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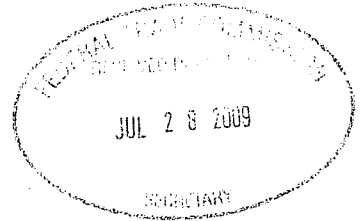
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July 27, 2009

BY UPS OVERNIGHT DELIVERY

Federal Trade Commission
Office of the Secretary
Room H-135 (Annex A)
600 Pennsylvania Avenue, N.W.
Washington, DC 20580

Re: Debt Collection Roundtable – Comment, Project No. P094806

Ladies/ Gentlemen:

Enclosed are comments for the above matter.

Sincerely,

Daniel A. Edelman

COLLECTION LITIGATION ABUSE

August 1, 2009

Daniel A. Edelman

EDELMAN, COMBS, LATTURNER & GOODWIN, LLC

I. DEBT BUYERS FILE SUITS ON DEBTS THAT THEY DO NOT OWN OR CANNOT PROVE THEY OWN

A. An article that appeared in the trade press in 2007 stated:

More collection agencies are turning to the debt resale market as a place to pick up accounts to collect on. Too small to buy portfolios directly from major credit issuers, they look to the secondary market where portfolios are resold in smaller chunks that they can handle. But what they sometimes find in the secondary market are horror stories: The same portfolio is sold to multiple buyers; the seller doesn't actually own the portfolio put up for sale; half the accounts are out of statute; accounts are rife with erroneous information; access to documentation is limited or nonexistent.

Corinna C. Petry, *Do Your Homework; Dangers often lay hidden in secondary market debt portfolio offerings. Here are lessons from the market pros that novices can use to avoid nasty surprises*, Collections & Credit Risk, Mar. 2007, at 24.

B. Debt buyers acknowledge in litigation that debts are sold without good title and suits brought to collect them

1. Debt buyer American Acceptance filed a lawsuit alleging that a broker of charged-off debts sold it debts to which it did not have title. *American Acceptance Co. v. Goldberg*, No. 2:08-CV-9 JVB, 2008 U.S. Dist. LEXIS 39418 (N.D.Ind. May 14, 2008).
2. Another debt buyer, Hudson & Keyse, filed suit alleging that the same debt broker obtained information about consumer debts owned by Hudson & Keyse and used the information to try to collect the debts for its own account, even though it did not own them. *Hudson & Keyse, LLC v. Goldberg & Associates, LLC*, No. 9:2007cv81047 (S.D.Fla. Nov. 5, 2007).
3. A similar suit, alleging that the broker resold accounts it did not own, was filed by Old National Bank. *Old National Bank v. Goldberg & Associates, LLC*, No. 9:2008cv80078 (S.D.Fla. Jan. 24, 2008).
4. The same debt broker is accused in another complaint of selling 6,521 accounts totaling about \$40 million face value which it did not own. *RMB Holdings, LLC v. Goldberg & Associates, LLC*, No. 3:2007cv00406 (E.D.Tenn. Oct. 30, 2007). On May 29, 2008, a decision was issued in favor of the plaintiff in that case. *RMB Holdings, LLC v. Goldberg & Associates, LLC*, No. 3:07-cv-406 (E.D.Tenn.). The decision finds that "RMB began making attempts to collect the accounts it purchased from Goldberg" even though "Goldberg never delivered title or ownership of the accounts to RMB." Why was RMB attempting to collect debts as to which it never received title?
5. Other debt buyers have voiced similar complaints about defective title to debts. *Florida Broker Faces Multiple Lawsuits*, Collections & Credit Risk,

Apr. 2008, at 8.

- C. There are multiple reported cases in which debtors have been subjected to litigation because they settled with *A*, and then *B* claimed to own the debt.
1. *Smith v. Mallick*, 514 F.3d 48 (D.C.Cir. 2008) (commercial debt purchased and resold by debt buyer, debt buyer (possibly fraudulently) settles debt it no longer owns, settlement held binding because notice of assignment not given, but obligor subjected to litigation as result).
 2. *Miller v. Wolpoff & Abramson, LLP*, No. 1:06-CV-207-TS, 2008 U.S. Dist. LEXIS 12283 (N.D.Ind. Feb. 19, 2008): debtor complained he had been sued twice on the same debt.
 3. *Dornhecker v. Ameritech Corp.*, 99 F.Supp.2d 918, 923 (N.D.Ill. 2000): which the debtor claimed he settled with one agency and was then dunned by a second for the same debt. This is a very common complaint.
 4. *Northwest Diversified, Inc. v. Desai*, 353 Ill.App.3d 378, 818 N.E.2d 753 (1st Dist. 2004): a commercial debtor paid the creditor only to be subjected to a levy by a purported debt buyer.
 5. In *Wood v. M&J Recovery LLC*, No. CV 05-5564, 2007 U.S. Dist. LEXIS 24157 (E.D.N.Y. Apr. 2, 2007), a debtor complained of multiple collection efforts by various debt buyers and collectors on the same debt, and the defendants asserted claims against one another disputing the ownership of the portfolio involved. Shekinah alleged that it sold a portfolio to NLRS, that NLRS was unable to pay, that the sale agreement was modified so that NLRS would only obtain one fifth of the portfolio, and that the one fifth did not include the plaintiff's debt. Portfolio Partners claimed that it, and not Shekinah, was the rightful owner of the portfolio.
 6. In *Associates Financial Services Co. v. Bowman, Heintz, Boscia & Vician, P.C.*, IP 99-1725-C-M/S, 2001 U.S. Dist. LEXIS 7874 at **9 – 12 (Apr. 25, 2001), *later opinion*, No. IP 99-1725-C-M/S, 2004 U.S. Dist. LEXIS 6520 (S.D.Ind. Mar. 31, 2004), allegations were made that a creditor had continued to collect accounts allegedly sold to a debt buyer.
 7. The author has encountered several cases in which debts were paid or settled to one entity, after which another tried to collect the entire debt or the remaining portion.
- D. Numerous debt buyer cases have been dismissed for failure to show that the plaintiff owned the debt:
1. In *Unifund CCR Partners v. Cavender*, No. 2007-CC-3040, 14 Fla.L. Weekly Supp. 975b (Orange Cty. July 20, 2007), the court held that a debt buyer "assignment" that does not refer to specific accounts does not establish ownership by the plaintiff, nor is testimony based on a computer screen sufficient:

The Court has reviewed the documents presented by the

Plaintiff, Bill of Sale and the Assignment, and finds that they fail to sufficiently identify the accounts that were assigned or sold to the Plaintiff. Neither the Bill of Sale nor the Assignment indicate the account numbers or names of account holders. They do not provide any information that would allow the Court to determine if the alleged account of Defendant was one of the accounts sold or assigned to the Plaintiff. Without any indicia of ownership that would sufficiently identify the true owner of the account at the time that Plaintiff filed this action, the Plaintiff is unable to prove that it had standing to bring the action. An assignment is the basis of the Plaintiff's standing to invoke the processes of the Court in the first place and is therefore an essential element of proof. . . .

