



specific allegations pertaining to the named Plaintiff, which are based upon personal knowledge. As of the date of this Complaint, no discovery has been conducted. As a result, it is likely that once the discovery process is underway, the named Plaintiff will seek leave to amend their Complaint to add new factual allegations and/or new claims.

**I.**

**NATURE OF THE ACTION**

1. This is a statewide class action brought under (i) the Tennessee Consumer Protection Act (hereinafter referred to as the “TCPA”) of 1977, as amended, TENN. CODE ANN. § 47-18-109(a)(1) and (ii) Tennessee common law to remedy Defendant’s actions in causing thousands of Tennessee persons and entities to pay an unlawful attorney’s fee in direct violation of Tennessee law. The named Plaintiff and the Class Members solely seek an award of compensatory damages against Defendant as well as an award of punitive damages or treble damages against Defendant to the extent that it is determined that Defendant’s violations of Tennessee law were intentional, reckless and/or willful.

**II.**

**SUBJECT MATTER JURISDICTION AND VENUE**

2. This Court has original subject matter jurisdiction over this Class Action pursuant to the Class Action Fairness Act of 2005, 28 U.S.C. § 1332(d)(2). Pursuant to § 1332(c)(2), the named Plaintiff, a estate established in the Probate Court of Shelby County Tennessee, is a citizen of the State of Tennessee because the decedent Lenora S. Wright was a citizen of Tennessee at the time of her death. Pursuant to § 1332(d)(10), the Defendant, a limited liability partnership, is an unincorporated association organized under the laws of the State of Texas, with its principal place of business in Austin, Texas, and, as such, is a citizen of the State of Texas.

*See, Ferrell v. Express Check Advance of SC LLC*, 591 F.3d 698, 707 (4<sup>th</sup> Cir. 2010)(holding that limited liability company was an “unincorporated association” for purposes of § 1332(d)(10), stating “we conclude that the term ‘unincorporated association’ in § 1332(d)(10) refers to all non-corporate business entities”); *Davis v. HBCS Bank Nevada, N.A.*, 557 F.3d 1026, 1032 (9<sup>th</sup> Cir. 2009)(“The Best Buy limited partnership is organized under the laws of Virginia. For qualifying class actions such as this one, CAFA abrogates the traditional rule that an unincorporated association shares the citizenship of each of its members for diversity purposes”); *Abrego v. The Dow Chemical Co.*, 443 F.3d 676, (9<sup>th</sup> Cir. 2006)(“under § 1332(d)(10) ‘an unincorporated association [is] ... deemed to be a citizen of the State where it has its principal place of business and the State under whose laws it is organized,’ which departs from the rule that frequently destroys diversity jurisdiction, that ‘a limited partnership's [or unincorporated association's] citizenship for diversity purposes can be determined only by reference to all of the entity's members’)(citations omitted). As a result, the named Plaintiff and the Defendant are citizens of different States, pursuant to § 1332(d)(2)(A).

3. The proposed Class well exceeds 100 persons. Pursuant to the 28 U.S.C. § 1332(d)(6), the aggregate amount of the Class Members’ claims substantially exceeds \$5,000,000.00 and, thus, exceeds the requisite amount in controversy set forth in § 1332(d)(2). Additionally, because, *inter alia*, the Defendant, a citizen of the State of Texas, is the only defendant named in this cause from whom any relief is sought by the named Plaintiff and the proposed Class Members, the “local controversy exception” and “home state exception” to jurisdiction under § 1332(d)(2), as set forth under § 1332(d)(4)(A) and (B), cannot apply to this cause.

4. This action solely seeks monetary damages from Defendant, a private entity. This action does not seek any injunctive, declaratory or other prospective relief with respect to the City of Memphis or any other entity. Nor does this action seek to challenge the constitutionality and/or the legal validity of any Tennessee or City of Memphis tax law. To the contrary, Plaintiff and the Class Members accept the validity of all Tennessee and City of Memphis tax laws and their tax obligations arising under same and have fully paid such taxes to the City of Memphis as alleged herein. Instead, Plaintiff and the Class Members seek compensatory damages caused by the tortious conduct of Defendant. As a matter of law, any monetary judgment granted against Defendant, a private entity, cannot reduce any tax revenue that has been collected by the City of Memphis. As a result, Plaintiffs and the Class Members do not seek to enjoin, suspend or restrain the City of Memphis from the assessment, levy or collection of any tax under state law.

5. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(a), (b) and (c) on the grounds that all or a substantial portion of the acts giving rise to the violations alleged herein occurred in this judicial district.

### III.

#### **THE PARTIES AND PERSONAL JURISDICTION**

6. Plaintiff Darrell L. Wright, Sr. (hereinafter referred to as “Plaintiff”) is an individual residing in Memphis, Tennessee who has been duly appointed by the Probate Court of Shelby County, Tennessee as the as the Administrator of the Estate of Lenora S. Wright, Deceased. Acting in his role as Administrator of the Estate, Plaintiff is a member and proposed representative of a Class of Tennessee persons and entities who were subjected to the unlawful collection activity of the Defendant as more fully described herein.

7. Defendant Linebarger Goggan Blair & Sampson, LLP (hereinafter referred to as

“Defendant” or “Linebarger”) is an unincorporated association organized under the laws of the State of Texas, with its principle place of business located at The Terrace II, 2700 Via Fortuna, Suite 400, Austin, Texas 78746. As such, Defendant Linebarger is a citizen of Texas. Service of process may be accomplished on Defendant through a partner or managing agent of Defendant at Defendant’s place of business in this judicial district, which is located at One Commerce Square, 40 S. Main, Suite 2250, Memphis, Tennessee 38103.

8. This Court has both general and specific personal jurisdiction over Defendant Linebarger based upon the fact that it maintains an office in the State of Tennessee and has had substantial and continuous contact with Tennessee as to the fees charged to the Class Members as well as with respect to the legal cases involving the Class Members. As a result, this Court has personal jurisdiction over Defendant Linebarger pursuant to TENN. CODE ANN. §§ 20-2-214(1) and (2) and (6) and 20-2-223(1), (3) and/or (4) on the grounds that the claims asserted against it arise from its transaction of business within Tennessee and on the grounds that it has committed a tortious act within Tennessee. Furthermore, Defendant Linebarger’s contacts and actions were directed toward Tennessee and thus warrant the exercise of personal jurisdiction over it pursuant to TENN. CODE ANN. § 20-2-225(2).

#### IV.

#### **FACTUAL ALLEGATIONS**

##### **A. Summary of Class Allegations**

9. Employing a lawyer staff of over 100 persons in eleven different states, Defendant Linebarger touts itself a “major player” law firm that is recognized across the nation as a delinquent personal and property tax collector for its clients. Among other things, acting as a law firm, Defendant Linebarger prepares and files lawsuits for the collection of delinquent property taxes, serves said suits, obtains judgments in connection with same, collects taxes and

attorney's fees related to its collection efforts and conducts tax sales as to properties for which taxes have not been paid. When acting as a tax collection law firm, Defendant Linebarger admits that "we must adhere to the stringent ethical requirements promulgated by the Supreme Court in every state in which we practice." See, <http://www.publicans.com/about/index.htm>

10. In an effort to capitalize on its past success in collecting real estate taxes in other states, Defendant entered into a contract with the City of Memphis in March 2004 to collect delinquent real property taxes from the landowners subject to the City of Memphis land taxes. The City of Memphis relied upon the supposed expertise of Defendant Linebarger, including its knowledge of Tennessee tax law, when entering in to the collection contract. From that time until the present, Defendant Linebarger has calculated the sums owed by thousands of Memphis landowners with respect to attorney's fees and prosecution fees, has informed thousands of delinquent tax payers of the necessity to pay the delinquent taxes, have sued these landowners for delinquent taxes and have caused them to pay delinquent taxes to the City of Memphis. In doing so, Defendant Linebarger has received approximately \$16.5 million in attorney's fees that have been paid by delinquent Memphis tax payers in connection with Defendant Linebarger's collection activity.

11. Unfortunately, despite its claim that it employs a robust ethical practice, Defendant Linebarger has caused Plaintiff and thousands of absent delinquent tax payers to remit a 20% attorney's fee in connection with delinquent real property taxes which is specifically prohibited by Tennessee law. To the contrary the only attorney fee that can be charged by Defendant Linebarger to a City of Memphis delinquent tax payer is a 10% attorney's fee. This suit is brought to remedy this significant violation of Tennessee law by Defendant Linebarger.

