

DISCOVERY CONTROL PLAN

1. The discovery in this case is intended to be conducted under Level 3 pursuant to TEX. R. CIV. P. 190.4.

JURISDICTION AND AUTHORITY

2. Under TEX. FIN. CODE § 156.103, Powers of Commissioner,

In addition to any other action, proceeding or remedy authorized by law, the commissioner may institute an action in the commissioner's name to enjoin a violation of this chapter or a rule adopted under this chapter.

3. Commissioner Payne seeks in this lawsuit to enforce Chapter 156 of the Texas Finance Code, and regulations issued thereunder. Chapter 156 is in Subtitle E, OTHER FINANCIAL BUSINESSES, under Title 3, FINANCIAL INSTITUTIONS AND BUSINESSES, of the Finance Code.

4. Under § 17.47 of the DTPA, the Consumer Protection and Public Health Division of the Office of the Attorney General may bring an action whenever it has reason to believe that any person is engaging in, has engaged in, or is about to engage in any false, misleading or deceptive act or practice in the conduct of any trade or commerce.

5. Under § 17.47(d) of the DTPA the Court may make such orders or judgments as are necessary to compensate identifiable persons for damages or to restore money or property acquired by means of any unlawful act or practice.

VENUE

6. Venue of this suit lies in El Paso County, Texas for the following reasons:

a. Under the DTPA § 17.47(b), venue is proper because Defendant has done business in El Paso County, Texas; and

b. Under TEX. CIV. PRAC. & REM. CODE §15.002(a)(1) venue is proper in El Paso

County, Texas because all or a substantial part of the events or omissions giving rise to the claims occurred in El Paso County, Texas.

PARTIES

7. Plaintiff COMMISSIONER DANNY PAYNE is charged with enforcing the Texas Mortgage Broker License Act.

8. The Attorney General is authorized by the Texas Constitution, Art. 4, § 22, to enforce the laws of Texas. Section 17.47 of the DTPA authorizes the attorney general to bring enforcement actions under the DTPA.

9. Defendant ABELARDO PICHARDO is a resident of El Paso County, Texas, who may be served with process at his business address, 1604 Doug Olson, El Paso, Texas 79936.

EXHIBIT

10. The factual allegations in this pleading relating to unauthorized mortgage broker activity are supported and sworn to in a Certification of Licensure by Sandra Weller, Director of Examinations with the Savings and Loan Department of Texas, and the Affidavit of Petricia M. Jerome. The Certificate and Affidavit are attached as Exhibits A and B.

PUBLIC INTEREST

11. The Attorney General has reason to believe that Defendant has engaged in the unlawful practices described below. The Attorney General also has reason to believe that Defendant has caused and will continue to cause injury, loss and damage not only to Texas consumers, but also to legitimate businesses which lawfully conduct trade and commerce in Texas, including those which make authorized mortgage broker transactions. The Consumer Protection and Public Health Division of the Office of the Attorney General believes that this action is in the public interest.

TRADE AND COMMERCE

12. Defendant has, at all time described below, engaged in conduct which constitutes “trade” and “commerce” as those terms are defined by § 17.45(6) of the DTPA.

ACTS OF AGENTS

13. Whenever it is alleged in this Petition that Defendant did any act, it is meant either that the Defendant performed or participated in the act, or that the Defendant’s officers, agents, or employees performed or participated in the act on behalf of and under the authority of the Defendant.

NOTICE

14. The Consumer Protection Division did not inform Defendant of the alleged unlawful conduct prior to filing suit because immediate and irreparable injury, loss or damage will occur as a result of such delay in obtaining a Temporary Restraining Order.

SUMMARY OF THE CASE

15. Defendant had been the holder of a mortgage broker license issued by the Savings and Loan Department of Texas. However, on February 5, 2003, on request of former Commissioner James Pledger, the Department issued an Order revoking that license, by reason of Defendant’s failure or refusal to provide information, books and records, in violation of TEX. FIN. CODE § 156.303(a)(15)(c).

16. Defendant operates a business known as MORTGAGE FUND AMERICA, at 1810 Trawood, Suite C2, El Paso, Texas 79935. Defendant also advertises that he operates a business known as ABEL MORTGAGE, a/k/a ABLE MORTGAGE, at 6045 Griems Ct., Suite C2, El Paso, Texas 79905. However, this location is occupied by a facility owned by SBC, and there is no

indication that Defendant has any connection with this address.

