

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF ALABAMA  
WESTERN DIVISION**

IN RE:	)	
	)	Case No.: 12-72368-CMS
Cindy Swindle Howard	)	
John M. Howard	)	
Debtors,	)	CHAPTER 13
<hr/>		
	)	
Cindy Swindle Howard	)	
	)	
Plaintiff,	)	ADVERSARY PROCEEDING
	)	
The Mortgage Law Group, LLP	)	NO. <b>13-70017-CMS</b>
	)	
Defendant.	)	

**COMPLAINT SEEKING TO AVOID A PRE-PETITION TRANSFER OF PROPERTY  
PURSUANT TO 11 U.S.C. § 548, TO RECOVER PROPERTY OF THE ESTATE  
PURSUANT TO 11 U.S.C. § 542, SEEKING DAMAGES FOR VIOLATIONS OF THE  
AUTOMATIC STAY PURSUANT TO 11 U.S.C. § 362, SEEKING DAMAGES FOR  
VIOLATIONS OF THE ALABAMA DECEPTIVE TRADE PRACTICES ACT, FOR  
DAMAGES FOR VIOLATION OF THE DEBT RELIEF AGENCY PROVISIONS OF  
THE BANKRUPTCY CODE, BREACH OF CONTRACT, VIOLATION OF ALABAMA  
TORT LAW AND BREACH OF FIDUCIARY DUTIES**

COMES NOW the Plaintiff, Cindy Swindle Howard, in the above-styled bankruptcy case, by and through counsel, and does allege and complains as follows:

**INTRODUCTION**

1. This action seeks to avoid pre petition transfers of property from the Plaintiff to the Defendant from which the Plaintiff received less than equivalent value from the Defendant. These transfers were all done within one (1) year of the filing of the voluntary chapter 13 bankruptcy petition.
  
2. This action seeks the turnover of property of the estate pursuant to 11 U.S.C. § 542.

3. This action seeks damages for violation of the automatic stay pursuant to 11 U.S.C. § 362.
4. This Action Seeks Damages for Violation of the Debt Relief Agency Provisions of the Bankruptcy Code.
5. This action seeks damages for the pre-petition actions of the Defendant which constitute numerous violations of the Alabama Deceptive Trade Practices Act.
6. This action seeks damages for the pre-petition actions of the Defendant which constitute violations of Alabama Contract Law and Alabama Tort Law.

### **JURISDICTION AND VENUE**

7. Jurisdiction is conferred on this Court pursuant to the provisions of Section 1334 of Title 28 of the United States Code in that this proceeding arises in and is related to the above-captioned Chapter 13 case under Title 11 and concerns property of the Debtors in that case.
8. This Court has both personal and subject matter jurisdiction to hear this case pursuant to Section 1334 of Title 28 of the United States Code, Section 157(b)(2) of Title 28 of the United States Code.
9. This Court has supplemental jurisdiction to hear all state law claims pursuant to Section 1367 of Title 28 of the United States Code.
10. This matter is primarily a core proceeding and therefore the Bankruptcy Court has jurisdiction to enter a final order. However, in the event this case is determined to be a non-core proceeding then and in that event the Plaintiff consent to the entry of a final order by the Bankruptcy Judge.

11. Venue lies in this District pursuant to Section 1391(b) of Title 28 of the United States Code.

### **PARTIES**

12. The Plaintiff, Cindy Swindle Howard, is a natural person who resides in Walker County, Alabama , and is a debtor under Chapter 13 of Title 11 of the United States Code in case number 12-72368-CMS13 with her husband, John M. Howard, which case is presently pending before this court. The Plaintiff is hereinafter referred to as the Plaintiff or the Debtor.
13. The Defendant, The Mortgage Law Group, LLP, is a for profit limited liability partnership organized under the laws of the State of Illinois, and listing a principal address of 233 South Wacker Drive, Suite 5150, Chicago, Illinois 60606. The Defendant lists its registered agent as Mark D. Guidubaldi at 500 West Madison Street, Suite 3700, Chicago, Illinois 60661.
14. Defendant is not licensed or qualified to do business in Alabama.

### **FACTUAL ALLEGATIONS**

15. The Chapter 13 case of the Plaintiff was commenced by the filing of a voluntary petition with the Clerk of this Court on November 12, 2012
16. The 11 U.S.C. § 341(a) meeting of creditors was held on December 19, 2012 in Jasper, Alabama.
17. In early 2012, the Debtor and her husband became behind on the mortgage payments on their home and feared imminent foreclosure. During that time, the Debtor became very nervous and sought ways to save her home.