**B. Defendant intentionally, recklessly and/or negligently impose illegal attorney's fees in excess of Tennessee law upon Plaintiff and thousands of other Tennesseans.**

12. Section 5-24-6 of the Charter for the City of Memphis permits the City of Memphis to collect delinquent real property taxes and to file suit for the recovery of same. That Section further provides that the City shall abide by all state laws with respect to the collection of attorney's fees and penalties that may be assessed in connection with delinquent property taxes. *See*, Code 1985 § 36-76; Code 1967 § 38-96("Such fees and commissions as are allowed by the state law to delinquent tax attorneys and as are collected in the suits so filed,...").

13. As a result, the City of Memphis is bound by the tax laws of the State of Tennessee with respect to the imposition and collection of attorney's fees and penalties associated with delinquent real property taxes.

14. Pursuant to TENN. CODE ANN. § 67-5-2404, no attorney collecting taxes for the City of Memphis shall be paid an attorney's fee that exceeds 10% of all delinquent taxes collected.

15. Pursuant to TENN. CODE ANN. § 67-5-2410(b)(1), only a 10% attorney's fee is assessable against the base amount of delinquent taxes owned (not including any accrued interest or penalties) which shall be allowed to the attorney filing delinquent tax suits as compensation for the attorney's services.

16. Thus, Tennessee law specifically prohibits anyone from assessing an attorney fee in excess of 10% of the base amount of delinquent tax owed by any person or business.

17. In March 2004, the City of Memphis entered into a contract for legal services with Defendant Linebarger. This contract purported to engage Defendant Linebarger to pursue collection of delinquent property taxes and to pay Defendant Linebarger a 20% attorney fee of the delinquent property taxes paid to the City of Memphis as a result of Defendant Linebarger's

efforts. This contract further denominated Defendant Linebarger as an independent contractor who would be separately liable for any negligent acts or omissions committed by Defendant Linebarger when carrying out its services. Furthermore, in this contract, Defendant Linebarger agreed to indemnify and hold harmless the City of Memphis for any of Defendant's negligent and/or wrongful acts.

18. In 2009, Plaintiff received a Notice of Lawsuit and a Delinquent Real Property Tax Statement that was prepared and sent by Defendant Linebarger with respect to delinquent taxes owned on the property located at 4500 Sun Valley Drive, Memphis, Tennessee 38109, which was owned by decedent Lenora S. Wright (hereinafter referred to as the "subject property").

19. The Notice of Lawsuit and Delinquent Real Property Tax Statement informed Plaintiff that decedent Lenora Wright had been sued in a Chancery Court lawsuit by Defendant's client, the City of Memphis, for delinquent real property taxes owed for the 2007 tax year and that total amount owed was \$960.33. Unbeknownst to Plaintiff, this amount included a 20% attorney fee which was unlawful.

20. The Notice of Lawsuit and Delinquent Real Property Tax Statement further informed Plaintiff that in if the full amount allegedly owed were not paid in full, Defendant Linebarger would request that the Chancery Court to enter a default judgment against decedent Lenora Wright and that in order to stop the lawsuit, the full amount needed to be paid immediately; if full payment were made, Defendant Linebarger would cause the subject property to be "removed from this lawsuit."

21. The base amount of the delinquent tax owned for 2007 on the subject property was \$539.87. Based upon this delinquent amount, the total attorney's fee that Defendant

Linebarger could seek to collect in connection with the delinquent tax amount was \$53.98.

22. Prior to sending the Notice of Lawsuit and Delinquent Real Property Tax Statement to Plaintiff, Defendant Linebarger had informed the City of Memphis that the subject property was to be assessed a total of \$203.96 in "Other Charges." This amount contained a 20% attorney fee (in the amount of \$107.97) which was in violation of Tennessee law. Relying upon Defendant Linebarger's calculations, the City of Memphis recorded the \$203.96 in "Other Charges" in its books and records as being owed on the subject property.

23. On behalf of decedent Lenora Wright and her heirs, Plaintiff paid the total amount of \$960.33 as demanded by Defendant Linebarger to the City of Memphis in order to cause Defendant Linebarger to have the property removed from the lawsuit and remove any 2007 tax lien asserted against the subject property. Upon information and belief, the City of Memphis remitted to Defendant Linebarger the entire unlawful attorney fee of 20% that was paid by Plaintiff.

24. Plaintiff's experience with respect to the illegal attorney's fees charged by Defendant Linebarger is not isolated or unique. Rather, in virtually all instances where Defendant notified a Class Member that a delinquent tax is owed via a Notice of Lawsuit and Delinquent Real Property Tax Statement, Defendant included in the total delinquent amount an unlawful attorney's fee.