2. *Nyankojo v. North Star Capital Acquisition*, A09A0704, 2009 Ga. App. LEXIS 574 (May 15, 2009) ("Through competent and admissible evidence, North Star showed nothing more than that, under a revolving charge agreement, Nyankojo was indebted in the amount of \$ 2,621.83 on an account to Leather World identified by number; that Leather World assigned an unidentified revolving charge agreement to an unidentified entity; and that Wells Fargo assigned to North Star an unidentified account on which Nyankojo owed \$ 1,132.62. This evidence, even together with the reasonable inferences from it, was insufficient to establish all essential elements of North Star's case").

3. *Citibank (South Dakota), N.A. v. Martin*, 11 Misc. 3d 219; 807 N.Y.S.2d 284 (Civ.Ct. 2005):

. . . as to assigned claims, it is essential that an assignee show its standing, which "doctrine embraces several judicially self-imposed limits on the exercise of . . . jurisdiction, such as the general prohibition on a litigant's raising another person's legal rights" . . . A lack of standing renders the litigation a nullity, subject to dismissal without prejudice It is the assignee's burden to prove the assignment Given that courts are reluctant to credit a naked conclusory affidavit on a matter exclusively within a moving party's knowledge . . . an assignee must tender proof of assignment of a particular account or, if there were an oral assignment, evidence of consideration paid and delivery of the assignment

4. *Palisades Collection LLC v. Haque*, 2006 N.Y. Misc. LEXIS 4036; 235 N.Y.L.J. 71 (Civ. Ct. Queens Co., April 13, 2006) (Pineda-Kirwin, J.).

Ms. Bergman testified that plaintiff is authorized to perform any and all acts relating to certain accounts assigned to plaintiff by AT&T Wireless pursuant to a limited power of attorney and a bill of sale and assignment of benefits. These two documents, both dated July 2004, were admitted into evidence as plaintiff's Exhibit 1A and 1B. These documents, however, name, as the assignee, an entity which is a Delaware limited liability company, not a New Jersey Corporation, as this plaintiff alleges

itself to be. Nor do the documents contain an indication that consideration was paid for the assignment and neither document is executed by plaintiff as the assignee. Further the assignment refers to a "Purchase and Sale Agreement" and indicates that an "Account Schedule" is attached to that agreement. Plaintiff did not seek to introduce the "Purchase and Sale Agreement" with its annexed schedule into evidence.

In contrast to the wording of the assignment which references the "Purchase and Sale Agreement" and its annexed schedule of accounts, the witness testified that the purchased accounts came to plaintiff by electronic transmission. Ms. Bergman testified credibly that the electronic statements were received on December 13, 2005. Ms. Bergman testified that defendant's account was included in those purchased by plaintiff. Plaintiff then sought to introduce into evidence a document, dated January 9, 2006, that the witness testified was the hard copy of the account summary generated by AT&T Wireless and electronically sent to plaintiff pertaining to this defendant. The witness testified that plaintiff did not have copies of any statements from AT&T Wireless that were allegedly sent to defendant. . . .

Further, in light of the dearth of evidence presented at trial regarding the assignment and the infirmities therein, plaintiff did not prove by a preponderance of the evidence that defendant's account was in fact assigned to plaintiff. . . . Had plaintiff been able to prove that much, as it is undisputed that defendant did not pay the monthly charge of \$24.99 for August and September, plaintiff would have been entitled to a judgment for those amounts.

5. *Palisades Collection, LLC a/p/o AT&T Wireless v. Gonzalez*, 10 Misc. 3d 1058A; 809 N.Y.S.2d 482 (N.Y. County Civ. Ct. 2005) (Ellen Gesmer, J.).

Finally, Ms. Bergmann claims that plaintiff is entitled to sue because of an assignment to it from AT&T. However, she does not attach a copy of the alleged assignment. In the absence of the document on which her statement is based, her statement is of no probative value . . . Consequently, Ms. Bergmann has failed to establish that plaintiff has the right to collect this debt.

6. *Rushmore Recoveries X, LLC v. Skolnick*, 15 Misc. 3d 1139A; 841 N.Y.S.2d 823 (Nassau Co. Dist. Ct. 2007):

. . . the documents upon which the Plaintiff relies do not support the Plaintiff's claim. While the Plaintiff alleges that it is the assignee of this account, the Plaintiff fails to provide proper proof of the alleged assignment sufficient to establish its standing herein. The Plaintiff has made no effort to

authenticate the alleged assignments, *NYCTL 1998-2 Trust v. Santiago*, 30 AD3d 572, 817 N.Y.S.2d 368 (2nd Dept. 2006); [****9**] and, there is a break in the chain of the assignments from Citibank down to the Plaintiff. The purported assignment from NCOP Capital, Inc. to New Century Financial Services, Inc., Plaintiff's alleged assignor, is not signed at all on behalf of NCOP Capital, Inc. There being no competent proof that the assignment to New Century Financial Services, Inc. was valid, the Plaintiff cannot establish the validity of the assignment from New Century Financial Services, Inc. to the Plaintiff, preventing [***4**] the granting of summary judgment for this reason as well. . . .

7. *MBNA America Bank, N.A. v. Nelson*, 13777/06, 2007 NY Slip Op 51200U; 2007 N.Y. Misc. LEXIS 4317 (N.Y.Civ. Ct. May 24, 2007).