18. On or about May 8, 2012, the Debtor entered into an agreement with the Defendant. This agreement required the Debtor to remit \$1,195.00 to the Defendant for purported foreclosure assistance. The Defendant, through its agents, represented to the Debtor that it would work out a loss mitigation plan with her mortgage company and forestall or prevent a foreclosure of her home. During the course of these communications, the Defendant failed to provide Plaintiff with any of the mandatory notices provided for in the Debt Relief Agency sections of The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 amendments to the Bankruptcy Code.
19. Defendant is in fact a “debt relief agency” as that term is defined in 11 U.S.C. Section 101(12A) in that Defendant provided bankruptcy advice to Plaintiff, an assisted person.
20. The Debtor remitted \$1,195.00 to the Defendant on or about May 30, 2012 and remitted monthly payments to the Defendant thereafter.
21. The Defendant took the Plaintiff’s money and failed to perform under the terms of the contract, failed to work out a loss mitigation plan, failed to work out payment arrangements with the Plaintiff’s mortgage company, failed to forestall or prevent the foreclosure of the Plaintiff’s home, and generally failed to perform under the terms of the contract.
22. By late 2012, the Debtor received a notice from her mortgage company that her home had been scheduled to be foreclosed upon. Being frightened and very alarmed, she contacted representatives of the Defendant who offered no assistance. Having no other option at that point, the Debtor was required to file her bankruptcy petition herein to stop the foreclosure.

23. The Plaintiff received less than a reasonably equivalent value in exchange for the transfer of funds to the Defendant within one year of the filing of their bankruptcy petition.
24. On or about February 10, 2013, the Plaintiff mailed a demand for refund of \$16,793.00 to the Defendant.
25. The Defendant thereafter issued a partial payment to the Plaintiff but has failed to fully compensate her for the damages which she has incurred.
26. The Defendant has failed to abide by its agreement with the Plaintiff and has failed to compensate her for the damages which she incurred.
27. As a result of the Defendant's actions, the Plaintiff has suffered emotional distress and mental anguish and has incurred legal fees and costs in the filing of her chapter 13 bankruptcy and in pursuit of the refund of the funds forwarded to the Defendant.

**FIRST CLAIM FOR RELIEF  
AVOIDANCE OF FRAUDULENT TRANSFERS**

28. The allegations in paragraphs 1 through 26 of this Complaint are realleged and incorporated herein by this reference.
29. 11 U.S.C. § 548(a)(1)(B)(i) allows the Bankruptcy Trustee to avoid a transfer of a debtor's interest in property that occurred within one year preceding the filing of the petition where as a result of such transfer the debtor "received less than a reasonably equivalent value in exchange for such transfer."
30. In this case, the Debtor transferred approximately \$4,500.00 to the Defendant in 2012.
31. The Debtor filed her bankruptcy petition with this Court on November 12, 2012. Therefore, all transfers were made within a one-year period prior to the commencement of the Debtor's chapter 13 case.

32. The Debtor received far less than a reasonable equivalent in value from these transfers in that Defendant did not provide any services in exchange for the money payments.
33. Pursuant to 11 U.S.C. § 548(a)(1)(B)(i) these pre-petition transfers were fraudulent transfers made involuntarily by the Debtor to the Defendant and should be returned to the bankruptcy estate pursuant to 11 U.S.C. § 541.

**SECOND CLAIM FOR RELIEF  
TURNOVER OF PROPERTY OF THE ESTATE**

34. The allegations in paragraphs 1 through 32 of this Complaint are realleged and incorporated herein by this reference.
35. Plaintiff's property, which is property of the estate pursuant to 11 U.S.C. §§ 541 and 1306, has been retained by the Defendant post-petition and is currently in the possession of the Defendant.
36. Under 11 U.S.C. § 1306 the Debtor is entitled to possession of all property of the estate. Plaintiff has made amicable demand to the Defendant for turnover of the property; nonetheless, the Defendant has refused to refund the money.
37. As a result of the Defendant's actions, the Defendant is liable to the Plaintiff for damages, attorney fees, and costs.

**THIRD CLAIM FOR RELIEF  
VIOLATION OF THE AUTOMATIC STAY**

38. The allegations in paragraphs 1 through 36 of this Complaint are realleged and incorporated herein by this reference.
39. The actions of the Defendant, set forth hereinabove, constitute willful and egregious violations of the automatic stay pursuant to 11 U.S.C. § 362(a)(3), which prohibits "any

actor to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate.”

