, all facilities outside San Diego, California are leased under the subsidiaries such as MCM. Encore cannot on one hand claim it has nothing to do with the operation of MCM and other subsidiaries and on the other include the employees of those subsidiaries as part of “IT’S GLOBAL WORKFORCE”. If the employees work for Encore, are paid by Encore although through a subsidiary name, their work product is directly tied to Encore’s revenue and the salaries of its Officers and Managers.

**ABOVE ALSO FOUND 2011 10-K Securities Filing- pg 6**

**2010 10-K Securities Filing- pg 7– Government Regulation –** *“Federal and state statutes establish guidelines and procedures which debt collectors must follow when collecting consumer receivables. The Fair Debt Collection Practices Act (the “FDCPA”) and comparable state statutes establish specific guidelines and procedures which debt collectors must follow when communicating with consumers, including the time, place and manner of the communications. It is our*

*policy to comply with the provisions of the FDCPA and comparable state statutes in all of our recovery activities. Our failure to comply with these laws could have a material adverse effect on us if they apply to some or all of our recovery activities. Alongside the FDCPA, the federal laws that apply to our business (in addition to the regulations that relate to these laws) include the following:*

*Truth-In-Lending Act, Fair Credit Billing Act, Equal Credit Opportunity Act, Fair Credit Reporting Act, Electronic Funds Transfer Act, U.S. Bankruptcy Code, Credit CARD Act of 2009, Gramm-Leach-Bliley Act, Soldiers and Sailors Act, Health Insurance Portability and Accountability Act, Dodd – Frank Wall Street Reform and Consumer Protection Act” In following years the TCPA is included as well as the “skip tracing” information which goes to the “ratification” of any violations alleged against them. They admit to full knowledge of the laws and restrictions and then INVEST heavily in the violation of same instead of investing in procedures to ensure compliance with the statutes.*

**2010 10-K Securities Filing- pg 8** – *“When we acquire receivables, we generally require the originating institution to contractually indemnify us against losses caused by its failure to comply with applicable statutes, rules and regulations relating to the receivables before they are sold to us.”... “State and federal laws concerning identity theft, privacy, data security, the use of automated dialing equipment and other laws related to consumers and consumer protection, as well as laws applicable to specific types of debt, impose requirements or restrictions on collection methods or our ability to enforce and recover certain of our receivables.” They admit to full knowledge of the laws and restrictions and then INVEST heavily in the violation of same instead of investing in procedures to ensure compliance with the statutes. Further they rely on the original sellers to reimburse them if they are caught violating the statutes as the daily course of business rather than taking precautions such as validating the accounts before committing possibly fraudulent actions against consumers.*

**2010 10-K Securities Filing- pg 12** – **Failure to comply with government regulation could result in the suspension or termination of our ability to conduct business, may require the payment of significant fines and penalties, or require other significant expenditures...** *“Many states and several cities require that we be licensed as a debt collection company.” If Encore and its*

subsidiaries are “the Company” and Encore as is established in its own 10-K SEC filings, defines itself as a “debt collector”, it would therefore be subject to the same licensing requirements as its subsidiaries. Check with your Secretary of State.

**2010 10-K Securities Filing- pg 15-** We may not be able to adequately protect the intellectual property rights upon which we rely... “We rely on proprietary software programs and valuation and collection processes and techniques and we believe that these assets provide us with a competitive advantage. We consider our proprietary software, processes and techniques to be trade secrets, but they are not protected by patent or registered copyright.”... This is an admission that the software programs used to generate their records are not protected by patent or copyright, therefore the records generated with it are not either. A claim of privilege or “trade secret” falls flat in the face of the above statement.

**2010 10-K Securities Filing- pg 16- Properties...** “ Our corporate headquarters and primary operations facility are located in approximately 28,600 square feet of leased space in San Diego, California”..... “Our policy is to improve, replace and supplement the facilities as considered appropriate to meet the needs of the individual operations. In this regard, we plan to move certain of our operations to an additional leased facility in San Diego during the coming year to accommodate our anticipated operational needs.”