It is imperative that an assignee establish its standing before a court, since "lack of standing renders the litigation a nullity." It is the "assignee's burden to prove the assignment" and "an assignee must tender proof of assignment of a *particular account* or, if there were an oral assignment, evidence of consideration paid and delivery of the assignment." Such assignment must clearly establish that Respondent's account was included in the assignment. A general assignment of accounts will not satisfy this standard and the full chain of valid assignments must be provided, beginning with the assignor where the debt originated and concluding with the Petitioner. . . .

Because multiple creditors may make collection efforts for the same underlying debt even after [***6**] assignment, for any variety of reasons (i.e. mis-communication or clerical error) failure to give notice of an assignment may result in the debtor having to pay the same debt more than once or ignoring a notice because the debtor believes he or she has previously settled the claim. Further, debtors are often left befuddled as they get the run-around from a panoply of potential creditors when inquiring about their defaulted accounts, [****16**] during which time they lose the ability to negotiate payments with the current debt owner (whoever that may be at the time) and therefore incur additional fees and penalties. Courts in other states, reviewing general principles of assignment, have noted that notice to the debtor is an explicit requirement to a valid assignment. ". . .

8. In *In re Leverett*, 378 B.R. 793, 800 (Bkrcy., E.D.Tex. 2007), the court held that a bankruptcy proof of claim submitted by an assignee must include a "signed copy of the assignment and sufficient information to identify the original credit card account." There must be a chain of title from a creditor listed on the debtor's schedules to the claimant.
9. *Colorado Capital Investments, Inc. v. Villar*, 5894/2005 (N.Y. Civ. Ct., June 4, 2009) ("None of these assignments, however, contain a list of the

accounts which were included in the transfer . . . Thus on their face, these assignments and bills of sale do not specify that defendant's account was included in any transfer, and cannot support movant's contention that defendant's account was so transferred").

- E. The February 2009 Workshop Report noted (p. 22) that "A leading association of debt buyers, DBA International ("DBA"), acknowledged that it is common for a debt buyer to receive only a computerized summary of the creditor's business records when it purchases a portfolio"

II. DEBT BUYERS ROUTINELY FILE FALSE AFFIDAVITS

- A. Debt buyers regularly submit affidavits which purport to be made on personal knowledge but in fact are based on reading a computer screen
1. *Luke v. Unifund CCR Partners*, No. 2-06-444-CV, 2007 Tex.App. LEXIS 7096 (2nd Dist. Ft. Worth Aug. 31, 2007).
 2. *Palisades Collection, LLC a/p/o AT&T Wireless v. Gonzalez*, 10 Misc. 3d 1058A; 809 N.Y.S.2d 482 (N.Y. County Civ. Ct. 2005):

Plaintiff now moves for entry of summary judgment in its favor. Plaintiff relies exclusively on an affidavit executed by one of its employees, and various documents which appear to have been created by AT&T. Since the affiant neither has personal knowledge of the facts nor can attest to the genuineness or authenticity of the documents, plaintiff has not made out its prima facie case. Therefore, even though defendant did not appear in opposition to this motion, it must be denied.

CPLR § 3212(b) requires that a motion for summary judgment be supported by an affidavit of a person with requisite knowledge of the facts, together with a copy of the pleadings and by other available proof . . . The movant must tender evidence, by proof in admissible form, to establish the cause of action "sufficiently to warrant the court as a matter of law in directing judgment" . . . "Failure to make such showing requires the denial of the motion, regardless of the sufficiency of the opposing papers." . . . A conclusory affidavit, or an affidavit by a person who has no personal knowledge of the facts, cannot establish a prima facie case. . . . When the affiant relies on documents, the documents relied upon must be annexed . . . and the affiant must establish an adequate evidentiary basis for them. Mere submission of documents without any identification or authentication is inadequate. . . . When the movant seeks to have the Court consider a business record, the proponent must establish that it meets the evidentiary requirements for a business record, by, [*2]for example, having a corporate officer swear to the authenticity and genuineness of the document. . . .

The court held that affidavits based on "books and records" but not executed by someone familiar with the manner in which the entity that engaged in the transactions prepared and maintained the books and records are insufficient:

Plaintiff relies on an affidavit executed by Joanne Bergmann, ^[FN2] who identifies herself as the Vice President of plaintiff's Legal Department. She does not claim to have any personal knowledge of the transaction underlying this complaint but rather states that she is making the affidavit "based upon the books and records in my possession." She claims that she is familiar with plaintiff's methods for creating and maintaining its business records, including records of the accounts purchased by plaintiff. She then annexes and discusses various records. Through her affidavit, she seeks to establish four facts on which to ground plaintiff's claim: that defendant executed a contract with AT&T; that defendant defaulted in making payments under the contract; that AT&T sent defendant bills which defendant did not dispute; and that plaintiff is entitled to sue as AT&T's assignee. Ms. Bergmann's affidavit is not adequate to establish any of these facts.

To establish the contract, Ms. Bergmann asserts that defendant entered into a contract with AT&T, and alleges that it is attached as Exhibit A. Her bald statement that defendant entered into a contract is not probative, since Ms. Bergmann acknowledges that she is simply relying on the documents in her possession. Moreover, the document attached as Exhibit A is equally ineffective to establish that defendant signed a contract, since it is merely an unsigned 9-page form, headed "Terms and Conditions for Wireless Service." Putting aside the question of whether Ms. Bergmann could properly authenticate a contract which appeared to be signed by defendant, her proffer of an unexecuted document certainly does not establish that defendant signed a contract with AT&T.