25. Like the named Plaintiff, the Class Members also paid the unlawful attorney's fee sought by Defendant Linebarger when paying their delinquent tax amounts to the City of Memphis for certain tax years. (For each such tax year that a Class Member's payment to the City of Memphis included the alleged unlawful fee, each Class Member's tax obligation to the City of Memphis was fully satisfied for the given tax year). In turn, the City of Memphis

thereafter remitted to Defendant Linebarger the full, unlawful attorney fee of 20% paid by the Class Members. The 20% attorney fee charged by Defendant Linebarger to Plaintiff and the Class Members was never retained by the City of Memphis as “tax revenue.” As a result, to the extent that this action deems Defendant Linebarger’s conduct unlawful and grants compensatory damages to Plaintiff and the Class Members, Defendant Linebarger has no claim against the City of Memphis for contribution or indemnity because it received the entire unlawful fee. In fact, as alleged above, Defendant Linebarger is contractually obligated to indemnify the City of Memphis.

26. This common course of unlawful conduct has injured thousands of Tennessee individuals in violation the Tennessee law and, standing alone, warrants the certification under Rules 23(b)(3) of the Federal Rules of Civil Procedure as more fully described in Section V of this Class Action Complaint.

27. The monetary damages flowing from unlawful legal fees are not simply the amount of fees that were charged in excess of Tennessee law , which Defendant received. To the contrary, under Tennessee jurisprudence, when – as in this case – a legal fee is illegal or excessive, the attorneys who have charged the illegal or excessive fee are not entitled to *quantum meruit* but, instead, must disgorge the entire legal fee. *See, White v. McBride*, 937 S.W.2d 796, 803 (Tenn. 1996)(holding that where fee is illegal or clearly excessive, attorney was not entitled to any fee, stating “[t]o permit an attorney to fall back on the theory of *quantum meruit* when he unsuccessfully fails to collect a clearly excessive fee does absolutely nothing to promote ethical behavior. On the contrary, this interpretation would encourage attorneys to enter exorbitant fee contracts, secure that the safety net of *quantum meruit* is there in case of a subsequent fall”).

V.

**CLASS ACTION ALLEGATIONS**

28. The named Plaintiff brings this action as a Class Action pursuant to Rule 23(a) of the Federal Rules of Civil Procedure, and pursuant Rule 23(b)(3) as defined follows:

From March 25, 2004 to the present, Plaintiff, and all of similarly situated persons and entities to whom Defendant sent or caused to be sent a Notice of Lawsuit and/or a Delinquent Real Property Tax Statement that included an unlawful attorney's fee amount and who paid said unlawful attorney fee, the amount of which was ultimately received by Defendant.

Excluded from the Class are the named Defendant, their agents, affiliates, and employees, the Judge assigned to this matter and his or her staff.

29. **Numerosity.** The requirements of Rule 23(a)(1) are satisfied in that there are too many Class Members for joinder of all of them to be practicable. Upon information and belief, these Class Members exceed over 1,000 in number. This Class, as defined above, meets the numerosity requirement.

30. **Commonality.** The claims of the Class Members raise numerous common issues of fact and/or law, thereby satisfying the requirements of Rule 23(a)(2). These common legal and factual questions, which may be determined without the necessity of resolving individualized factual disputes concerning any Class Member, include, but are not limited to, the following questions:

**Questions of Fact**

- (i) Whether Defendant prepared and sent Notices of Lawsuit and Delinquent Real Property Tax Statements to the Class Members.
- (ii) What are the amounts of unlawful attorney's fees that the Class Members have

paid.

- (iii) How much of the unlawful attorney's fees were received by Defendant Linebarger.
- (iii) Whether Defendant Linebarger committed its wrongful actions in an intentional or reckless manner.

**Questions of Law**

- (i) Whether the Notices of Lawsuit and Delinquent Real Property Tax Statements sent to the Class Members prepared by Defendant Linebarger included an unlawful amount.
- (ii) Whether Defendant Linebarger's actions violated the TCPA.
- (iii) Whether Defendant Linebarger has been unjustly enriched.
- (iv) Whether a constructive trust should be imposed upon the assets of Defendant Linebarger.
- (v) Whether Defendant Linebarger owed the Class Members an ordinary duty of care to inform them of, and seek to collect from them, only lawful amounts in connection with delinquent land taxes and whether such a duty was breached.
- (vi) Whether Defendant converted the Class Members' property.
- (vii) Whether punitive damages should be assessed against Defendant.