**2011 10-K Securities Filing- pg F-26** – “The Company leases office facilities in San Diego, California; Pheonix, Arizona; Arlington, Texas; St. Cloud, Minnesota; Gurgaon, India; and Costa Rica. The leases are structured as operating leases, and the Company incurred related rent expense in the amounts of \$5.8 million, \$4.5 million and \$4.3 million during the years ended December 31, 2011, 2010, and 2009, respectively.” Admission of material participation in the form of “footing the bill” for MCM’s call centers and collection actions.

**2012 10-K Securities Filing- pg 26-** “Our corporate headquarters and primary operations facility are located in approximately 99,000 square feet in tow separate leased locations in San Diego, California.”... “We lease approximately 32,000 square feet of space in San Jose, Costa Rica. This facility can accommodate approximately 300 employees. The facility serves as a call center.” Admission of

material participation in the form of “footing the bill” for MCM’s call centers and collection actions.

**2011 10-K Securities Filing- pg 5 of Lease Guaranty...** signed by J. Brandon Black, President and CEO (for Midland Credit Management, San Diego bldg.)

**2010 10-K Securities Filing- pg 17-** *“Brent v Midland Credit Management, Inc et. al, filed on May 19, 2008, in the United States District Court for Northern District of Ohio Western Division, the plaintiff, Andrea Brent, has filed a class action counter-claim against our subsidiaries Midland Credit Management, Inc. and Midland Funding LLC (the “Midland Defendants”). Ongoing case against “the Company”.*

**2010 10-K Securities Filing- pg 18-** *“On November 2, 2010 and December 17, 2010 two national class actions entitled Robinson v. Midland Funding LLC and Tovar v. Midland Credit Management, respectively, were filed in the United States District Court for the Southern District of California. The complaints allege that our subsidiaries violated the Telephone Consumer Protection Act (“TCPA”) by calling consumers’ cellular phones without their prior express consent. The complaints seek monetary damages under the TCPA, injunctive relief and other relief, including attorney fees. We have filed motions to dismiss or stay these cases. Those motions are currently pending.” ..... “On January 6, 2010, the Office of Attorney General of the State of California, the “California Attorney General,” issued a subpoena to us to answer interrogatories and to produce documents in a proceeding entitled In the Matter of the Investigation of Encore Capital Group Inc., Midland Credit Management, Inc. and Affiliated Persons and Entities concerning our debt collection practices and related topics. We have and intend to continue to cooperate fully with the California Attorney General in response to this subpoena, subject to applicable law.” Ongoing case against “the Company” which led to the MDL.*

**ABOVE ALSO FOUND 2011 10-K Securities Filing- pg 6, 7 and includes the MDL info. Also found on page F-26**

**Above also found, 2012 10-K Securities Filing- pg 27- Moved into the MDL**



**2010 10-K Securities Filing- pg 29-** Other operating expenses... *“an increase of \$1.1 million in telephone number tracing expenses and a net increase in various other operating expenses....”* General and administrative expenses... *“The increase was primarily the result of an increase of \$4.1 million in legal settlements,...”* A statement that “the Company” has expanded its unlawful practice of knowingly and willfully calling numbers it knows are not connected with any “prior written consent”.

**2010 10-K Securities Filing- pg 51-** *“The Company’s management, including our Chief Executive Officer and Chief Financial Officer, is responsible for establishing and maintaining adequate internal control over financial reporting (as such term is defined in Exchange Act Rule 13a-15(f) and 15d-15(f) for Encore Capital Group, Inc. and its subsidiaries (the “Company”).”* **Goes to material participation in the running of the subsidiary.**

**2011 10-K Securities Filing- pg 56-** *“Lease Deed, dated as of March 4, 2011, between Midland Credit Management, Inc., a Kansas corporation (“Tenant”) and Teachers Insurance and Annuity Association of America for the Benefit of its Separate Real Estate Account, a New York corporation (“Landlord”) for real property located in San Diego, California (the “San Diego Lease”) (filed herewith)* **All leases paid by Encore Capital Group and signed by the CEO. Goes to material participation in the running of the subsidiary.**

**2011 10-K Securities Filing- pg F-6 Ownership, Description of Business...**  
*“Encore Capital Group, Inc. (“Encore”), through its subsidiaries (collectively), the “Company”, is a leader in consumer debt buying and recovery.”... “Encore is a Delaware holding company whose principal assets are its investments in various wholly owned subsidiaries.”* **An outright admission that Encore is directly involved in the operations and actions of their subsidiaries referred to as (collectively) the “Company”. They state they buy consumer debt and are among the industry leaders in the “recovery” which in this context is synonymous with “collection”.**