Next, Ms. Bergmann seeks to establish that defendant is in default by making various conclusory statements to that effect and then attaching, as Exhibit D, documents she refers to as account statements which allegedly reflect the activity on defendant's account. On the simplest level, the Court cannot rely on Ms. Bergmann's description of the documents annexed as Exhibit D because her description is inconsistent with the documents themselves and with her own prior statements as to defendant's obligation to plaintiff. Specifically, she describes the documents as "account statements that reflect purchases made by defendant along with periodic payments. The statements reflect the finance charges on the balance as provided in the retail installment credit agreement." However, the account statements do not, on their face, reflect "purchases" but rather monthly charges for cell phone usage. Similarly, the account statements do not appear to be based on charges on a "retail

installment credit agreement," but rather on a cell phone service plan. Consequently, since Ms. Bergmann has described incorrectly the document she claims to [*3]rely on, the Court will not credit the statements she makes based on it.[FN3]

Even if the Court were to overlook the inaccuracy of Ms. Bergmann's description of the documents attached as Exhibit D, the Court could not rely on them. Since the documents are out-of-court statements offered for their truth, Ms. Bergmann must establish that they fall within an exception to the hearsay rule in order for them to be admissible. . . . Presumably, Ms. Bergmann is asking the Court to treat them as a business record since she describes herself as being familiar with plaintiff's business records . . . However, the records attached at Exhibit D were created not by plaintiff but by plaintiff's assignor, AT&T. In order to establish a business records foundation, the witness must be familiar with the entity's record keeping practices . . . Ms. Bergmann does not claim to be familiar with AT&T's record keeping practices, but only with the method by which plaintiff maintains the accounts it purchases from others. The mere fact that plaintiff obtained the records from AT&T and then retained them is an insufficient basis for their introduction into evidence. . . .^[FN4] Therefore, the Court cannot rely on the account statements which Ms. Bergmann proffered to establish defendant's default.

Footnote 4: This is not a situation where the relationship between the proponent of the record and the maker of the record guarantees the reliability of the records, such as where the maker of the record was acting on behalf of the proponent and in accordance with its requirements when making the records, (*People v Cratsley*, 86 NY2d 81, 89-91 [1995]) or where the proponent of the records relies contemporaneously on the accuracy of the other entity's records for the conduct of its own business (*People v DiSalvo*, 284 AD2d 547, 548-9 [2d 2001]; *Plymouth Rock Fuel Corp. v Leucadia, Inc.*, 117 AD2d 727, 728 [2d Dept 1986]). Here, there is no evidence that there was any relationship between AT&T and plaintiff at the time that the records were created.

The court also held insufficient affidavits that documents had been mailed when the affiant neither mailed them nor was able to testify on personal knowledge that a routine practice of mailing such documents existed within the business. The court also found that a reproduction of the document mailed was required and that a later printout prepared using data in the system would not do:

Ms. Bergmann also asserts that the account statements were mailed to defendant and the statements were neither returned nor disputed. Presumably, Ms. Bergmann is making this statement in order to support a claim for an account stated. However, plaintiff's complaint does not include a cause of

action for an account stated, so these statements by Ms. Bergmann are irrelevant.

Even if plaintiff were asserting a claim for an account stated, Ms. Bergmann's statement [*4] would be totally inadequate to support it. Ms. Bergmann does not even assert whether she claims that the documents were sent by AT&T or by plaintiff, but, either way, her statements are not sufficient to establish mailing. As stated above, Ms. Bergmann does not claim to have personal knowledge of this account. Certainly, she does not claim to have mailed these statements herself. Where an affiant does not have personal knowledge that a particular document was mailed, she can establish that it was mailed by describing a regular office practice for mailing documents of that type. . . . However, Ms. Bergmann did not do that in this case. ^[FN5] Consequently, plaintiff has failed to prove that the account statements were in fact mailed to defendant.

Footnote 5: Moreover, the account statements could not be a true copy of the documents allegedly mailed to defendant since they indicate, on their face, that they were printed out on June 29, 2005, after this action was commenced.

3. *Rushmore Recoveries X, LLC v. Skolnick*, 15 Misc. 3d 1139A; 841 N.Y.S.2d 823 (Nassau Co. Dist. Ct. 2007):

The Plaintiff attempts to support its motion with the affidavit of Todd Fabacher, who identifies himself as "an authorized and designated custodian of records for the plaintiff regarding the present matter." (*Fabacher Affidavit 3/14/07*, P 1) Mr. Fabacher describes his duties as including "the obtaining, maintaining and retaining, all in the regular course of plaintiff's business, including obtaining records and documents from or through CITIBANK or [*2] any assignee or transferee previous to plaintiff, any and all records ^[**3] and documentation regarding the present debt." (*Fabacher Affidavit 3/14/07*, P 1) While Mr. Fabacher attempts to portray himself as one who is "personally familiar with, and hav[ing] knowledge of, the facts and proceedings relating to the within action" (*Fabacher Affidavit 3/14/07*, P 1), it is readily apparent from a reading of his affidavit that his claimed personal familiarity with this matter is taken from the documents and records ostensibly created by Citibank, and/or assignees who have preceded the Plaintiff, which have now come into the Plaintiff's possession. Clearly, Mr. Fabacher has no personal knowledge of the retail charge account agreement between the Defendant and Citibank. . . .

The Plaintiff's reliance upon the documents it submits is insufficient to make out a *prima facie* case entitling the Plaintiff to summary judgment. Simply annexing documents to the moving papers, without a proper evidentiary foundation ^[**4]

is inadequate. . . .

The documents the Plaintiff attempts to submit, specifically the purported account statements and assignments, are being offered for the truth of the statements contained therein and are, by definition, hearsay. . . . They may be considered only if they fall within one of the recognized exceptions to the hearsay rule. . . . The Plaintiff attempts to rely upon the business records exception to the hearsay rule in its effort to establish a *prima facie* case.

. . . the proponent of the offered evidence must establish three general elements, by someone familiar with the habits and customary practices and procedures for the making of the documents, before they will be accepted in admissible form: (1) that the documents were made in the regular course of business; (2) that it was the regular course of the subject business to make the documents; and, (3) that the documents were made contemporaneous with, or within a reasonable time after, the act, transaction, occurrence or event recorded. . . .

The repetitive statements of Mr. Fabacher, the Plaintiff's custodian of records, to the effect that he collects and maintains the records and documents of Citibank and/or any other prior assignees, "in the regular course of plaintiff's business" (*Fabacher Affidavit* 3/14/07, P 1), as if they were magic words, does not satisfy the business records exception to the hearsay rule. That phrase, standing alone, does not establish that the records upon which the Plaintiff relies were made in the regular course of the Plaintiff's business, that it was part of the regular course of the Plaintiff's business to make such records, or that the records were made at or about the time of the transactions recorded. Contrary to the misconception under which the Plaintiff labors, "the mere filing of papers received from other entities, even if they are retained in the regular course of business, is insufficient [**8] to qualify the documents as business records (citation omitted)." . . . The statements of Mr. Fabacher, "who merely obtained the records from another entity that actually generated them, was an insufficient foundation for their introduction into evidence . . .