31. **Typicality**. The claim of the named Plaintiff is typical of the unnamed Class Members because they have a common source and rest upon the same legal and remedial theories, thereby satisfying the requirements of Rule 23(a)(3). For example, the named Plaintiff's claims are typical of the claims of the Class because Plaintiff and all Class Members were injured or damaged by the same wrongful practices in which Defendant engaged, namely the

charging and collection of unlawful attorney's fees which are prohibited under Tennessee law.

32. **Adequacy of Representation.** The requirements of Rule 23(a)(4) are satisfied in that the named Plaintiff has a sufficient stake in the litigation to vigorously prosecute their claims on behalf of the Class Members and the named Plaintiff's interests are aligned with those of the proposed Class. There are no defenses of a unique nature that may be asserted against Plaintiff individually, as distinguished from the other members of the Class, and the relief sought is common to the Class. Plaintiff does not have any interest that is in conflict with or is antagonistic to the interests of the members of the Class, and has no conflict with any other member of the Class. Plaintiff has retained competent counsel experienced in class action litigation, including consumer and financial services class actions, to represent her and the Class Members in this litigation. To wit, Plaintiff's chosen counsel – Watson Burns, PLLC – has successfully prosecuted class actions in several matters, including, but not limited to, class action suits brought against law firms for charging and collecting unlawful fees and expenses. *See, e.g., Howard et al v. Wilkes & McHugh, P.A.*, Case No. 2:06-cv-02833-JMP-cgc (W.D. Tenn. 2006)(appointing Watson Burns, PLLC as Class Counsel and ultimately approving \$ 4 million settlement in connection with overcharged legal fee); and *Stephenson et al v. Fearnley & Califf, PPLC*, Civ. Action No. 06-67 (Dyersburg Circuit Ct. 2006)(Watson Burns, PLLC appointed Class Counsel in connection with settlement regarding unlawful title insurance fees charged by law firm).

33. **Predominance and Superiority.** All of the requirements for Rule 23(b)(3) are satisfied because the common factual and legal issues identified above are sufficiently cohesive to warrant adjudication by representation. In particular, the Plaintiff and the Class Members have suffered a common cause of injury, namely the imposition of unlawful attorney's fees

included in their delinquent real property tax Notices, in excess of Tennessee law. The Class Members' legal claims arise exclusively under Tennessee law and, therefore, do not involve the application of other states' laws which may have varying degrees of liability and proof. Class action treatment is also superior to other available methods for the fair and efficient adjudication of this controversy, because individual litigation of the claims of all Class Members is economically unfeasible and procedurally impracticable. The likelihood of individual Class Members prosecuting separate claims is remote and, even if every Class Member could afford individual litigation, the court system would be unduly burdened by individual litigation in such cases. Additionally, individual litigation would also present the potential for varying, inconsistent or contradictory judgments while magnifying the delay and expense to all parties and to the court system, thus resulting in multiple trials of the same legal issue and creating the possibility of repetitious litigation. As a result, the desirability to concentrate litigation in this forum is significantly present. Plaintiff knows of no difficulty to be encountered in the management of this action that would preclude its maintenance of a class action. Relief concerning Plaintiff's rights under the laws herein alleged and with respect to the Class would be proper.

## VI.

### CAUSES OF ACTION

#### **COUNT 1 – VIOLATIONS OF TCPA, TENN. CODE ANN § 47-18-104(a) & (b)**

34. Plaintiff incorporates all allegations of fact in all preceding paragraphs as if fully set forth in this Count.

35. The TCPA, TENN. CODE ANN. § 47-18-109(a)(1), provides that “[a]ny person who suffers an ascertainable loss of money or property, real, personal, or mixed, or any other

article, commodity, or thing of value wherever situated, as a result of the use or employment by another person of an unfair or deceptive act or practice declared to be unlawful by this part, may bring an action individually to recover actual damages.” (emphasis added).

36. Plaintiff and the Class Members are natural persons and legal entities and, as such, constitute “persons” as defined by the TCPA, TENN. CODE ANN. § 47-18-103(9) and fall within the meaning of the term “any person” as contained in the TCPA, § 47-18-109(a)(1).

37. By its plain terms, the TCPA provides a private right of action for any person who is harmed by a violation of the TCPA and who suffers an ascertainable loss, regardless of whether the person harmed constitutes a “consumer” as defined by the TCPA, TENN. CODE ANN. § 47-18-103(2). Indeed, the TCPA, TENN. CODE ANN. § 47-18-104(27) prohibits another person from “[e]ngaging in any other act or practice which is deceptive to the consumer or *any other person*.” (emphasis added).