**2012 10-K Securities Filing- pg 34 –** Our business and Operating Segments – *“... In addition, through our subsidiary Propel Financial Services, LLC (“Propel”), we assist Texas property owners who are delinquent on their property taxes by*

*paying these taxes on behalf of the property owners in exchange for payment agreements collateralized by tax liens on the property.” Encore enters into the predatory foreclosure arena.*

**DOWNLOAD THE 8-K (ref. page 53 2011 10-K)**

<http://www.sec.gov/Archives/edgar/data/1084961/000108496104000071/0001084961-04-000071-index.htm>

[http://www.sec.gov/Archives/edgar/data/1084961/000108496104000071/form8k\\_sdllease.htm](http://www.sec.gov/Archives/edgar/data/1084961/000108496104000071/form8k_sdllease.htm)

<http://www.sec.gov/Archives/edgar/data/1084961/000108496104000071/sdllease.htm>

[http://www.sec.gov/Archives/edgar/data/1084961/000108496104000071/lease\\_guaranty.htm](http://www.sec.gov/Archives/edgar/data/1084961/000108496104000071/lease_guaranty.htm)

<http://www.sec.gov/Archives/edgar/data/1084961/000108496104000071/0001084961-04-000071.txt>

**SURVIVING A MOTION TO DISMISS....**

### **Legal Standard**

While a plaintiff need not give “detailed factual allegations,” he must plead sufficient facts that, if true, “raise a right to relief above the speculative level.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 545 (2007).

“To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009) (quoting *Twombly*, 550 U.S. at 547). A claim is facially plausible when the factual allegations permit “the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* In other words, “the nonconclusory ‘factual content,’ and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief.” *Moss v. U.S. Secret Service*, 572 F.3d 962, 969 (9th Cir. 2009). “Determining whether a complaint states a plausible claim for relief will ... be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.” *Iqbal*, 129 S.Ct. at 1950.

In reviewing a motion to dismiss under Rule 12(b)(6), the court must assume the truth of all factual allegations and must construe all inferences from them in the light most favorable to the nonmoving party. *See Thompson v. Davis*, 295 F.3d 890, 895 (9th Cir. 2002); *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996). However,

legal conclusions need not be taken as true merely because they are cast in the form of factual allegations. *See* *Ileto v. Glock, Inc.*, 349 F.3d 1191, 1200 (9th Cir. 2003); *Western Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981). When ruling on a motion to dismiss, the Court may consider the facts alleged in the complaint, documents attached to the complaint, documents relied upon but not attached to the complaint when authenticity is not contested, and matters of which the Court takes judicial notice. *See* *Lee v. City of Los Angeles*, 250 F.3d 668, 688-89 (9th Cir. 2001). If a court determines that a complaint fails to state a claim, the court should grant leave to amend unless it determines that the pleading could not possibly be cured by the allegation of other facts. *See* *Doe v. United States*, 58 F.3d 494, 497 (9th Cir. 1995).

#### **NOTES FROM THE PRA MDL JUDGES RULING ON MOTION TO DISMISS:**

Defendants further contend plaintiff's FACC "lacks factual allegations to overcome the general rule that a parent company is not liable for its subsidiary's actions" and fails to "allege elements required for their claims under the doctrines of vicarious liability, veil piercing, agency and ratification." *Id.* at 9. Thus defendants contend plaintiff's fail to state a claim under any theory of vicarious liability.