Finally, "The Plaintiff has also failed to submit any competent proof of an agreement between Citibank and the Defendant."

The Plaintiff's reliance on *Chase Manhattan Bank (National Association), Bank Americard Division v. Hobbs*, 94 Misc 2d 780, 405 N.Y.S.2d 967 (Civ. Ct. Kings Co. 1978) is misplaced. The plaintiff therein was not an assignee, but the party with which the defendant had entered into a retail charge account agreement and could properly lay a business record foundation for [**10] the entry of the documents necessary to prove the existence of same. Additionally, the plaintiff therein provided

proper proof of mailing of the subject account statements, along with copies of the retail charge account agreement, and demonstrated the defendant's use of the credit card in question, thereby accepting the terms of use of that card.

In the matter *sub judice*, the account statements upon which the Plaintiff relies do not show any usage of the credit card in question by the Defendant. The four (4) statements submitted show only an alleged open balance, with the accrual of fees and finance charges thereon. The Plaintiff also fails to submit any proof that a copy of the retail installment credit agreement or the statements upon which it relies were ever mailed to the Defendant. Neither Mr. Fabacher nor Plaintiff's counsel mailed these documents or have personal knowledge of their mailing; nor does the Plaintiff even attempt to describe a regular office practice and procedure for the mailing of the documents designed to insure that they are always properly addressed and mailed. . . .

4. Other false affidavit cases: *Todd v. Weltman, Weinberg & Reis Co., L.P.A.*, 434 F.3d 432 (6th Cir. 2006); *Delawder v. Platinum Financial*, 443 F. Supp. 2d 942 (S.D. Ohio March 1, 2005); *Griffith v. Javitch, Block & Rathbone, LLP*, 1:04cv238 (S.D. Ohio, July 8, 2004); *Gionis v. Javitch, Block & Rathbone*, 405 F. Supp. 2d 856 (S.D. Ohio. 2005); *Blevins v. Hudson & Keyse, Inc.*, 395 F. Supp. 2d 655 (S.D. Ohio 2004), later opinion, 395 F. Supp. 2d 662 (S.D. Ohio 2004); *Stolicker v. Muller, Muller, Richmond, Harms, Meyers & Sgroi, P.C.*, 1:04cv733 (W.D. Mich., Sept. 8, 2005).

III. DEBT BUYERS REGULARLY USE INAPPLICABLE OR MANUFACTURED DOCUMENTS

A. Fake statements

1. *Hartman v. Great Seneca Fin. Corp.*, Nos. 08-3773/3804, 2009 U.S. App. LEXIS 14110 (6th Cir., June 30, 2009).

B. Generic or inapplicable contracts

1. *MBNA America Bank, N.A. v. Nelson*, 13777/06, 2007 NY Slip Op 51200U; 2007 N.Y. Misc. LEXIS 4317 (N.Y. Civ. Ct. May 24, 2007). The court required proof of the actual terms of the agreement with the particular debtor (*7-9)

. . . The notion that the terms of a valid offer be communicated to the offeree, regardless of whether the contract is unilateral, bilateral or otherwise, before they can become binding is well settled law.³² Therefore, absent a definite and certain offer outlining the terms and conditions of credit card use with the user's *actual signature*, the Petitioner . . . has the burden of establishing the binding nature of the underlying contract, including any allegedly applicable arbitration clauses, which

entails proof, at a most basic level, that the debtor was provided with notice of the terms and conditions ³³ to which Petitioner now [*8] seeks to hold [**23] Respondent. ³⁴

Petitioner must tender the *actual* provisions agreed to, including any and all amendments ³⁵, and not simply a photocopy of general terms to which the credit issuer may currently demand debtors agree. For example, Petitioner's Exhibit A which is labeled "Credit Card Agreement and Additional Terms and Conditions" lacks Respondent's signature. Neither does it contain a date indicating when these terms were adopted by MBNA nor how the terms were amended or changed, if at all, over the years appear anywhere on the document. Furthermore, the contract does not contain any name, account number or other identifying statements which would connect the proffered agreement with the Respondent in this action. In fact, petitioners [**25] appear to have attached the exact same photocopy, which as noted is not specific to any particular consumer, to many of its confirmation petitions. While on its face there is nothing necessarily unusual about a large commercial entity such as MBNA providing a standard form contract that all credit card consumers agree to, the burden nevertheless remains with MBNA to tie the binding nature of its boiler-plate terms to the user at issue in each particular case and to show that those terms are binding on each Respondent it seeks to hold accountable ³⁶ (the Respondent's intent to be bound *after notice of terms is established* can be shown via card use ³⁷). ³⁸ The fact that MBNA issues a particular agreement with particular terms with the majority of its customers is of little relevance in determining the actual terms of the alleged agreement before this Court, if not linked directly to respondent in some way shape or form. Just because a petitioner provides a photocopy of a document entitled "Additional Terms and Conditions," certainly does not mean those terms are binding on someone who could have theoretically signed a completely different agreement when they were extended credit. Whether [**26] the physical card itself or some solicitation agreement with Respondent's signature referenced the terms and conditions ³⁹, or whether the terms were made readily accessible to Respondent by e-mail or the internet, and Respondent was in fact aware of this, may all be relevant to an inquiry into constructive notice but such notice must still be established. At bar, MBNA Bank has failed to establish that the provided terms and conditions were the actual terms and conditions agreed to by Nelson. As such, applying *Kaplan*, the Court does not find objective intent on the part of the Respondent to be bound to the contractual statements proffered by MBNA requiring the question of arbitrability to be decided by the arbitrator or that arbitration is the required forum for either party to bring claims against the other.

35 State law often outlines the acceptable procedures for

amendments to retail credit agreements, and courts may treat as a nullity any amendment that did not follow proper [*17] notification, opt out or other relevant amendment procedures (see for e.g. *Kurz v. Chase Manhattan Bank USA, N.A.*, 319 F. Supp. 2d 457, 465 [2d Cir. 2004]) (under Delaware law "a credit card issuer seeking [**27] unilaterally to add an arbitration clause to the agreement must provide notice and an opt out provision"). However, in order to make such a determination the evolution of the contractual agreement from birth to litigation must be outlined for the court's scrutiny. Without the original agreement provided and its history made available, the court is effectively impinged from exercising its limited review function.