38. Nevertheless, Plaintiffs and the Class Members allege that, in addition to “any person,” they also constitute “consumers” as defined by the TCPA, TENN. CODE ANN. § 47-18-103(2). Among other things, Plaintiff and the Class Members paid the unlawful attorney’s fees sought and charged by Defendant Linebarger. Plaintiff and the Class Members did so in order to ensure that Defendant Linebarger would stop the delinquent tax lawsuit, would not request entry of a default judgment against them and would remove their respective properties from the delinquent tax lawsuit (and any tax liens associated therewith) that was pending in Chancery Court. As such, Plaintiff and the Class Members acquired by purchase or other disposition, *inter alia*, the services of Defendant Linebarger and/or the intangible right to acquire tax lien-free properties with respect to the tax years paid by them.

39. Defendant Linebarger constitutes a “person” as defined by the TCPA, TENN.

CODE ANN. § 47-18-103(9) and falls within the meaning of the term “another person” as contained in the TCPA, § 47-18-109(a)(1).

40. Pursuant to the TCPA, TENN. CODE ANN. § 47-18-109(a)(1), Plaintiff and the Class Members are entitled to bring a private action for Defendant’s violations of the TCPA because, among other things, they have suffered an ascertainable loss of money, namely the payment of unlawful attorney’s fees in violation of Tennessee law.

41. Furthermore, Plaintiff and the Class Members are entitled to bring their TCPA claims as a class action under Rule 23 of the Federal Rule of Civil Procedure, despite the decision of *Walker v. Sunrise Pontiac-GMC Truck, Inc.*, 249 S.W.2d 301 (Tenn. 2008), which held that claims brought under the TCPA, TENN. CODE ANN. § 47-18-109(a)(1) are not eligible for class certification under the Tennessee Rules of Civil Procedure. *Id.* at 313 (“we hold that the TCPA does not provide for class certification of claims brought thereunder). Pursuant to *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, 130 S.Ct. 1431 (2010), Rule 23 of the Federal Rules of Civil Procedure validly preempts any state law (including the TCPA’s provision limiting TCPA claims to those brought “individually”) that otherwise makes ineligible for class treatment certain causes of action. *Id.* at 1442 (“Rule 23 unambiguously authorizes *any* plaintiff, in *any* federal civil proceeding, to maintain a class action if the Rule’s prerequisites are met. We cannot contort its text, even to avert a collision with state law that might render it invalid”)(emphasis in original).

42. This is true regardless of whether the TCPA’s prohibition of the maintenance of a class action is deemed to be “substantive” rather than “procedural” law. *Id.* at 1444 (“The fundamental difficulty with both these arguments [that New York’s law making certain claims ineligible for class certification was a substantive law or, alternatively, was a procedural

provision enacted for substantive reasons] is that the substantive nature of New York's law, or its substantive purpose, *makes no difference*. A Federal Rule of Procedure is not valid in some jurisdictions and invalid in others – or valid in some cases and invalid in others – depending upon whether its effect is to frustrate a state substantive law (or a state procedural law enacted for substantive purposes). . . In sum, it is not the substantive or procedural nature or purpose of the affected state law that matters, but the substantive or procedural nature of the Federal Rule. We have held since *Sibbach*, and reaffirmed repeatedly, that the validity of a Federal Rule depends entirely upon whether it regulates procedure. If it does, it is authorized by § 2072 and is valid in all jurisdictions, with respect to all claims, regardless of its incidental effect upon state-created rights”(emphasis in original and citations omitted). *See also, Thorogood v. Sears, Roebuck and Co.*, 547 F.3d 742, 746 (7<sup>th</sup> Cir. 2008)(Posner, J.) (“The Tennessee Consumer Protection Act . . . does not authorize class actions. *Walker v. Sunrise Pontiac-GMC Truck, Inc.*, 249 S.W.2d 301 (Tenn. 2008). Sears argues that the Tennessee rule precludes the maintenance of the present case as a class action. That is wrong. The procedure in diversity suits is governed by federal law”).

43. Defendant's notification and collection of the above described unlawful attorney's fees constitutes an unfair and/or deceptive practice which affects trade or commerce within Tennessee in violation of the TCPA, TENN. CODE ANN. § 47-18-104(a) and/or (b).