40. As a result of the Defendant’s violations of the automatic stay, the Defendant is liable to the Plaintiff for actual damages, legal fees, costs, and treble or punitive damages.

**FOURTH CLAIM FOR RELIEF  
VIOLATIONS OF ALABAMA DECEPTIVE TRADE PRACTICES ACT**

41. The allegations in paragraphs 1 through 39 of this Complaint are realleged and incorporated herein by this reference.
42. Debtor has a private right of action against the Defendant pursuant to Ala. Code § 8-19-10. Debtor has suffered loss of money as a result of the use or employment by another person of unfair or deceptive method, act, or practice declared unlawful by Ala. Code § 8-19-1 through 8-19-5.
43. Defendant has violated Ala. Code § 8-19-10, and Ala. Code § 8-19-1 through 8-19-5 by engaging in the unfair and deceptive practice of misleading consumers as to the nature of their program and how payments into their program are to be applied and/or distributed, and making material misrepresentations regarding the same.
44. Defendant’s acts as described above were done intentionally with the purpose of coercing the Debtor out of her money. This Defendant’s actions were fraudulent as that term is defined pursuant to Ala. Code § 6-5-101 and Ala. Code § 6-5-103 through Ala. Code § 6-5-104.
45. As a result of the above violations, the Defendant is liable to the Plaintiff for actual damages, statutory damages, attorney’s fees, and costs pursuant to Ala. Code § 8-19-10.

**FIFTH CLAIM FOR RELIEF  
VIOLATION OF ALABAMA CONTRACT LAW**

46. The allegations in paragraphs 1 through 44 of this Complaint are realleged and incorporated herein by this reference.
47. “Actual fraud denotes the actual mental operation of intending to defeat or delay the rights of the creditor. On the other hand, constructive fraud is based on facts and circumstances which courts have said constitute legal fraud, regardless of actual intent.” *Hope Developers, Inc. v. Vandiver*, 665 So.2d 910, 913 (Ala. 1995).
48. Alabama relies on the common law definition of constructive fraud which is “the breach of a legal or equitable duty which, irrespective of the moral guilt, the law declares fraudulent because of its tendency to deceive others, to violate public or private confidence, or to inspire public interest. It usually arises from a breach of duty where a relationship of trust and confidence exists.” *Hornaday v. First Nat. Bank of Birmingham*, 65 So.2d 678, 687-688 (Ala. 1953). Plaintiff herein entered into a contract with the Defendant as evidenced by the payment of approximately \$4,500.00 to Defendant which established a confidential and fiduciary relationship.
49. A fiduciary relationship is a confidential relationship in which one person is obligated to act in another person’s best interests. *Bank of Red Bay v. King*, 482 So.2d 274, 284 (Ala. 1985). In the instant case, Defendant has failed to perform under the terms of the contract with the Plaintiff, has collected a fee in advance, and has therefore breached the contract to the benefit of the Defendant.
50. The Alabama Supreme Court has held that in order to survive a motion to dismiss, a cause of action for fraud must allege (1) a false representation, (2) the false representation must concern a material existing fact, (3) the plaintiff must rely upon that false

representation, and (4) the plaintiff must be damaged as a proximate result. *Cecil Crews Chevrolet-Oldsmobile, Inc. v. Williams*, 394 So.2d 912, 914 (Ala. 1981).

51. Plaintiff has suffered loss as a result of her detrimental reliance on the Defendant's performance under the contract.
52. Defendant's actions with respect to the Debtor, as set forth herein above, rise to the level of fraud, constructive and actual.
53. Defendant intentionally misrepresented the services promised to provide on behalf of Debtor, intentionally collected a fee in advance of providing services, intentionally refused to perform the services promised to Debtor, and intentionally did not honor rescission of the agreement between Debtor and Defendant.
54. To recover compensatory damages for fraud and deceit, plaintiff must show that she has suffered an actual pecuniary loss as the result of the fraud. *Ringer v. First Nat. Bank of Stevenson*, 281 So.2d 261, 266 (Ala. 1973). Where an intent to deceive has been shown, punitive damages are allowable; however, they are also allowable for wanton and reckless misrepresentations. *Baldwin Mut. Ins. Co. v. Brantley*, 518 So.2d 32, 36 (Ala. 1987).
55. Obviously, the element of intent is present in the instant case. Defendant intentionally offered services to the Plaintiff, intentionally collected a fee in advance, intentionally drew up the terms of the contract, intentionally did not provide the services promised, and intentionally did not honor the rescission of the contract entered into with Plaintiff.
56. The Defendant was unjustly enriched.
57. The Alabama Supreme Court has held that the retention of a benefit is unjust if '(1) the donor of the benefit ... acted under a mistake of fact or in misreliance on a right or duty,

or (2) the recipient of the benefit ... engaged in some unconscionable conduct, such as fraud, coercion, or abuse of a confidential relationship. *Mantiplay v. Mantiply*, 951 So.2d 638, 654-655 (Ala. 2006).