While these deficiencies of proof are fatal to Petitioner's claim, such a problem is not without a solution. Since the credit card issuer is the party in the best position to maintain records of notification it may provide an affidavit from someone with knowledge of the policies, procedures and practices of its organization affirming (1) when and how the notification of the original terms and conditions was provided ⁴⁰, including any solicitations or applications containing the Respondent's signature, (2) what those terms and conditions were *at the time of the notification*, (3) whether the mandatory arbitration clause, and any [**29] other additional provisions Petitioner now treats as binding, were included in the terms and conditions of card use at the time Respondent entered into the retail credit agreement, and if they were not, then when they were added, as well as a statement certifying that (a) such addition was made pursuant to the applicable [*9] law chosen by the parties to apply to the agreement, not limited to but especially including mandatory opt-out requirements, and (b) a statement indicating that upon reasonable and diligent inspection of the records maintained by the Petitioner, and to the best of Petitioners' knowledge Respondent never opted out of said clause, and the basis for this determination. The use of such affidavits to support confirmation of arbitration awards is not novel. ⁴¹

2. *Palisades Collection LLC v. Haque*, 2006 N.Y. Misc. LEXIS 4036; 235 N.Y.L.J. 71 (Civ. Ct. Queens Co., April 13, 2006).

Plaintiff attempted to introduce into evidence a document entitled "Terms and Conditions" which does not name defendant, contains no specific terms as to this defendant's particular account, and contains no signatures, claiming that AT&T Wireless sent it to defendant with the information regarding defendant's account. Ms. Bergman testified that plaintiff received it from AT&T Wireless along with the electronic transmission. In light of the earlier testimony that the account came to plaintiff via electronic transmission, it was not clear from the testimony how the "Terms and Conditions"

document was sent along with the other information.

Defendant examined the document and objected on the grounds that the document was not his contract with AT&T Wireless as it did not contain the terms of his agreement and that he had never received such a document from AT&T Wireless. As plaintiff could not demonstrate that AT&T Wireless ever sent defendant this document, as the document was introduced to prove the truth of its contents, and as plaintiff failed to lay an adequate foundation for its admission as a business record, the objection was sustained. [citation]

Plaintiff again sought to introduce the "Terms and Conditions" document by claiming that AT&T Wireless sent the document to plaintiff as part of the purchase of defendant's account. Defendant again objected on the basis that it was not his contract, and the objection was again sustained. Plaintiff essayed several more times to introduce the "Terms and Conditions" contract, defendant objected, and each time the objection was sustained. Thus, plaintiff was unable to offer evidence of the terms of the agreement between AT&T Wireless and defendant. . . .

While it is well settled that the absence of an underlying agreement, if established, does not relieve a defendant of his obligation to pay for goods and services received on credit, (Citibank (SD) NA v. Roberts, 304 AD2d 901 [3rd Dept 2003],) that is not the sole impediment to this plaintiff's case. Here, without any admissible evidence from its alleged assignor, plaintiff was unable to establish that AT&T Wireless and defendant entered into a contract pursuant to which defendant was obligated to pay for the additional charges for which defendant now sues.

3. *Unifund CCR Partners v. Harrell*, 2005 Conn. Super. LEXIS 2037 (Aug. 3, 2005): Failure to produce signed agreement or affidavit authenticating purported agreement as that entered into with defendant results in denial of summary judgment. Affidavit of "plaintiff's legal coordinator" that "she has access to the records of Unifund CCR Partners and therefore has personal knowledge of the facts" not sufficient.
4. *First Select Corp. v. Grimes*, 2003 Tex. App. LEXIS 604 (Jan. 23, 2003): summary judgment for debtor affirmed where there was no evidence that the debtor used the credit card after First Select sent out an agreement modification and no copy of the written agreement between the original creditor and the consumer or the consumer's acceptance of such agreement.

IV. FILING SUITS AGAINST WRONG PERSONS

A. Suing or serving wrong person as a result of inadequate information

1. In 2004, the Federal Trade Commission shut down a debt buyer called

CAMCO headquartered in Illinois. The following is from a press release issued by the FTC in connection with that case.

... In papers filed with the court, the agency charged that as much as 80 percent of the money CAMCO collects comes from consumers who never owed the original debt in the first place. Many consumers pay the money to get CAMCO to stop threatening and harassing them, their families, their friends, and their co-workers.

According to the FTC, CAMCO buys old debt lists that frequently contain no documentation about the original debt and in many cases no Social Security Number for the original debtor. CAMCO makes efforts to find people with the same name in the same geographic area and tries to collect the debt from them – whether or not they are the actual debtor. In papers filed with the court, the FTC alleges that CAMCO agents told consumers – even consumers who never owed the money – that they were legally obligated to pay. They told consumers that if they did not pay, CAMCO could have them arrested and jailed, seize their property, garnish their wages, and ruin their credit. All of those threats were false, according to the FTC. . . . (<http://www.ftc.gov/opa/2004/12/camco.htm>)

2. The same thing occurs with litigation.

- a. We had one case where a debt buyer contacted a person with a common Hispanic name, who provided the debt buyer with the last 4 digits of his SSN to show that he was not the correct person. The debt buyer sued him anyway, attaching an affidavit asserting that the person sued owed \$x. *Gutierrez v. LVNV Funding, LLC*, EP-08-CV-225-DB, 2009 U.S. Dist. LEXIS 54479, *2-3 (W.D.Tex. March 16, 2009):

On or about January 24, 2008, Defendant LVNV Funding, LLC ("LVNV Funding") filed suit against Plaintiff in the 448th District Court, El Paso County, Texas ("state action"), to collect upon a purported credit card debt, which LVNV Funding claimed to have purchased. Attached to the state action petition was an "affidavit of account," signed by an authorized representative of LVNV Funding and notarized. The affidavit of account stated that the affiant or a person under her supervision "has care, custody, and control of all records concerning [Plaintiff's] account" Further, the affiant averred that she had "personal knowledge" that the claim against Plaintiff is "just and true," and that Plaintiff owed LVNV Funding \$ 6961.13, exclusive of interest. Plaintiff alleges that this affidavit of account is false because LVNV Funding did not have any original documents or records concerning Plaintiff's purported debt and instead relied upon a computerized list that provides minimal information. Further, Plaintiff

alleges that the affidavit of account is a standard form document prepared on a mass production basis, that the affiant is always one of Defendants' employees, and that the affidavit of account is always untrue.