44. Defendant's conduct described in the preceding paragraphs was not isolated or unique to Plaintiff, but was widespread, covering the Class period, affecting thousands of Tennessee consumers, and was a regular and intended business practice of Defendant, instituted and implemented with a view towards unfairly and/or deceptively profiting at the expense of Plaintiff and the absent Class Members. Because Defendant failed to disclose its unfair and/or

deceptive acts and practices when they had a duty to do so, Defendant have fraudulently concealed Plaintiff's and the Class Members' causes of action, including their claims arising under the TCPA. *See, French v. First Union Securities, Inc.*, 209 F.Supp.2d 818, 825-26 (M.D.Tenn. 2002)( the TCPA's statute of repose may be tolled by fraudulent concealment). As a result, the TCPA's five (5) year statute of repose and the common law claims asserted below were all tolled during the Class period

45. As a result of the above described unfair and/or deceptive acts or practices, all of which affect the conduct of trade and commerce in Tennessee, Defendant has violated the TCPA, TENN. CODE ANN § 47-18-104(a) and/or (b), and the Plaintiff and other Class Members have thereby suffered ascertainable losses, the exact amount of which is presently unknown, but which is capable of being liquidated.

46. As a result of Defendant's violations of the TCPA, Defendant is liable to Plaintiff and the other members of the Class for all actual damages, including but not limited to, the full return of all legal fees charged and collected, and pre-judgment and post- judgment interest.

47. Plaintiff and the Class Members further request their reasonable attorneys' fees and costs, pursuant to the TCPA, TENN. CODE ANN. § 47-18-109(e)(1). Additionally, to the extent that Defendant's violations were intentional (as opposed to merely negligent), the actual damages to Plaintiff and other members of the Class should be trebled pursuant to the TCPA, TENN. CODE ANN. § 47-18-109(a)(3), or alternatively, under Tennessee common law, Defendant should be assessed punitive damages, whichever is determined to be greater by the trier of fact.

#### **COUNT 2 – UNJUST ENRICHMENT**

48. Plaintiff incorporate all allegations of fact in all preceding paragraphs as if fully set forth in this Count.

49. A benefit was conferred upon Defendant by Plaintiff and the Class Members by

the payment of unlawful attorney fees. Defendant ultimately received and appreciated from such monetary benefit. However, Defendant's acceptance and retention of such benefit under such circumstances is inequitable for them to retain the benefit without payment of the value thereof. The benefit accepted and retained by Defendant is unjust.

50. As a result of the unlawful acts and practices described above, Defendant was unjustly enriched by unlawful attorney's fees it received indirectly from Plaintiff and the Class. Defendant has been unjustly enriched at the expense of Plaintiff and the Class. Plaintiff and the Class are entitled to damages as a result of Defendant's unjust enrichment, including the disgorgement of all monies unjustly received by Defendant indirectly from Plaintiff and the Class Members.

### **COUNT 3 – NEGLIGENCE AND GROSS NEGLIGENCE**

51. Plaintiff incorporates all allegations of fact in all preceding paragraphs as if fully set forth in this Count.

52. As attorneys specializing in the collection of delinquent real property taxes, Defendant owed a duty of reasonable care to Plaintiff and the Class Members to ensure that the amounts that it sought to collect and in fact collected from them were at all times correct and lawful. This duty included notifying Plaintiff and the Class Members of and collecting only those attorney fee's which were permitted by law. Defendant, however, breached these duties by informing Plaintiff and the Class Members of an attorney's fee that they did not owe and by causing them to pay same.

53. As a direct and proximate result of the negligence and gross negligence of Defendant, Plaintiff and the Class Members have suffered damages.

#### **COUNT 4 – CONSTRUCTIVE TRUST**

54. Plaintiff incorporates all allegations of fact in all preceding paragraphs as if fully set forth in this Count.

55. A constructive trust arises contrary to intention and *in invitum* [against an unwilling party], against one who, by commission of a wrong, or by any form of unconscionable conduct, artifice, concealment, or questionable means, or who in any way against equity and good conscience, either has obtained or holds the legal right to property which he ought not, in equity and good conscience, hold and enjoy. As a result of the above described wrongful conduct, Defendant has obtained unlawful attorney's fees indirectly from Plaintiff and the Class Members which, in equity and good conscience, they should not hold and enjoy. Therefore, this Court should establish a constructive trust from which Plaintiff and the Class Members may claim funds rightfully belonging to them.