17. When Defendant applied for and obtained his license, he notified the Commissioner in writing of his use of the assumed name MORTGAGE FUND AMERICA. He has not notified the Commissioner in writing of the other assumed name(s) that he is using, nor of the addresses where they are located.

18. Each one of the businesses operated by Defendant receives applications from prospective borrowers for the purposes of making a mortgage loan from Defendant's own funds or from the funds of another person.

19. Defendant advertises and holds himself out as engaging in or conducting the business of a mortgage broker in this state.

20. At each business location, Defendant fails to prominently display a mortgage broker license.

21. At each business location, Defendant employs persons who are sponsored by Defendant for the purposes of performing the acts of a mortgage broker.

22. At each business location, Defendant fails to prominently display a loan officer license for each person acting as a loan officer.

23. Despite the revocation of his license, Defendant continues to operate as a mortgage broker in the State of Texas.

24. Defendant has failed and refused, and continues to fail and refuse, to file an Annual Report with the Savings and Loan Department.

25. At the time an applicant submits an application to Defendant, Defendant fails to provide to the applicant a disclosure that specifies the nature of the relationship between applicant

and Defendant, the duties Defendant has to the applicant, and how Defendant will be compensated.

26. At each business location, Defendant receives money, or the equivalent of money, as a fee or profit because of or in consequence of Defendant acting as a mortgage broker or loan officer for consumer loans.

27. In addition, Defendant is engaging in false, misleading or deceptive acts or practices in the conduct of his business, in that his operating as a mortgage broker constitutes a representation that he is authorized to do so, when that is not the case.

28. Defendant is engaging in false, misleading or deceptive acts or practices in the conduct of his business, in that he fails to disclose that he is not authorized to operate as a mortgage broker in the State of Texas, or to accept fees as a mortgage broker in the State of Texas.

29. Defendant is engaging in false, misleading or deceptive acts or practices in the conduct of his business, in that he advertises that he has an office at an address when he does not have such office.

APPLICABLE LAW

30. Under § 156.002, TEX. FIN. CODE,

(5) "Loan Officer" means an individual sponsored by a licensed mortgage broker for the purposes of performing the acts of a mortgage broker.

(9) "Mortgage broker" means a person who receives an application from a prospective borrower for the purposes of making a mortgage loan from that person's own funds or from the funds of another person.

31. Under § 156.004, TEX. FIN. CODE,

At the time an applicant submits an application to a mortgage broker, the mortgage broker shall provide to the applicant a disclosure that specifies the nature of the relationship between applicant and broker, the duties the broker has to the applicant, and how the mortgage broker will be

compensated. The finance commission, by rule, shall promulgate a standard disclosure form to be used by the mortgage broker.

32. Under § 156.201, TEX. FIN. CODE,

(a) A person may not act in the capacity of, engage in the business of, or advertise or hold that person out as engaging in or conducting the business of a mortgage broker in this state unless the person holds an active mortgage broker license or is exempt under Section 156.202

(b) An individual may not act or attempt to act as a loan officer unless the individual at the time is:

(1) licensed under this chapter;

(2) sponsored by a licensed mortgage broker and acting for the mortgage broker; or

(3) exempt under Section 156.202.

(c) Each mortgage broker licensed under this chapter is responsible to the commissioner and members of the public for any act or conduct performed under this chapter by the mortgage broker or a loan officer sponsored by or acting for the mortgage broker

33. Under TEX. FIN. CODE, § 156.212,

(c) The license certificate of a mortgage broker shall be at all times prominently displayed in the mortgage broker's place of business. The branch office certificate shall be at all times prominently displayed in the mortgage broker's branch office.

(d) A loan officer license certificate shall be at all times prominently displayed in the office of the mortgage broker for whom the loan officer primarily conducts business.

34. Under TEX. FIN. CODE, § 156.213,

(a) Each licensed mortgage broker shall file an annual report with the Savings and Loan Department.

35. Under TEX. FIN. CODE, § 156.406,

(b) A person who received money, or the equivalent of money, as a fee or profit because of or in consequence of the person acting as a mortgage broker or loan officer without an active license or being exempt under this chapter is liable for damages in an amount that is not less than the amount of the fee or profit received and not to exceed three times the amount of the fee or profit received, as may be determined by the court. An aggrieved person may recover damages under this subsection in a court.