The affidavit of account filed against Plaintiff was also allegedly false in that it mistakenly identified Plaintiff as the putative debtor when he, in fact, was not. Prior to the filing of the state action against Plaintiff, Plaintiff allegedly provided LVNV Funding a copy of his Social Security card, showing that the last four (4) digits of his social security number did not match those of the putative debtor. Nevertheless, LVNV Funding commenced the state action. As a result, Plaintiff hired counsel to defend the state action. In May 2008, the state action was nonsuited. . . .

Our research showed that there were over 600 people named Gabriel Gutierrez in Texas.

- b. In another case, a debt buyer had a claim against a Felicia Allen, with an address in Chicago. It served a Felisa Allen, located in a suburb of Chicago, and insisted on pursuing the case. Ultimately Felisa was granted summary judgment because there was no evidence to controvert her affidavit that she was not the correct person.

B. Authorized users of credit cards and other agents

1. Generally, "authorized users" of a credit card are not personally liable; only the cardholder is. *Alabran v. Capital One Bank*, Civ. Action No. 3:04CV935, 2005 U.S. Dist. LEXIS 34158 at **12, 16 (E.D.Va. Dec. 8, 2005); *Sears Roebuck & Co. v. Ragucci*, 203 N.J. Super. 82, 495 A.2d 923 (1985); *Cleveland Trust Co. v. Snyder*, 55 Ohio App.2d 168, 380 N.E.2d 354 (1978); *Blaisdell Lumber Co. v. Horton*, 242 N.J. Super 98, 575 A.2d 1386 (1990); *Sears, Roebuck & Co v. Stover*, 32 Ohio Misc.2d 1, 513 N.E.2d 361 (1987); *First National Bank of Findlay v. Fulk*, 57 Ohio App.3d 44, 566 N.E.2d 1270 (1989); *FCC National Bank v. Laursen (In re Laursen)*, 214 B.R. 378, 381 (Bankr. D.Neb. 1997); *Citibank (S.D.), N.A. v. Hauff*, 2003 SD 99, 668 N.W.2d 528 (2003); *Chevy Chase Savings Bank v. Strong*, 46 Va. Cir. 422 (1998); *Houfek v. First Deposit National Bank (In re Houfek)*, 126 B.R. 530 (Bankr. S.D. Ohio 1991); *Nelson v. First National Bank Omaha*, No. A04-579, 2004 WL 2711032 (Mn.App. Nov. 30, 2004).
2. The documentation debt buyers obtain is insufficient to allow them to distinguish between persons who are liable and those who are not
3. We have had multiple cases in which (a) either original issuers or purchasers of credit cards attempted to collect from authorized users or (b) nursing homes filed lawsuits against patient representatives who clearly signed contracts as agent of the patient.

V. STATUTES OF LIMITATIONS ARE HABITUALLY IGNORED BY DEBT BUYERS, COLLECTION ATTORNEYS

1. *Castro v. Collecto, Inc.*, EP-08-CA-215-FM, 2009 U.S. Dist. LEXIS 20324 (W.D.Tex. March 4, 2009) (Federal Communications Act provision for cell phone debts).
2. *Portfolio Acquisitions, LLC v. Feltman*, 1-07-3004, 2009 Ill. App. LEXIS 301 (Ill.App., 1st Dist., May 20, 2009); *Nicolai v. Mason*, 118 Ill.App.3d 300, 454 N.E.2d 1049 (5th Dist. 1983); *Parkis v. Arrow Financial Services*, No. 07 C 410, 2008 U.S.Dist. LEXIS 1212 (N.D.Ill. Jan. 8, 2008); *Ramirez v. Palisades Collection LLC*, No. 07 C 3840, 2008 U.S.Dist. LEXIS 48722 (N.D.Ill. June 23, 2008) (Illinois credit card statute is 5 years, not ten years).
3. Unfounded claims of tolling of limitations by payment and use of unlawful lawsuits to coerce payment.
 - a. *Unifund CCR Partners v. John T. Nee*, 08 M1 119392 (Circuit Court of Cook County, Illinois). On March 5, 2008, two months after *Parkis*, Unifund CCR Partners filed a complaint on a credit card debt that was more than 5 years old. Unrepresented consumer appears in court and, unaware of his rights, agrees to a payment plan. Unifund then claims that the payments induced by the filing of a time-barred lawsuit waive the statute of limitations.

VI. UNSUBSTANTIATED INTEREST, FEES AND CHARGES

- A. With a majority of credit cards being variable rate accounts, collector cannot simply assume that the rate of interest charged at one time continues indefinitely
- B. Debt buyers often hold accounts, add enormous amounts of unsubstantiated interest over years
- C. Absent proof of agreement and all changes thereto, debt buyer or collection agency hired by a debt buyer should not be able to add interest, or not in excess of the rate permitted by statute in the absence of any agreement
- D. Debt buyer cannot go back and add interest or fees that the original creditor did not impose. E.g., account written off in 2005, creditor ceases addition of interest and late charges at the time, debt buyer acquires in 2008, debt buyer retroactively adds interest and late charges for 2005-2008. If creditor has right to increase rate or change terms at will, it also has the right to do so in favor of the consumer, and the failure to charge interest is binding on the debt buyer.

VII. SEIZURE OF EXEMPT ASSETS

- A. Social security, SSI, pension
- B. Illinois exempts first \$4,000 of any account under "wildcard," but debtor has to

appear or file motion to claim it.

- C. Exempt assets are frequently seized anyway
- D. Cook County forms were recently amended to prevent banks from freezing accounts containing only Social Security and other benefits

VIII. COLLECTOR GENERATED CHECKS

- A. Recurrent complaints about money being debited from accounts without authorization.
- B. Often once collector obtains account information, money is taken using it and consumer complains they did not authorize
- C. We have had case where money was supplied by relative who had no legal obligation to pay the debt and further debits were made

IX. SEWER SERVICE

- A. Frequent complaints
- B. Illinois law allows court to direct service by alternative means. This should not include employers and others who are not agents of the defendant and have no obligation to deliver process to defendants.