#### **COUNT 5 – CONVERSION**

56. Plaintiff incorporates all allegations of fact in all preceding paragraphs as if set forth fully herein.

57. By seeking to collect and collecting unlawful attorney's fees, Defendant Linebarger exercised improper dominion over the property of Plaintiff and the Class Members. Furthermore, Defendant has withheld the money rightfully belong to Plaintiff and the Class Members and acted inconsistent with their claim of ownership and title. As a result, Defendant Linebarger has converted the property of Plaintiff and the absent Class Members, thus proximately causing them damages.

**COUNT 6 - PUNITIVE DAMAGES**

58. Plaintiff incorporates all allegations of fact in all preceding paragraphs as if fully set forth in this Count.

59. Each Defendant alleged herein acted intentionally and/or recklessly with respect to their wrongful conduct because they were aware, but consciously disregarded, the substantial and unjustifiable harm that they would cause to Plaintiff and the Class Members for contracting for, charging and collecting unlawful attorney's fees. As a result, Defendant's actions and omissions constituted a reckless and/or gross deviation from the standard of care that an ordinary person would exercise under the circumstances.

60. Because of Defendant's wrongful conduct, punitive damages are warranted in order to punish Defendant and to deter them from future misconduct.

61. With respect to the applicable factors that may be addressed by the fact finder when determining punitive damages, Plaintiff would allege as follows:

(i) Defendant's financial affairs, financial condition and net worth range in the multimillions of dollars;

(ii) The nature and reprehensibility of Defendant's wrongdoing is substantial because Defendant have intentionally or recklessly abused and taken advantage of a class of persons who are generally in financial straits and are low income consumers;

(iii) Defendant was aware of the harm that could and would be caused to Plaintiff and the Class Members with respect to their wrongful conduct;

(iv) Defendant's misconduct spanned several years;

(v) In order to recover their losses, Plaintiff and the Class Members will incur substantial costs;

(vi) Defendant profited significantly from the unlawful legal fees, and a significant punitive award is the only method to deter future similar misconduct.

62. Based upon the above allegations and factors, Plaintiff and the Class Members would respectfully request entry of a punitive award in an amount to be determined by the trier of fact.

**VII.**

**PRAYER FOR RELIEF**

WHEREFORE, the named Plaintiff and the Class Members demand judgment against Defendant Linebarger Goggan Blair & Sampson, LLP, on each Count of the Complaint and pray for the following relief:

1. Issue service of process and serve the Defendant;
2. Issue an Order certifying that this action may be maintained as a class action, appointing Plaintiff and their counsel to represent the Class, and directing that reasonable notice of this action be given by Defendant to all Class Members;
3. Grant any reasonable request to Amend Plaintiff's Class Action Complaint to conform to the discovery and evidence obtained in this Class Action;
4. Empanel a jury to try this matter;
5. Award each plaintiff Class Member compensatory damages who has suffered same;
6. Award appropriate punitive damages and/or trebled damages pursuant to TENN. CODE ANN. § 47-18-109(a)(3), whichever is determined to be higher by the trier of fact ;
7. Award costs and expenses incurred in this action pursuant to Rule 54 of the Federal Rules of Civil Procedure;
8. Grant the Plaintiff Class Members their reasonable attorney's fees and costs incurred in this litigation pursuant to TENN. CODE ANN. § 47-18-109(e)(1);
9. Award pre-and post-judgment interest in the amount of 10% per annum pursuant to TENN. CODE ANN. § 47-14-123 in amount according to the proof at trial; and

10. Grant the Plaintiff and Class Members such further relief as the Court may deem just and proper.

Respectfully submitted,

s/Frank L. Watson, III

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s/Donald A. Donati

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*Counsel for Plaintiff Darrell L. Wright, Sr. as the  
Administrator of the Estate of Lenora S. Wright,  
Deceased, and the absent Class Members*

**CERTIFICATE OF SERVICE**

I hereby certify that on the 14<sup>th</sup> day of May, 2010 a true and correct copy of the foregoing was filed electronically with the Court's Electronic Case Filing System and served via U.S. Mail, postage pre-paid, on the following non-ECF user parties:

Defendant Linebarger Goggan Blair & Sampson, LLP  
c/o Brian Brown  
The Terrace II  
700 Via Fortuna  
Suite 400  
Austin, Texas 78746

Defendant Linebarger Goggan Blair & Sampson, LLP  
c/o Pamela Pope Johnson  
One Commerce Square  
40 S. Main,  
Suite 2250  
Memphis, Tennessee 38103

s/ Frank L. Watson III \_\_\_\_\_  
Frank L. Watson, III