58. As a result of its fraud and breach of contract, there is sufficient reason to justify rescission of the agreement between the Debtor and the Defendant and as such Defendant is liable to the Plaintiff for actual damages and attorney fees, and punitive damages pursuant to Ala. Code § 6-5-104 and Ala. Code § 8-19-10.

**SIXTH CLAIM FOR RELIEF  
VIOLATION OF THE ALABAMA RESIDENTIAL MORTGAGE FRAUD ACT**

59. The allegations in paragraphs 1 through 57 of this Complaint are realleged and incorporated herein by this reference.
60. The Debtor contends that the Defendant has violated Ala. Code § 13A-9-130 by knowingly making a material deliberate misstatement or misrepresentation during the mortgage lending process with the specific intention that it be relied on by the Debtor.
61. The Defendant intentionally misrepresented certain mortgage modification services to the Debtor. The Debtor relied on the misrepresentation and subsequently provided the Defendant with payments for the mortgage modification.
62. The Defendant received payment for the mortgage modification service without providing the actual mortgage modification services.
63. As a result of this intentional misrepresentation, the Defendant has violated the Alabama Residential Mortgage Fraud Act and is subject to actual and punitive damages pursuant to Ala. Code § 13A-9-130.

**SEVENTH CLAIM FOR RELIEF  
ALABAMA TORT LAW**

64. The allegations in paragraphs 1 through 62 of this Complaint are realleged and incorporated herein by this reference.
65. The tort of intentional infliction of emotional distress is recognized in Alabama.
66. “Where the contractual duty or obligation is so coupled with matters of mental concern or solicitude, or with the feelings of the party to whom the duty is owed, that a breach of that duty will necessarily or reasonably result in mental anguish or suffering, it is just that damages therefore be taken into consideration and awarded.” *Taylor v. Baptist Medical Center, Inc.*, 400 So.2d 369, 374 (Ala. 1981).
67. Defendant violated Alabama tort law through the intentional and negligent acts set forth herein above.
68. As a result of the violations of Alabama tort law, Plaintiff suffered and continues to suffer personal humiliation, anxiety, embarrassment, mental anguish, and emotional distress.
69. Due to the above violation of Alabama tort law, Defendant is liable to the Plaintiff for actual damages, attorney’s fees, and costs.

**EIGHTH CLAIM FOR RELIEF  
BREACH OF FIDUCIARY DUTY AND SELF DEALING**

70. The allegations in paragraphs 1 through 68 of this Complaint are realleged and incorporated herein by this reference.
71. A claim based on a contract entered into by a trustee in the trustee's fiduciary capacity, on an obligation arising from ownership or control of trust property, or on a tort committed in the course of administering a trust, may be asserted in a judicial proceeding against the

trustee in the trustee's fiduciary capacity, whether or not the trustee is personally liable for the claim pursuant to Ala. Code § 19-3B-1010.

72. Upon information and belief, the Defendant was the trustee of a trust account in which funds paid by the Plaintiff's were deposited.
73. As trustee of this account, the Defendant owed fiduciary duties to the Debtors.
74. The Defendant has breached these fiduciary duties by self dealing with the Trust Account. This self dealing occurred where the Defendant paid itself fees from the Trust Account. These Fees were not earned by the Defendant.
75. As a result of these breaches, the Plaintiff has suffered actual damages and have suffered from emotional distress.

**NINTH CLAIM FOR RELIEF  
FAILURE TO COMPLY WITH DEBT RELIEF AGENCY PROVISIONS OF THE  
BANKRUPTCY CODE**

76. The allegations in paragraphs 1 through 74 of this Complaint are realleged and incorporated herein by this reference.
77. Defendant directly, indirectly, affirmatively and/or by material omission misrepresented to Plaintiff the services Defendant would provide to Plaintiff in violation of 11 U.S.C. Section 526(a)(3)(A).
78. Defendant directly, indirectly, affirmatively and/or by material omission misrepresented to Plaintiff the benefits and risks that may result if Plaintiff became a debtor in a case under title 11 of the United States Code in violation of 11 U.S.C. Section 526(a)(3)(B).
79. Defendant intentionally or negligently disregarded the material requirements of title 11 of the United States Code applicable to Defendant as a debt relief agency in violation of 11 U.S.C. Section 526(c)(2)(C).