X. ARBITRATION

- A. Not understood or taken seriously by consumers
- B. Prevalence of NAF arbitrations – Minnesota Attorney General case alleging common ownership between National Arbitration Forum and collection firm that uses NAF.
- C. Neither the arbitration claim nor subsequent confirmation proceedings contain any evidence that the consumer agreed to arbitrate. In Illinois, an action to confirm an arbitration award is brought in the same manner as any other lawsuit. The existence of an agreement to arbitrate is subject to de novo review by the court in Illinois. *Salsitz v. Kreiss*, 198 Ill. 2d 1, 17, 761 N.E.2d 724 (2001) (because “an agreement to arbitrate is a matter of contract . . . where the arbitrator decides the question of arbitrability in the first instance, the circuit court must review the arbitrator's decision *de novo* Were it not so, a party would be bound by the arbitration of disputes he has not agreed to arbitrate and would be left with only a court's deferential review of the arbitrator's decision on the question of arbitrability.”). However, consumers do not understand this. Arbitration is thus used to obtain judgments against persons who are merely authorized users, victims of identity theft, etc.
- D. Court should refuse to confirm award, even by default, without evidence that the consumer did in fact agree to arbitrate.

XI. NEED FOR LEGISLATION/ REGULATION

- A. Most consumers are unrepresented, frightened, and unaware of their rights. The vast majority of cases in which a return of service is filed (90%+) result in default judgments. The few consumers who show up in court often enter into payment plans regardless of (a) valid defenses, (b) lack of evidence that the plaintiff owns the debt or (c) the fact that they have no non-exempt assets or income.
- B. For example, most consumers assume that if someone is suing them, they must own the claim. It does not occur to them to insist on proof until a second attempt is made to collect the debt.
- C. By statutory amendment or regulation, the following should be specifically defined as unfair and deceptive practices:
 - 1. The filing of lawsuits by an assignee of a debt without copies of assignments showing an unbroken chain of title beginning with the original creditor and ending with the plaintiff and showing that the particular account was transferred in each case.
 - 2. Filing affidavits which purport to be based on personal knowledge but are in fact based on a cursory review of computer screens or records
 - 3. Filing "statements" which are created by the debt buyer for litigation purposes. The debt buyer should be required to have a statement from the original creditor showing purchase or payment activity on the account.
 - 4. Collecting debts beyond the statute of limitations, by any means, unless there is a reasonable basis for believing that they are not time-barred. Currently only Wisconsin and Mississippi prohibit all collection efforts. The FDCPA has been construed to permit a request for payment, but not threats of suit or actual suit.
 - 5. Seizing assets which are known to be subject to exemption, even if consumer does not claim.
 - 6. Filing a false return of service
- D. Other necessary changes, in addition to those suggested in the February 2009 report:
 - 1. The initial contact with a consumer by a debt buyer should be a notice complying with §1692g rather than a summons and complaint.
 - 2. Collector generated checks should be prohibited without verifiable authorization by the consumer of particular checks – recording
 - 3. The use of a fax in collections should be treated as a postcard
 - 4. Email and phone messages should be permitted only if the collector has permission or has ascertained that only the debtor and other authorized persons have access to them.

E. Arbitration

1. Abolish forced arbitration in consumer contracts.
 - a. Subject to abuse without knowledge of consumer: National Arbitration Forum consent decree
 - b. Not understood by consumers
 - c. More expensive to consumers
 - d. Difficulty of obtaining fee waivers
 - e. Difficulty of obtaining legal assistance – there are “help” desks manned by legal services providers at several places in the state courts in Cook County and other counties; nothing equivalent exists for arbitration.
 - f. Use by businesses as a device to escape liability, by coupling with waivers of relief, class action waivers
 - g. Serious due process problem where one litigant or lawyer has ability to direct large volume of business to a particular arbitration organization and organization’s income is derived from the cases it hears. *Caperton v. A. T. Massey Coal Co.*, No. 08-22, 129 S. Ct. 2252; 173 L. Ed. 2d 1208; 2009 U.S. LEXIS 4157 (June 8, 2009) (substantial financial contribution by litigant to judge); *Brown v. Vance*, 637 F.2d 272 (5th Cir. 1981) (justice of the peace system where creditor could determine which of several justices in the judicial district to file before and justices were paid from fees generated by cases).
 - h. It is inappropriate to have a situation where much of the contact that ordinary citizens have with the law is diverted to a privately-run system which is not accountable to the public in any meaningful way. The authors of the Federal Arbitration Act did not contemplate arbitration of hundreds of thousands of cases against ordinary consumers. There is a societal purpose to having a court system that arbitration cannot perform.
2. Prohibit arbitration organizations from having significant ownership by persons submitting disputes to them. If one debt collector has significant ownership in organization, it should not be allowed to hear any debt collection cases, since the issues in such cases tend to be similar. Violation of prohibition should result in award and any judgment enforcing it being void.
3. Transparency regarding ownership, financial relations with particular litigants, and case outcome essential.
 - a. Arbitration organizations handling consumer disputes should be required to file statements disclosing (a) officers, directors,

managers, anyone owning 5% or more of any entity providing services with respect to arbitrations and (b) whether any litigant, group of related litigants, or attorney is involved in 5% or more of the arbitrations, by number or income.

4. An arbitration organization should not be permitted to promote itself by advertising how its procedures favor one side. Some of the NAF promotions to creditors are very similar to matters testified to in *Brown v. Vance*.
5. FTC should take action under §5 of the FTC Act against unfair or deceptive practices by arbitration organizations, creditors.
6. Consider licensing of arbitration and dispute resolution providers in light of NAF problem.
7. Consumer should be given choice of 3 or more forums
8. Require notice of proceedings to be given in same manner as service of summons. Notice should be similar and should warn consumer that this is a legal proceeding, that the arbitration award can be turned into a judgment and result in seizure of income or assets, and that failure to raise issues before the arbitrator cannot be later raised before the court.
9. Hearings should be required to be held in same geographic area that a state court lawsuit should be held under 15 U.S.C. §1692i. Notice should conspicuously inform the consumer of that.
10. Require admissible evidence that consumer agreed to arbitrate before award can be turned into judgment