In opposition, plaintiffs contend their second cause of action sufficiently alleges defendants PRA Inc. and Stern are directly liable for the TCPA violations and sufficiently pleads theories of piercing the corporate veil, agency and ratification. (See Doc. #74). Plaintiffs point to their allegations that "PRA LLC account for the overwhelming majority (approximate 80%) of PRA Inc.'s revenue and that accordingly, PRA, Inc. directly manages PRA LLC's daily operations – and does not treat PRA LLC as a passive investment." *Id.* at 1-2 (citing FACC ¶ 62). Plaintiffs further point out their FACC alleges "PRA Inc. is directly involved in PRA LLC's TCPA violations and PRA Inc.'s employees and agents had direct, personal participation in [PRA LLC's] TCPA violations ..." *Id.* at 2. Plaintiffs also note the FACC recites portions of defendants' securities filing which, along with the FACC's own recitations, explains the involvement of PRA Inc. personnel, including Stern, in the operation of PRA LLC's call centers. *Id.* at 2-3. According to plaintiffs, "the FACC's most important allegation [regarding Stern's involvement] is that PRA Inc.'s compensation to Mr. Stern has been based, in part, on his development and implementation of strategies that increased the number of dollars recovered from consumers...." *Id.* at 3 (quoting FACC ¶ 63). Second, plaintiffs point out the FACC clearly alleges "the circumstances of this case 'support piercing the corporate veil,'" "amply alleges that PRA LLC acted as Stern and PRA Inc.'s agent when it violated the TCPA" and that "Stern and PRA Inc. are liable because they ratified PRA LLC's TCPA violations." *Id.* at 3-4, 7 (citing FACC ¶¶ 66, 67, 68).

This Court agrees with defendants that there are no allegations PRA Inc. or Stern made or placed any calls to plaintiffs and, thus, plaintiffs' direct liability theory fails. However, this Court's review of the record reflects that plaintiffs sufficiently plead facts in support of vicarious liability in the form of veil-piercing, agency and/or ratification

theories. Construing the facts presented here as true and in the light most favorable to plaintiffs, this Court finds there are sufficient allegations contained in the FACC to state a plausible theory for vicarious liability against defendants PRA Inc. and Stern. *See* Ashcroft, 129 S.Ct. at 1949. Therefore, this Court finds defendants' motion to dismiss plaintiffs' second cause of action for failure to state a claim for relief must be DENIED.

#### ATTORNEY'S FEES

In opposition, plaintiffs concede Section 1021.5 does not explicitly provide for an award of attorneys' fees but contend there is no case authority prohibiting this Court from awarding attorneys' fees under Section 1021.5 based on a violation of the TCPA. Doc. # 74 at 19-20. Plaintiffs, however, point out that "[d]efendants have failed to produce a single case where a court held that section 102.5 *does not* apply to a TCPA claim." Id. at 19 (emphasis in original). Thus, plaintiffs contend this Court should decline to be first court to do so, especially since courts have "routinely awarded attorneys' fees under section 1021.5 for the vindication of rights arising under *federal law*." Id. (citing *Maria P. v. Riles*, 43 Cal.3d 1281, 1293 (1987)(attorneys' fees awarded under Section 1021.5 based on violation of the Family Educational Rights and Privacy Act of 1974); *Citizens Against Rent Control v. City of Berkeley*, 181 Cal.App.3d 213 (1986)(attorneys' fees under Section 1021.5 awarded based on vindication of First Amendment rights); *Slayton v. Pomona Unified School Dist.*, 161 Cal.App.3d 538 (1984)(First Amendment rights as well as California law); *Schmid v. Lovette*, 154 Cal.App.3d 466 (1984)(confirming attorneys' fee award under Section 1021.5 based on a state law that was "repugnant to the state and federal constitutions")). Plaintiffs also contend the TCPA does not expressly or impliedly preempt an award of attorneys' fees. Id. at 20-21.

This Court finds plaintiffs' arguments persuasive. Although plaintiffs do not dispute the TCPA does not expressly authorize fee-shifting or an award of attorneys' fees, this Court finds no reason to deny plaintiffs the opportunity, at this early stage of litigation, to seek such an award should plaintiffs prevail. This Court is also persuaded by the cases cited by plaintiffs in which the courts determined that attorneys' fees could be awarded pursuant to Section 1021.5 based on vindication of a federal right. *See* *Maria P.*, 43 Cal.3d at 1293; *Citizens Against Rent Control*, 181 Cal.App.3d 213; *Slayton*, 161 Cal.App.3d 538; *Schmid v. Lovette*, 154 Cal.App.3d 466. Thus, this Court finds plaintiffs should not be foreclosed from seeking attorneys' fees under Section 1021.5 should they prevail under the TCPA. Therefore, defendants' motion to dismiss plaintiffs' claim and request for attorneys' fees is DENIED.