36. Under TEX. FIN. CODE, § 156.402,

(b) The commissioner, the attorney general, or a mortgage applicant may bring an action to enjoin a violation of this chapter.

37. Under TEX. ADMIN. CODE, § 80.10,

No Mortgage Broker or Loan Officer may:

(4) knowingly participate in or permit the submission of false or misleading information of a material nature to any person in connection with a decision by that person whether or not to make or acquire a Mortgage Loan;

38. Under TEX. ADMIN. CODE, § 80.12,

(a) Each application for a license under the Act requires the applicant to indicate the location(s) at which he or she proposes to conduct the licensed activity. A separate license is required for each specified location. When issued, each license will indicate the location for which it is issued.

(b) Each required license issued pursuant to the Act and this Chapter must be prominently displayed at the location indicated thereon....

(c) Before the tenth day preceding the effective date of any change in address, a Mortgage Broker shall notify the Commissioner in writing of the proposed new address of that Mortgage Broker or, as applicable, a Loan Officer sponsored by that Mortgage Broker. A new license certificate, reflecting the new address, must be obtained prior to a Mortgage Broker or Loan Officer conducting business at a new address.

39. Under TEX. BUS. & COMM. CODE § 17.46(a),

False, misleading or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful;”

40. Under TEX. BUS. & COMM. CODE § 17.46(b)(3),

“Causing confusion or misunderstanding as to affiliation, connection, or association with, or certification of goods or services” is a false, misleading or deceptive act or practice;

41. Under TEX. BUS. & COMM. CODE § 17.46(b)(5),

“Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have or that a person has a sponsorship, approval, status, affiliation, or connection which he does not” is a false, misleading or deceptive act or practice;

42. Under TEX. BUS. & COMM. CODE § 17.46(b)(24),

“The failure to disclose information concerning goods or services which was known at the time of the transaction if such failure to disclose such information was intended to induce the consumer into a transaction into which the consumer would not have entered had the information been disclosed” is a false, misleading or deceptive act or practice;

VIOLATIONS

43. By engaging in the above described conduct, Defendant has violated and is continuing to violate the following laws:

(a) § 156.004, TEX. FIN. CODE, by failing to deliver to each applicant a disclosure that specifies the nature of the relationship between applicant and broker, the duties the broker has

to the applicant, and how the mortgage broker will be compensated;

(b) § 156.201, TEX. FIN. CODE, by acting in the capacity of, engaging in the business of, or advertising or holding that person out as engaging in or conducting the business of a mortgage broker in this state when the person does not hold an active mortgage broker license;

(c) § 156.201, TEX. FIN. CODE, by employing persons who act or attempt to act as a loan officer when the individual at the time is not licensed and sponsored by a licensed mortgage broker and acting for the mortgage broker;

(d) § 156.212, TEX. FIN. CODE, by failing to prominently display a mortgage broker's license and the license of each loan officer in each place of business operated by him;

(e) § 156.213, TEX. FIN. CODE, by failing to file an annual report with the Savings and Loan Department;

(f) § 156.406, TEX. FIN. CODE, by receiving money, or the equivalent of money, as a fee or profit because of or in consequence of the person acting as a mortgage broker or loan officer without an active license;

(g) § 80.10(4), TEX. ADMIN. CODE, by receiving applications from consumers and otherwise acting as a mortgage broker or loan officer when he does not hold an active mortgage broker license;

(h) § 80.12, TEX. ADMIN. CODE, by failing to notify the Commissioner in writing of his new address, and failing to obtain a new license certificate for that address;

(i) § 17.46(b)(3) of the DTPA by operating as a mortgage broker without holding an active mortgage broker license, thereby causing misunderstanding as to certification by the Savings and Loan Department;

(j) § 17.46(b)(5) of the DTPA by operating as a mortgage broker without holding an active mortgage broker license, thereby representing that the services provided have approval or characteristics which they do not have;

(k) § 17.46(b)(24) of the DTPA by failing to disclose that he is not authorized to operate as a mortgage broker in the State of Texas;

(l) § 17.46(b)(24) of the DTPA by failing to disclose that he is not authorized to receive money, or the equivalent of money, as a fee or profit because of or in consequence of acting as a mortgage broker.