80. Defendant failed to provide Plaintiff with the written notice required under 11 U.S.C. Section 342(b)(1) in violation of 11 U.S.C. Section 527(a)(1).
81. Defendant failed to provide Plaintiff, within three (3) business days after the first date Defendant first offered to provide bankruptcy assistance services to Plaintiff, the further clear and conspicuous written notices required by, and in violation of, 11 U.S.C. Sections 527(a)(2)(A) through (D).
82. Defendant failed to provide Plaintiff the clear and conspicuous separate written notice required by, and in violation of, 11 U.S.C. Section 527(b).
83. Defendant failed to provide Plaintiff the clear and conspicuous separate written notice required by, and in violation of, 11 U.S.C. Section 527(c).
84. Defendant failed to provide Plaintiff with a complete and fully executed copy of the contract as required by, and in violation of, 11 U.S.C. Section 528(a)(2).

**WHEREFORE, PREMISES CONSIDERED**, the Plaintiff having set forth her claims for relief against the Defendant respectfully prays of the Court as follows:

- A. That the pre-petition transfers totaling approximately \$4,500.00 be avoided pursuant to 11 U.S.C. § 548;
- B. That this Court order the Defendant to turn over to the Plaintiff property of the estate that is in the Defendant's possession, and that the Court award sanctions, legal fees, actual damages, and treble or punitive damages to the Plaintiff;
- C. That this Court order the Defendant to pay actual and punitive damages, attorney fees, and costs pursuant to 11 U.S.C. § 362(k) for violations of the automatic stay;
- D. That this Court order the Defendant to pay additional actual damages, statutory damages, attorney fees and costs in a sum to be determined by the Court for violation of Ala. Code § 8-19-10, et. seq. and § 8-19-1 through § 8-19-5, and that such actual damages be trebled pursuant to Ala. Code § 8-19-10;
- E. That this Court order the Defendant to pay punitive damages in order to deter the Defendant from committing these acts in the future;
- F. That this Court order the Defendant to pay additional damages, attorney fees and costs resulting from the rescission of their agreement with the Debtor due to the Defendant's fraud;

- G. That this Court order the Defendant to pay additional damages for the emotional distress created by the Defendant's violation of Alabama tort law and by the Defendant's breach of fiduciary duties it owed to the Plaintiff;
- H. That the Plaintiff have and recover against the Defendant all reasonable legal fees and expenses incurred by their attorney;
- I. Declaring and adjudging that the contract for services between the Plaintiff and Defendant is void, pursuant to 11 U.S.C. Section 526(c)(1), for failure to comply with the material requirements of Sections 526, 527 and/or 528 of the United States Bankruptcy Code and that no provision of such contract may be enforced by the Defendant against the Plaintiff;
- J. Finding Defendant liable to Plaintiff, pursuant to 11 U.S.C. Section 526(c)(2), in the amount of \$1,650.00 as the amount received by Defendant from Plaintiff in connection with providing bankruptcy assistance;
- K. Awarding Plaintiff any additional actual damages as permitted by 11 U.S.C. Section 526(c)(2);
- L. Requiring Defendant to pay Plaintiff's counsel fees and legal expenses as required by 11 U.S.C. Section 526(c)(2);
- M. Declaring and adjudging that Defendant intentionally violated the provisions of 11 U.S.C. Section 526 and enter an order enjoining Defendant's further violation of such Section as permitted by Section 11 U.S.C. Section 526(c)(5)(A);
- N. Declaring and adjudging that Defendant has engaged in a clear and consistent pattern or practice of violating 11 U.S.C. Section 526 and imposing an appropriate civil penalty against Defendant as permitted by Section 11 U.S.C. Section 526(c)(5)(B);
- O. Awarding Plaintiff's costs of suit;
- P. Awarding interest to Plaintiff;
- Q. Permanently enjoining Defendant from engaging in such unlawful and illegal practices in the State of Alabama; and
- R. That the Plaintiff have such other and further relief as the Court may deem just and proper.

Respectfully submitted this the 2<sup>nd</sup> day of May, 2013.

/s/ Bradford W. Botes

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