#### **RELATIVE CASE LAW:**

A debt collectors parent company was also found to be a debt collector since the parent company was shown to be "thoroughly enmeshed in the debt collection business" and "a significant participant in the debt collection process" 67 (the foot note says!) it references case *Hernandez v. Midland Credit Mgmt., Inc.*, WL 111576 (N.D. ILL. Sept. 25th 2007) debt collector and its parent were debt buyers.

A franchisor could be liable for the collection activities of its franchisee because of its involvement. See *Taylor V. Checkrite, LTD.*, 627 F. Supp. 415 ( S.D. Ohio 1986).

## **Executive Profile: Brandon Black**

April 19, 2012 | Volume 6, Issue 4 | [www.sdchamber.org](http://www.sdchamber.org) | [Contact Us](#)

<http://www.sdchamber.org/news-and-publications/publications/business-action-online-2012/march-2012/business-action-online-march-2012/executive-profile-brandon-black.html>

### *1. What is your business background?*



I have been the President of Encore Capital Group Inc. since 2004, and have been its Chief Executive Officer since 2005. I also serve as the President and CEO of Midland Credit Management, Inc., one of Encore's subsidiaries. After earning my MBA at the University of Richmond in 1996, I spent a number of years in executive roles in the financial industry before joining Encore in 2000 as Executive Vice President and Chief Operating Officer. In fact, much of my expertise in consumer receivables originated from my tenure at Capital One. When I started at Encore in 2000, the company was close to bankruptcy, and we were losing about \$23 million. I had a mandate to make the company profitable in 90 days, because in 91 days we would be in default. I hadn't done anything like that before, but I brought an eye for details and analysis and learned to trust my instincts. Today, I am proud to say that Encore is thriving financially and has built a strong reputation as a leader in the consumer debt buying industry. We are now one of the best-positioned companies in the industry due to the unique competitive advantages we have built since 2000, including an industry-leading behavioral science program and a broad and deliberate commitment to consumer rights and dignity. We take the treatment of our customers and their financial information very seriously.

### *2. How does Encore Capital Group distinguish itself from its competitors?*

First and foremost, Encore employees are taught to conduct themselves in accordance with the highest ethical standards. This permeates every area of our business and helps foster a culture

that, I believe, gives us a sustainable competitive advantage. In our industry, the emphasis Encore places on ethical conduct is important, and we enjoy a significant advantage with consumers and employees as a result. We also invest heavily in analytics and understanding our consumers. For example, we developed the industry's first "Ability to Pay" model and recently founded the Consumer Credit Research Institute (CCRI) which is dedicated to differentiating and describing financially distressed consumers through the application of modern behavioral science methods. We have partnered with leading universities, nonprofit organizations, commercial entities and policy agencies, and our activities are wholly directed toward identifying and answering the most interesting and pressing questions about consumer financial behavior. Insights we'll gain through the CCRI will have an important impact on policy, financial education, and general consumer economic well-being. We believe that an improved understanding of consumer behavior will help people make better-informed financial decisions in their daily lives and continue to differentiate us from our competitors.

## Executive Profile: Brandon Black

April 19, 2012 | Volume 6, Issue 4 | [www.sdchamber.org](http://www.sdchamber.org) | [Contact Us](#)

### *1. What is your business background?*



I have been the President of Encore Capital Group Inc. since 2004, and have been its Chief Executive Officer since 2005. I also serve as the President and CEO of Midland Credit Management, Inc., one of Encore's subsidiaries. After earning my MBA at the University of Richmond in 1996, I spent a number of years in executive roles in the financial industry before joining Encore in 2000 as Executive Vice President and Chief Operating Officer. In fact, much of my expertise in consumer receivables originated from my tenure at Capital One. When I started at Encore in 2000, the company was close to bankruptcy, and we were losing about \$23 million. I had a mandate to make the company profitable in 90 days, because in 91 days we would be in default. I hadn't done anything like that before, but I brought an eye for details and analysis and learned to trust my instincts. Today, I am proud to say that Encore is thriving financially and has built a strong reputation as a leader in the consumer debt buying industry. We are now one of the best-positioned companies in the industry due to the unique competitive

advantages we have built since 2000, including an industry-leading behavioral science program and a broad and deliberate commitment to consumer rights and dignity. We take the treatment of our customers and their financial information very seriously.