(m) § 17.46(a) of the DTPA by advertising that he has an office at 6045 Griems Ct., Suite C2, El Paso, Texas 79905, when he does not.

EQUITABLE RELIEF

44. Commissioner Payne asks that the Court temporarily restrain and permanently enjoin Defendant from operating as a mortgage broker, as defined by Texas law, without being licensed as such.

45. Commissioner Payne further asks that the Court temporarily restrain and permanently enjoin Defendant from employing loan officers, as defined by Texas law, without the loan officer being licensed as such.

46. Commissioner Payne further asks that the Court temporarily restrain and permanently enjoin Defendant from advertising or offering services that would cause people to believe that Defendant is a mortgage broker, as defined by Texas law, unless and until Defendant holds an active mortgage broker license.

47. Commissioner Payne further asks that the Court temporarily restrain and permanently enjoin Defendant from failing to deliver to each applicant a disclosure that specifies the nature of the relationship between applicant and broker, the duties the broker has to the applicant, and how the mortgage broker will be compensated.

48. Commissioner Payne asks further that the Court temporarily restrain and permanently enjoin Defendant from failing to prominently display a mortgage broker's license and the license of each loan officer in each place of business operated by him.

49. Commissioner Payne asks further that the Court temporarily restrain and permanently enjoin Defendant from failing to file an annual report with the Savings and Loan Department.

50. Commissioner Payne and the State of Texas further ask that the Court temporarily restrain and permanently enjoin Defendant from charging, receiving, or contracting for any money, or the equivalent of money, that is in any way related to his services as a mortgage broker or those of his employees or agents acting as loan officers until and unless Defendant obtains a license to be a mortgage broker and the employees or agents obtain licenses to be loan officers.

51. Commissioner Payne asks further that the Court temporarily restrain and permanently enjoin Defendant ROMO from utilizing an assumed name, corporate name, partnership name or any other name, under, through, or for which he conducts activities for which a mortgage broker license is required under Texas law, without notifying the commissioner, in writing, of such name.

52. Commissioner Payne asks further that the Court temporarily restrain and permanently enjoin Defendant ROMO from failing to notify the Commissioner in writing of his new address, and failing to obtain a new license certificate for that address.

53. Commissioner Payne and the State of Texas further ask that the Court, under its

equity powers, to order Defendant to make restitution and disgorge not less than, and no more than three times, the sum of all money, or the equivalent of money, paid by consumers to Defendant since February 5, 2003 as a fee or profit because of or in consequence of Defendant acting as a mortgage broker or employing a loan officer without an active license;

**NECESSITY OF IMMEDIATE RELIEF
TO PRESERVE DEFENDANTS' ASSETS**

54. Plaintiff the State of Texas requests immediate relief by way of an Ex Parte Temporary Restraining Order freezing Defendant's assets to preserve and protect such assets from dissipation so the victims of Defendant's actions can receive the restitution to which they are entitled. Defendant's assets are subject to dissipation for the reason that Defendant misrepresents his businesses as being authorized mortgage brokerage companies when in fact they are not. Defendant is not properly licensed or bonded and does not account to the Texas Savings and Loan Department for their activities. They collect large sums of money from consumers without being legally entitled to do so. As a result, all of the money received by Defendant under the guise of being a mortgage broker is contraband

OTHER RELIEF

55. The State of Texas asks the Court to order Defendant to compensate all of his customers since February 5, 2003 for actual damages, and to restore any money or property which may have been acquired by means of any unlawful act or practice.

56. The State of Texas asks the Court to order Defendant to pay a civil penalty, to and for the benefit of the State of Texas, in the amount of \$20,000.00 per violation of the DTPA.

57. The State of Texas asks the Court to issue a declaratory judgment that Defendant is engaged in unlawful mortgage brokerage activity because he is not a licensed mortgage broker.

58. The State of Texas asks the Court to order Defendant to pay reasonable attorney fees, pursuant to TEX. GOVT. CODE § 402.006.