## *2. How does Encore Capital Group distinguish itself from its competitors?*

First and foremost, Encore employees are taught to conduct themselves in accordance with the highest ethical standards. This permeates every area of our business and helps foster a culture that, I believe, gives us a sustainable competitive advantage. In our industry, the emphasis Encore places on ethical conduct is important, and we enjoy a significant advantage with consumers and employees as a result. We also invest heavily in analytics and understanding our consumers. For example, we developed the industry's first "Ability to Pay" model and recently founded the Consumer Credit Research Institute (CCRI) which is dedicated to differentiating and describing financially distressed consumers through the application of modern behavioral science methods. We have partnered with leading universities, nonprofit organizations, commercial entities and policy agencies, and our activities are wholly directed toward identifying and answering the most interesting and pressing questions about consumer financial behavior. Insights we'll gain through the CCRI will have an important impact on policy, financial education, and general consumer economic well-being. We believe that an improved understanding of consumer behavior will help people make better-informed financial decisions in their daily lives and continue to differentiate us from our competitors.

## *3. What are your aspirations for Encore Capital Group?*

**Encore has over 50 years of experience in the debt collection industry.** My goal is to continue to lead Encore into a new era of growth and maturity in which our partnership with our consumers continues to thrive. I hope that I have created a work environment where employees feel respected, engaged and invested in the company's culture. When I step down from my role someday, I look forward to knowing that the decisions I drove during my tenure have positioned Encore, our employees, and our consumers for long-term success. I think we are well on our way to meeting that goal as a company. We've been recognized recently by a variety of publications for our work and culture. For employees, we provide tuition reimbursement and training opportunities, and employees receive exceptional benefits including wellness programs offering proactive support to quit smoking, lose weight, and lead healthy lifestyles. I am proud to say that, because of these efforts, the San Diego Business Journal recently recognized Encore as San Diego's Healthiest Large Company. Additionally, we continue to make important strides in ensuring that our consumers are treated fairly and with dignity and respect as they repay their financial obligations and repair their credit. Our industry-leading Consumer Bill of Rights is a groundbreaking step to ensure that continues, and is another strong example of our leadership as a company.



4. *What challenges are currently facing your industry?*

The industry's biggest challenges come from today's increasingly-complex regulatory environment. We seem to be relying on an ever-increasing number of regulations, at both the federal and state levels, to ensure corporate responsibility, sometimes at the expense of individual accountability. Some of these have the potential to make it very difficult for good companies to operate profitably.

5. *How do Encore Capital Group's operations serve the economy?*

In addition to employing nearly 2,400 employees in the U.S. (including our corporate headquarters in San Diego), India and Costa Rica, we provide a critical service for both consumers and creditors. We invested almost \$400 million dollars directly back into the economy in 2011 and we've helped hundreds of thousands of consumers over the past year to satisfy their financial debt obligations. This enables them to gain access to better credit opportunities and to regain their financial footing. More fundamentally, it also helps restore an individual's sense of pride and self-confidence. The industry plays an important role in the modern economy and consumer credit system. Because we compensate creditors when consumers are unable to do so, companies like Encore help keep credit prices low and help ensure that consumer credit remains broadly available and affordable.

6. *What is an important lesson you have learned during your career?*

One of the biggest lessons I have learned as a CEO is to continue to employ the same review strategies and the same level of energy toward productivity improvement in both good times and bad. During my first 90 days at Encore, when financial times were tough for the company, I think I was extremely focused and disciplined. During good times, it is equally important not to let up and lose that discipline. In order to sustain growth, you must remain consistently focused on the same goals. To keep from falling into the complacency trap, I conduct a robust planning cycle multiple times per year with the management team, diving down into very specific details for each key initiative and each business group. I measure activity levels and corresponding results generated by each team across the company, looking to identify best practices and assure continuous improvement throughout the company. To ensure strong performance you have to focus on it, and that's what our planning process is all about

- See more at: <http://www.sdchamber.org/news-and-publications/publications/business-action-online-2012/march-2012/business-action-online-march-2012/executive-profile-brandon-black.html#sthash.u0tCYzXx.dpuf>