PRAYER

59. WHEREFORE, Plaintiffs Commissioner Payne and the State of Texas pray that an Ex Parte Temporary Restraining Order be granted and Defendant be cited according to law to appear and answer herein; that after reasonable notice and hearing a Temporary Injunction be issued; and upon final hearing a Permanent Injunction be issued, restraining and enjoining Defendant, his successors, assigns, officers, agents, servants, employees, attorneys and any other person in active concert or participation with Defendant whether such acts are performed under his own name, under the assumed name “Mortgage Fund America,” “Abel Mortgage,” “Able Mortgage,” or under any other assumed name or legal entity, from engaging in the following acts or practices, until and unless Defendant obtains a license to be a mortgage broker and his employees or agents obtain active licenses to be loan officers under his sponsorship:

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

b. Transferring, spending, hypothecating, concealing, encumbering, withdrawing, removing or allowing the transfer, removal, or withdrawal from any bank, savings association, credit union or other financial institution or from the jurisdiction of this Court any money, stocks, bonds, assets, sports memorabilia, notes, equipment, funds, accounts receivable, policies of insurance, trust agreements, or other property, real, personal

or mixed, wherever situated, belonging to or owned by, in the possession or custody of, standing in the name of, or claimed by Defendant without further order of this court;

- c. Acting in the capacity of a mortgage broker or loan officer;
- d. Engaging in the business of a mortgage broker or loan officer;
- e. Advertising or holding himself out as engaging in or conducting the business of a mortgage broker or loan officer;
- f. Originating any residential mortgage loan on behalf of any person;
- g. Making any misrepresentation to any person, whether directly or indirectly, regarding his license status;
- h. Displaying or using a previous mortgage broker license certificate, letterhead, or business card in connection with any mortgage broker or loan officer activity;
- i. Receiving an application from a prospective borrower for the purpose of making, arranging, or obtaining a residential mortgage loan for the borrower unless;
- j. Interviewing any prospective mortgage loan applicant or advising any residential mortgage loan applicant on any matter related to making, arranging, or obtaining a residential mortgage loan, which includes qualifying or pre-qualifying a loan applicant or quoting or discussing available interest rates, loan products, or loan pricing with any loan applicant;
- k. Receiving or retaining any funds paid by or on behalf of a residential mortgage loan applicant;
- l. Completing or assisting in the completion of a residential mortgage loan application for or on behalf of any prospective borrower;
- m. Receiving or retaining any compensation for loan origination activity,

including any loan origination fee, application fee, underwriting fee, or other fee, of whatever type or description;

n. Employing, compensating, or associating with any person who is not licensed or exempt under the Mortgage Broker License Act who is expected or required to act as a loan officer or mortgage broker for or on behalf of Defendant;

o. Advertising or offering services that would cause people to believe that Defendant, his employees and agents, are loan officers as defined by Texas law, unless and until they hold active loan officer licenses;

p. Failing to deliver to each applicant a disclosure that specifies the nature of the relationship between applicant and broker, the duties the broker has to the applicant, and how the mortgage broker will be compensated;

q. Failing to prominently display the license of each loan officer in each place of business operated by Defendant;

r. Failing to file an annual report with the Savings and Loan Department;

s. Utilizing an assumed name, corporate name, partnership name or any other name, under, through, or for which he conducts activities for which a mortgage broker license is required under Texas law, without notifying the commissioner, in writing, of such name;

t. Failing to notify the Commissioner in writing of his new address, and failing to obtain a new license certificate for that address;

u. Advertising that he has an office at any location when he does not have such office;

v. Failing to file an annual report with the Savings and Loan Department;

w. Charging, receiving, or contracting for any money, or the equivalent of money, that is in any way related to his services as a mortgage broker or those of his employees or agents acting as loan officers;

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

a. Order Defendant to make restitution and disgorge not less than, and no more than three times, the sum of all money, or the equivalent of money, paid by consumers to Defendant since February 5, 2003 as a fee or profit because of or in consequence of Defendant acting as a mortgage broker or employing a loan officer without an active license, or, in the alternative, award actual damages and restore any money or property which may have been acquired by means of any unlawful act or practice;

b. Adjudge against Defendant civil penalties in favor of Plaintiff State of Texas in the amount of \$20,000.00 per violation of the DTPA;

c. Issue a declaratory judgment that Defendant is engaged in unlawful mortgage brokerage activity because he is not a licensed mortgage broker;

d. Order Defendant to pay Plaintiff State of Texas attorney's fees and costs of court pursuant to TEX. GOVT. CODE §402.006(c);

DATED this _____ day of May, 2004.

Respectfully submitted,

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